THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 476 JR]

IN THE MATTER OF SECTION 50 OF THE

PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

BRIAN HOLOHAN, RICHARD GUILFOYLE

NORIC GUILFOYLE AND LIAM DONEGAN

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

KILKENNY COUNTY COUNCIL

AND

THE MINISTER FOR ARTS, HERITAGE, REGIONAL, RURAL AND GAELTACHT AFFAIRS

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 4th day of May, 2017

1. The applicants seek an order of certiorari quashing a decision of An Bord Pleanála of 11th July 2014 which approved a proposed road development known as the Kilkenny Northern Ring Road extension. Development consent was granted to Kilkenny County Council pursuant to s. 51 of the Roads Act 1993, as amended. The applicants claim that the respondent erred in failing to consider the environmental effects of main alternatives studied, that the appropriate assessment (AA) purportedly carried out by the respondent was deficient, and that the respondent erred in approving the proposed development and endorsing the Natura Impact Statement (NIS) submitted by Kilkenny County Council, as the council had failed to carry out pre-consent ecological surveys. Further, it is claimed that the respondent erred in granting development consent in circumstances where there was a failure to establish whether derogation licences are required pursuant to art.16 of Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "habitats directive") and the Wildlife Act 1976, as amended.

Findings of fact

2. In 2002, Kilkenny County Council adopted the planning objective of completing a northern ring-road and extension to Kilkenny City as part of an overall O-Ring around the City. There is an existing C-Ring around the Eastern half of the City already in place, and the proposed northern extension amounts to a fairly small fragment of the overall plan, around 1.5 km in length.

3. The proposed road cuts through a number of protected natural areas: a Special Protection Area (site code 004233) designated under Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (the "birds directive") to protect the kingfisher, a candidate Special Area of Conservation (SAC) (site code 002162) under the habitats directive, and a proposed National Heritage Area. The SAC has been designated to protect various types of habitat including alluvial forest, petrifying springs, and other specified habitats. Its designation protects specific species listed in Annex II to the directive, namely the sea, river and brook lampreys, the crayfish, the twaite shad, atlantic salmon, otter, the marsh snail, the Killarney fern, freshwater pearl mussel, and the Nore freshwater pearl mussel (*Margaritifera margaritifera durrovensis*) of which this SAC is, according to the site synopsis, the "*only site in the world*" where this species exists (p.12).

4. The rationale for the project is set out in the environmental impact assessment (EIA) prepared in relation to this development, which refers to the over-capacity of the current transport links and for the fact that HGV vehicles are currently unnecessarily routed through the centre of this medieval city.

5. The site in question as a candidate SAC (cSAC) was notified to the European Commission in 2002, although for whatever reason formal designation has not occurred in the 15 years since then. Ms. Nuala Butler S.C. with Mr. Fintan Valentine B.L., who also addressed the court, for the board submits that this makes no difference in terms of the application of the legislation.

6. A site synopsis was prepared by the National Parks and Wildlife Service (NPWS) in connection with the SAC designation on 16th January, 2003 (a copy is annexed to Mr. Goodwillie's first ecology report) identifying all species on the site. (This was updated on 1st April, 2014 – see exhibit BH6).

7. In 2007, the Department of Environment, Heritage and Local Government issued circular PD2/07 which emphasised that complete information had to be included in the course of any application affecting a European site, and that development approval could not be made conditional on the furnishing of further information, having regard to the obligations of EU law.

8. In 2007, Kilkenny County Council adopted its development plan 2008-2014, which included the objective of constructing the northern ring-road extension as part of a wider roads scheme for the area.

9. Between 2008 and 2013, Mr. Roger Goodwillie, of Roger Goodwillie & Associates, on behalf of the council, conducted survey work on the site which was ultimately drawn from the preparation of the NIS. While there is evidence that the board's inspector indicated that the surveys had begun in 2008, he was unclear as to the exact dates of particular site visits.

10. Mr. Goodwillie made four written contributions to the papers before the board. The first in time was an ecology report prepared in March, 2008 for the constraints study being prepared by the council's consultants. This surveyed the wildlife and flora in the broad area. I will refer to subsequent reports later.

11. On 18th November, 2008, Clifton Scannell Emerson Associates, on behalf of the council, prepared a report entitled "*Kilkenny northern ring-road extension: constraints and route options study*", which involved a detailed comparison of alternative routes for the proposed ring-road extension, although this did not include the option of "*spanning*" the floodplain between the Nore river channel and Bleach Road by means of a bridge over the plain, as opposed to a culverted embankment thereon.

12. In 2008, the council submitted an application to the board for approval of a road scheme known as the *Central Access Scheme for the City of Kilkenny*. This was comprised of three separate phases, involving a 3.5 km road development and a bridge over the Nore.

13. On 7th July, 2009, the board, in dealing with the council's application for approval of the central access scheme for Kilkenny city, decided to invoke s. 217 of the 2000 Act, require a revised Environmental Impact Statement (EIS), and was provisionally of the view that the development was premature pending the completion of the Northern part of the ring road.

14. On 25th November, 2010, the NPWS prepared a "*site synopsis*" under the birds directive in respect of the Special Protection Area (SPA).

15. On 19th July, 2011, the NPWS prepared a "*conservation objectives*" document setting out the objectives to be achieved for the SAC (exhibit BH6). This identifies around 22 species and habitats requiring conservation and setting forth protection objectives. Note 4 on p. 2 of this document states that the maps "*do not necessarily show the entire extent of the habitats and species for which the site is listed. This should be borne in mind when appropriate assessments are being carried out*."

16. A separate, similar document was prepared on the same date under the birds directive in respect of the SPA, although it is somewhat more sparse in content.

17. In February, 2013, Mr. Goodwillie prepared a further ecology report.

18. In May, 2013, Mr. Goodwillie finalised the NIS, which assessed the impacts on the specific protected habitats and species for which the cSAC and SPA had been designated and that were found on the site. The impacts on species are discussed by reference to the site conservation objectives as stated in 2011. Ms. Butler submits that the proximity in time between the 2011 objectives and the 2013 NIS meant that there was no particular need for further review and analysis of the objectives at that point because the 2011 objectives could still be considered relevant and operative. At the same time, given the express qualification on the entire extent of the habitats and species set out in the conservation objectives document, a question arises as to whether a Natura impact statement must identify such entire extent.

19. In addition to those species for which the cSAC had been designated, there are species which contribute to the protected habitat and make it what it is. The impacts on such species appear to have been discussed in a much more summary manner if they are discussed at all. The manner in which the NIS was put together in this case appears to me to raise the question as to whether Directive 92/43/EEC as amended has the effect that the potential impact on all species (as opposed to only protected species) which contribute to and are part of a protected habitat must be identified and discussed in a Natura impact statement.

20. The NIS is a crucial document in the context of any development affecting a European site (art. 6(3) of the habitats directive).

21. Annex II of the habitats directive lists species whose conservation requires the designation of SACs (according to the NIS around a dozen such species arise in the case of the present cSAC), with those of priority status being marked with an asterisk (none arise in this case). In addition, Annex I defines the habitats requiring conservation, of which there are 10 in the present SAC, 2 of which are priority habitats.

22. In the particular section of the SAC affected by the development, there are 5 Annex II species and 1 protected habitat (alluvial forest with specified tree types (ref. no. 91E0 in Annex I)) nearby, as well as 1 species for which the SPA was designated. The species actually present are white clawed crayfish, brook lamprey, river lamprey, Atlantic salmon and otter, as well as the kingfisher in respect of the SPA. The one relevant habitat was watercourses of plane to montane level (ref. no. 3260 in Annex I).

23. The statement does not appear to specifically say that there would be no impacts on protected species or habitats other than those actually found on site. Ms. Butler suggests that that is implicit although it is not clear to me that such an implication can really be drawn in a scientific matter such as this. This question thus raised is whether Directive 92/43/EEC as amended has the effect that a Natura Impact Statement must expressly address the impact of the proposed development on protected species and habitats both located on the SAC site as well as species and habitats located outside its boundaries.

24. On 6th December, 2013, Clifton Scannell Emerson Associates prepared an EIS for the application. The "*spanning*" option was, according to Ms. Butler, "*not worked up by the council*" but rather discounted at an early stage. She says it was discounted without a specific model having been considered for such a span, for example by reference to a particular height or other dimensions.

25. The EIS included a number of provisions on the construction impacts and their mitigation (see ss. 6.4, 6.5, 7.5, 7.6, 8.4, 8.5, 10.4, 10.5, 11.2, 11.7, 12.4, 12.5, 14.4 and 14.5). Attached to the EIS is a section 15.0 headed "*Summary of environmental commitments*", subsequently referred to as a "*schedule of commitments*".

26. Chapter 7 of the EIS, on the ecological impacts, was written by Mr. Goodwillie. It discusses the impact on a selection of the total list of species identified in the initial ecology report. Ms. Butler submits that reference to the impact on other species was not necessary as those impacts could impliedly be considered not to be significant. At p. 63, the EIS refers to "*designated features present in the vicinity*". There is little apparent discussion of non-designated features, it is suggested because they are not designated and because of a reference to the fact that "*the plant species*" (apparently a reference to a particular plant species mentioned) are widespread in the river valley (at p. 64). The question thus arising is whether Directive 2011/92/EU as amended has the effect that an environmental impact statement must expressly address whether the proposed development will significantly impact on the species identified in the statement.

27. In addition to the species and habitats discussed in the NIS, the EIS also refers to Eutrophic tall herbs as a habitat under Annex I of the habitats directive, 3 further species under Annex I of the birds directive (whooper swan, peregrine and golden plover) and a

number of animals protected under the Wildlife Acts, 1976 to 2012, (bats, hedgehog, badger, stoat, pygmy shrew, common frog, common newt, and unspecified bird species).

28. On 16th December, 2013, Kilkenny County Council applied pursuant to s. 51 of the Roads Act, 1991 for permission from An Bord Pleanála to carry out the proposed development of the northern ring-road extension. By virtue of s. 215 of the Planning and Development Act, 2000, this is an application which is subject to the constraints of s. 50 of the 2000 Act.

29. On 11th February, 2014, the applicants made a written submission objecting to the proposed development, although in the present proceedings they have made it clear that they are not objecting to the principle of the northern ring-road extension but rather to the particular application for development consent at issue in this case.

30. On 24th February, 2014, the Department of Arts, Heritage and the Gaeltacht (later to be renamed) made a submission to the board, in which it stated that licences under the Wildlife Acts (it seems that s. 23 of the Wildlife Act, 1976 was particularly contemplated here) or derogations from the habitats directive (what was contemplated here was apparently derogations under art. 16 of the habitats directive) were "*all that will be required*" if the development had impacts on protected species. The Department were of the view that these licences should be required before planning consent "*to avoid delays and in case project modifications are necessary*".

31. On the same date 24th February, 2014, Inland Fisheries Ireland also made a submission to the board in which it stated that it had "*some difficulty in accepting*" the EIS analysis that water would dissipate at the same rate and manner as currently if the development proceeded, and in essence that there was a risk of increased flooding. The submission appears to imply a preference of the option of "*spanning*" the floodplain.

32. On 1st April, 2014, the Forestry and Wildlife Service of the Department of Arts, Heritage and the Gaeltacht prepared a "*site synopsis*" in which it stated that the site was considered to be of "*considerable conservation significance*".

33. On 14th and 15th April, 2014, an oral hearing was conducted by the board's inspector, Ms. Jane Dennehy. Certain features of the evidence adduced at the hearing are noteworthy. Firstly, there appears to have been a good deal of evidence on which it was open to the board to approve the project. Secondly, most of the council's evidence was uncontradicted. The applicants did not call expert evidence themselves but rather sought to challenge and draw out the council's experts.

34. In his statement of evidence, Mr. Emerson from the council's consultants noted that the spanning option of a "*continuous bridge structure*" was "*considered during the preliminary design and was discounted in favour of a more cost effective solution*".

35. Inland Fisheries Ireland (IFI) appeared to question the council's hydrology conclusions and to favour the spanning option initially, but Mr. Kilfeather for the IFI ultimately accepted that the hydrological impacts would be minimal.

36. Dr. Linda Patton of the NPWS gave evidence (set out at pp. 32 to 34 of Appendix C to the inspector's report) that "*a thorough survey*" would be required in advance (this was in the context of a discussion of nesting birds and bat roosts), and that nests should be left undisturbed but that if this was not possible there would need to be an application for a licence by way of derogation "which may or may not be granted".

37. Her final comment that "*a complete assessment must be conducted*" was in the context of post-consent surveys, but her earlier evidence that "*there is a need for an up to do* (sic) *date survey*" is not so qualified (the typo is presumably one in the record, rather than in her actual evidence).

38. Ms. Butler concedes that at the oral hearing the NPWS were expressing concerns, "*more so than in their written submission*". The submission referred to was sent by the Department rather than the NPWS specifically and is dated 24th February, 2014 and it lists a series of concerns in relation to which it suggests the board should satisfy itself before approval. Insofar as derogation licences are concerned it is suggested that these be applied for "*in advance of planning to avoid delays and in case project modifications are necessary*". Thus pre-consent steps are to that extent contemplated in the submission.

39. In relation to the flora survey it states that "*the survey dates for the flora survey were in March 2008 and Feb 2013. This would be considered inadequate to obtain a complete survey of summer plants*" although Mr. Goodwillie's knowledge of the site was noted. Additional flora species in the area were noted, such as bee orchids and the nettle-leaved bell flower. Ms. Butler submits that the submission regarding the bee orchid was later recognised to be erroneous as to location, and that the need for the flora survey developed solely in relation to that erroneous view. However that seems an unlikely interpretation of the submission. The stated need for an updated flora survey was separate and distinct from the additional point about two further species identified. Even if the latter point was partly based on a misunderstanding that did not dilute the first point.

40. Ms. Butler submits that the evidence of Dr. Patton "*has been misconstrued*" and referred only to pre-construction surveys in the context of whether post-consent derogation licences should be granted. However, in a scientific matter it seems highly doubtful that one can interpolate significant qualifications of this kind into expert scientific evidence. No such qualification appears in the written submission regarding the need for a flora survey and in the record of Dr. Patton's evidence regarding the need for a "*thorough survey in advance*".

41. The inspector specifically identifies the evidence of the NPWS as referable to the "*requirement for pre consent scientific surveys providing an evidence base for assessment in an NIS*". That is a finding that the NPWS expert evidence regarding the need for further surveys related to the pre-consent stage.

42. The NPWS written submission and oral testimony amounts, in my view, to expert evidence that the information then before the board was inadequate to enable the board to be satisfied that there would be no adverse impacts on species protected by the habitats directive. It was thus up to the board either to refuse permission or to deal with this evidence in such a way as to remove all scientific doubt, if such was possible.

43. Mr. Goodwillie also gave evidence as to the NIS prepared by him. He agreed that he had not read the EIS in full and that he was "*not fully familiar with the … proposed scheme*" (p. 30 of Appendix C to inspector's report).

44. He was unable to specify the nature and extent of any based line surveys undertaken and the methodology and analysis used in those studies. He recommended surveying protected species "*for the timing of the bridge construction*" (p. 30) and "*looking over the bridge site and river bank in advance of construction for any evidence of protected species particularly with regard to the breeding*

seasons" (p. 31), saying that the latter approach "*would be sufficient, and he hoped that this would be done*".

45. He also remarked that "*the project had been going on for such a long time that he could not be expected to remember details of walk-over surveys*" (p. 30), and referred to his various site visits in the period of 2008 to 2013. He also stated that he "*did not see any advantage in doing surveys as conditions change over a number of years*" (p. 31).

46. He expressed the opinion that "*the inclusion of alluvial woodlands as a priority habitat in the SAC order was not due to the presences of the alluvial woodland at Dunmore but due to other better examples in the SAC*" (p. 31), confirming that in forming this view "*he was reliant on his own judgment … rather than research or the site synopsis*" (p. 32).

47. On the second day of the hearing, the council updated the "schedule of environmental commitments" to include an undertaking not to locate the construction compound on the flood plain, the cSAC, the SPA or NHA.

48. On 13th June, 2014, the inspector's report on the application was issued. It concluded that the information in the application, the EIS and NIS was not adequate and that significant further information was required. The inspector drew up a draft notification under s. 217(4)(a) of the 2000 Act seeking the submission of a revised EIS and a revised NIS, setting out a list of further information. Two particular items of information are noteworthy:

(a) "*the fully comprehensive details for the construction phase of the proposed scheme*", which would include information such as "*all haul routes, construction access and construction compound*", the location of the latter not having been precisely certified; and

(b) A revised NIS which included a "*scientific baseline study and the inclusion of scaled drawings in which the location or possible location of occurrence of protected species or habits are indicated*". Such an approach is recommended in the Department of Environment, Heritage and Local Government Guidelines on appropriate assessment issued in 2009 and the draft s. 217 notice would have required that the revised statement adopt a methodology consistent with those recommendations.

49. In addition, the inspector considered that further information was required in relation to the "*spanning*" alternative; impliedly this appears to have represented a view that that alternative was a main alternative considered by the developer, as otherwise the obligation to provide information could not have arisen.

50. Notwithstanding these conclusions, no supplementary information was required from the council as developer.

51. Ms. Butler makes a number of criticisms of the inspector's report. Overall, she submits that the only "*contrary evidence*" was that of the NPWS witness. But that is not the case. Some of the documentary material was also adverse to the application and evidence under cross-examination is just as much evidence as evidence in chief. Mr. Goodwillie's replies under cross-examination can be said to assist some of the points made on behalf of the applicants.

52. She complains that the inspector assumed that information provided in relation to main alternatives had to involve a comparative analysis. That is a point of law discussed elsewhere in this judgment.

53. Secondly, the report states at p. 43 that "[*e]vidence based information on the presence of protected species is insufficient for the purposes of Appropriate Assessment*". Ms. Butler interprets this as meaning that a survey is required even if the presence of a protected species is not in dispute and that that is a mistaken approach. However, that is not the only interpretation of that comment; a more natural and correct interpretation is that even if the presence of a protected species is not in doubt, comprehensive scientific information and survey is still required to determine the prevalence and precise location of such species. Ms. Butler replies that otter are mobile throughout the river so "*it doesn't in fact make any difference whether there's one of them or a hundred of them*". That may or may not be so for otters but it cannot be said that for other species there might not be a great deal of validity to the comment of the inspector that evidence regarding their presence simpliciter is insufficient for the purposes of appropriate assessment.

54. A third alleged error arises because the inspector also recommended that the construction management details should be contained within the EIS (pp. 43 to 44 of the report). Ms. Butler submitted that this was contrary to caselaw. But caselaw only suggests that in certain circumstances, certain details can be delegated to agreement between developer and planning authority, such as construction details. Whether construction management details can be decided post-consent by the developer is a separate question, discussed further below.

55. A fourth alleged error is the contention that it has not been demonstrated that the methodology employed in the NIS is "*in accordance with the statutory requirements set out in the EU Habitats and Birds Directives*" because it is submitted that there is no such statutory methodology. I read this as a reference to the Court of Justice caselaw on the exacting approach to be adopted in the AA. Ms. Butler says that the Court of Justice does not set out methodology. But that is to engage in semantics. EU law clearly requires quite an exacting approach to the appropriate assessment process. It is to that exacting approach that the inspector must be taken to be referring. One might argue as to whether the assessment is adequate or not, but it is hair-splitting to contest the use of the term "*methodology*" to describe the approach required by statute and EU law.

56. Finally, Ms. Butler makes much of a passing reference by the inspector to an alleged "*conflict of evidence*" on the hydrology of the site, whereas she should have referred to a "*conflict of position*". That is a slip without any decisive significance.

57. A similar point is made regarding the fact that the only evidence as to the location of alluvial forests came from Mr. Goodwillie. Ms. Butler submits that "[*t]he putting of questions to an ecologist does not create a doubt or uncertainty.*" Unfortunately life is not as simple as that. Even if only one side calls a witness, the cross-examination of that witness may give rise to doubt or uncertainty as the evidence given in chief. As Mr. Paul O'Higgins S.C. (with Mr. David Browne B.L.) for the applicants put it in oral submissions, "*if someone bends in any way or if that which was previously clear now becomes unclear, that is* [equivalent to] *contrary evidence given by another witness*". Ms. Butler says that Mr. Goodwillie's evidence did not shift; but on one view it was qualified in certain respects. I should perhaps mention here that on this and other points in relation to the evidence before the inspector I considered it inappropriate to listen to the audio recording of the inspector's hearing because there was no evidence that the board had listened to it; nor did they contend or assert that they had done so. For me to take it into account would be to review the decision on the basis of essentially new material which the board did not actually look at, even though it could have done. These proceedings are a review of the board's decision-making and not a de novo decision; thus in principle this process should only address the materials actually considered by the board. Ms. Butler did not argue that the tape of the inspector's hearing should be played.

58. The affidavit of Chris Clarke purported to exhibit, at exhibit CC2, a CD-ROM of the material before the board. This constitutes (a)

a PDF document of all of the written material before the board and (b) an audio file of the oral hearing. I did not consider that a CD-ROM of this type was an appropriate exhibit in the circumstances, especially as the audio file is a sound file and not something capable of being printed as a written document without further work which has not taken place and was not proposed (i.e., transcription). It would be at a minimum highly inconvenient and at worst a bit of a charade for me to receive a lengthy sound file of a two day hearing and for me to hold that it is before the court, particularly in circumstances where there is no evidence that anybody has ever listened to or transcribed the audio file in the course of the actual decision of the board now being reviewed, and where, if the matter were ever to go any further, it would be equally inconvenient, if not more so, for an appellate court to have to consider a two-day sound file of this nature without that ever having been transcribed. Ms. Butler agreed to the strike out of exhibit CC2, and to having a new affidavit sworn which exhibited the documentary material that was actually considered by the board in a way that would allow the court to have meaningful access. I left open the option of coming back with a separate exhibit of the sound files if, on further legal consideration, it was felt desirable to make a case that they should be included, but that option was not taken up. A fresh affidavit of Brendan Slattery of 13th January, 2017, was received by consent simply exhibiting the PDF file and the index to the audio files.

59. Alluvial forests are shown by location in Map 6 of the conservation objectives, but that map must be read as subject to note 4 which clearly has the effect that the map is not definitive.

60. Mr. Harte, on behalf of the council, represents Mr. Goodwillie's evidence as that "*no wet woodland is traversed by the proposed scheme*" (p. 48 of the inspector's report). However, the report of Mr. Goodwillie's evidence does not actually expressly say that. A related complaint is that the inspector says that there was "*confusion*" (p. 60) as to the location of alluvial wet woodlands. Ms. Butler submits that no such confusion is apparent from the record of the evidence. All that happened was that Mr. Goodwillie said that the wetland forests were, in his opinion, not material to the cSAC designation and that better examples were at some remove. There are high quality examples of wetland forest elsewhere in the cSAC but the selected route is the option that has least impact on it (p. 29 of Appendix C). He was asked to identify the precise location and area and extent of the alluvial woodlands (p. 31). No clear answer is recorded but rather a repetition of the previous point. He conceded that he was reliant on his own judgement rather than research or the site synopsis (p. 32). Ms. Butler submits that Mr. Goodwillie was simply reflecting the NPWS position that the nearest alluvial woodlands were elsewhere but he is not actually recorded as rejecting the concept that there was alluvial woodland at all on the site. The actual term used in Annex I is "*alluvial forests*" with specified tree types. He does use the terminology of "*alluvial wetland forests*" on the site (p. 29) and there is some conflict of terminology as between alluvial wetland forest (p. 29), alluvial woodlands (p. 31), alluvial forests (annex I) or wetland woodland (p. 31). Overall the comment about "confusion" is one that was legitimately open to the inspector even bearing in mind that the only positive evidence on the location of alluvial forests was that of Mr. Goodwillie (and also bearing in mind that the report of that evidence is not explicit, or at best ambiguous, on where those forests are as opposed to whether the site had been designated for those forests).

61. Overall, and leaving aside the points of law referred to, I would reject the submission that there is anything major to criticise in the inspector's approach. It seems to me that the inspector carried out her work with very great dedication, thoroughness, diligence and attention to the material before her.

62. On 10th July, 2014, the board made a decision granting the application, as well as a compulsory purchase order for the acquisition of lands of the applicants in connection with the scheme, essentially rejecting the approach recommended by the inspector.

Procedural matters
63. On 28th July, 2014, Baker J. made an order granting leave to seek judicial review. Ms. Butler helpfully informs me that there is no issue on time or locus standi in this case.

64. By consent I substituted the title of the Minister as a notice party for that of the National Parks and Wildlife Service (which is an administrative branch of her Department).

65. I am grateful to Mr. O'Higgins for seeking to net down his case and for informing me that he was not pursuing certain identified elements, leaving two central headings for consideration: an alleged defect in the EIS and shortcomings in the appropriate assessment and NIS in particular.

66. Furthermore, when an issue arose during the hearing as to whether Mr. O'Higgins could rely on ground III(3) regarding reasons as a basis for certiorari rather than declaratory relief, Ms. Butler very helpfully waived any pleading objection and accepted that Mr. O'Higgins could rely on this ground for the relief by way of certiorari. Ms. Butler also agreed that points pleaded regarding the inadequacy of information regarding the construction compound and similar matters could be relied on in support of the submission pertaining to the appropriate assessment rather than the EIA, and I am grateful to her for the practical approach adopted in relation to the foregoing matters.

67. In connection with the possibility of a reference to Luxembourg I have also heard from Mr. Garrett Simons S.C. for the Minister, and in addition received a written submission from Harte Solicitors, on behalf of the council.

Relief sought
68. The applicants seek the following reliefs in these proceedings:

(i). An order of *certiorari* quashing the decision of the respondent to grant planning permission to the first named notice party pursuant to s. 51 of the Roads Act 1993, as amended, for the construction of an extension to the Kilkenny City Ring Road between the N77 Castlecomer Road and the R693 Freshford Road, including the provision of approximately 1.5 kilometres of single carriageway; the construction of a roundabout on the R693 between Aut Even Hospital and LS6600 Thornback Road; the retro-fitting of the N77 Castlecomer Road Roundabout to facilitate a fourth arm to connect the proposed road; the provision of a 1.8 metre footpath and a 1.75 metre wide off-road cycle track along the city side of the proposed road; the construction of a three-span bridge structure over the River Nore with a centre span of 45 metres and edge spans of 22.5 metres each, supported by abutments at each end; the provision of 16 no. culverts along the River Nore floodplain at the west of the Bleach Road, consisting of 13 no. arched culverts 10 metres wide by 3.6 metres high and three no. box culverts 10 metres wide by 4.5 metres high; the construction of an underpass for the Bleach Road under the proposed road; the provision of four no. box culverts to the east of the Bleach Road to accommodate farm underpasses and allow for the movement of water in flood events; various chambers and ducting works to be undertaken at various locations within the site for use by the authorities, utilities and service providers and private utility services; various landscape, environmental and mitigation works; various drainage works and associated drainage outfalls; various fencing and vehicle/pedestrian safety barrier systems; various signing and lighting works; various earthworks; various accommodation works including access to properties and lands and various ancillary works which are collectively known as the Kilkenny Northern Ring Road Extension (Freshford Road to Castlecomer Road) [An Bord Pleanala Ref. No. KA0029].

(ii). A declaration that the decision of the respondent was in breach of and contravenes Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment and specifically art.5(3)(d) thereof.

(iii). A declaration that the appropriate assessment which was purportedly carried out by the Respondent pursuant to s. 177V in Part XAB of the Planning and Development Act 2000, as amended, was in breach of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and the jurisprudence of the European Court of Justice (ECJ) and the Court of Justice of the European Union (CJEU).

69. The primary relief is thus simply one of certiorari quashing the decision. Where declarations are sought additional to certiorari, it is normally (although not invariably) the case that such declarations are unnecessary if the decision is quashed, and inappropriate if it is not. Here, the declarations do not add a great deal to the challenge because the points relied on are also being made in support of certiorari.

The first ground – the treatment of alternatives in the EIS
70. Under art. 5(3)(d) of the consolidated Environmental Impact Assessment directive (Directive 2011/92/EU of the European Parliament and Council of 13 December, 2011, on the assessment of the effects of certain public and private projects on the environment (transposed by Article 94 (a) of, and para. 1 (d) of Schedule 6 to the Planning and Development Regulations, 2001)), an EIS must contain "*an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects*".

71. In this case, the developer council identified the alternative favoured by the applicants, namely a bridge to "*span*" the road above the flood plain. But that proposal was rejected at an early stage essentially on cost grounds, without any information being provided as to its environmental impact, and before the proposal was modelled in any detailed way by reference to particular dimensions. The allegation is that the consideration given to the alternative was inadequate.

Whether an option expressly considered but rejected by the developer at an initial stage constitutes a main alternative to the development within art. 5 of the EIA directive
72. Ms. Butler submits that because it was rejected at an early stage, the spanning option was not a "*main alternative*" within the meaning of art. 5(3)(d).

73. One question therefore arises as to whether an option that the developer considered and discussed in the EIA, and that was argued for by some of the stakeholders, amounts to a "*main alternative*" even if it was rejected at an early stage.

74. Mr. Simons submits that there was no express requirement to consider main alternatives under the original 1985 version of the EIA directive. The requirement was introduced under directive 97/11/EC. The initial proposal by the European Commission would have inserted a requirement for a "*description of the main alternatives which might be envisaged*". The objective was explained as being "*to make the examination of the main alternatives to the project compulsory. This is to make the Directive more effective and to harmonize the relevant national provisions*". The draft wording was then amended by the Council in the common position adopted on 25th June, 1996, along the lines ultimately adopted. The European Parliament decided on 13th November, 1996, to seek to amend the directive to impose what Mr. Simons calls a "*very onerous obligation*" to describe "*the main alternatives which might be envisaged, and have been examined by the developer, including the zero option and the most environment-friendly alternative" including the "reasons for rejection of alternatives*". These amendments were acceptable to the Commission but not to the Council which did not include them in the final directive 97/11/EC.

75. It is true that the EIA process determines the process not the outcome (*Kelly v. An Bord Pleanála* [2014] IEHC 400 at para. 33; Case C-420/11 *Leth v. Austria* [2013] 3 C.M.L.R. 2, Opinion of Advocate-General at para. 42). However, that in itself does not mean that a consideration of environmental implications of alternatives is not a potentially informative part of the process even if an alternative not adopted is more environmentally friendly.

76. It seems to me that to adopt the applicants' interpretation is not to give effect to the failed European Parliament amendments; rather the point is more limited seeing as the developer did consider this alternative to some degree.

77. Mr. Simons contrasts the wording with that in the strategic environmental assessment directive 2001/42/EC at Annex I(h), where in that context there is an obligation to set out "*an outline of the reasons for selecting the alternatives dealt with*". This is differently worded from the EIA directive although in *R. (HS2 Action Alliance Ltd.) v. Secretary for State for Transport* [2014] UKSC 3 per Lord Carnwath at para. 44 the U.K. Supreme Court said that "*[t]he reasons for this difference are not obvious*".

78. Prof. Ludwig Krämer, in EU Environmental Law (7th ed.) (Sweet and Maxwell, 2011) at p. 157, n. 104, states that art. 5(3) "*is generally understood in the sense that the developer is not obliged to study alternatives; only where he has done so, he must submit information on them*". By contrast, the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) (the Espoo Convention) requires the study of "*reasonable alternatives*" (Appendix II, Content of the Environmental Impact Assessment Documentation) as does Directive 2014/52/EU of the European Parliament and Council of 16th April, 2014, amending the EIA directive. Prior to the adoption of that directive, the Commission noted in its Report on the application and effectiveness of the EIA Directive (COM(2009), 378 final) of 23rd July, 2009, that "[s]*ome* [member states] *have introduced a legal obligation to consider specific alternatives, while others have not. The competent authorities and the public may also contribute to the selection of alternatives for assessment*" (p. 6. para. 3.2.2.). The Commission Proposal for a Directive amending the EIA directive (COM(2012) 628 final) of 26th October, 2012, envisaged a new art. 5(2) (at p. 16) which would have provided for the competent authority to determine the reasonable alternatives. The language in the Commission proposal regarding the extent to which the proposal amends existing law needs to be viewed in the context of that particular proposal, which was modified in the adopted directive. However, in this case, the developer has identified and discussed, albeit to a limited extent, the option favoured by the objectors.

79. That question is premised on the proposition that it is entirely up to the developer to determine what are the main alternatives considered. While that has been something of a working assumption under the EIA directive prior to its 2014 amendment, it does not seem to have been formally decided. Ms. Butler submits that this is acte clair by reason of having been the subject of an amendment in 2014, but that does not appear to me to follow. The question thus remains to be definitively determined.

Whether an alternative option considered by the board must be taken to be a main option considered by the developer even if discounted by the developer at an early stage
80. The board's actual decision on the issue of alternatives is somewhat ambiguous, but appears to link the satisfactoriness of the developer's proposal with the absence of a need for further information on the alternative. This is consistent only with treating the spanning option as a main alternative. Otherwise the board would have said that there was no need for information on the spanning

alternative because art. 5 did not apply to it as it was not a main alternative considered by the developer. The question arising here is whether the fact that the spanning option was considered by the competent authority (the board) renders it a main alternative for the purposes of art. 5.

Whether art. 5 of the EIA directive requires the specification of the environmental impact of a main alternative to the development

81. If the spanning option is to be considered as a main alternative, the question arises as to how much assessment of its environmental impact needs to be spelled out. It seems to me that there are a number of possible interpretations of art. 5(3)(d) as follows:

> (a) That the developer must provide an environmental impact statement or an analysis akin to an EIS, in outline form, for each of the alternative developments.
>
> (b) That the EIS should contain sufficient information as to the environmental impact of each alternative as to enable a comparison to be made between the environmental desirability of the different alternatives. Mr. O'Higgins submits in effect that the assessment of "alternatives" implies an inherently comparative process, and a proportionality requirement, such that it must be evident from the information provided by the developer as to whether the non-environmental benefit of the preferred option (for example a cost saving) is disproportionate to the environmental disbenefit of choosing that option rather than a more environmentally friendly alternative. Such a proportionality analysis cannot be conducted unless the EIS contains sufficient information regarding the environmental benefits of the alternatives to enable this assessment to be carried out.
>
> (c) That it must be made explicit in the EIS as to how the environmental effects of the alternatives were taken into account. On such an interpretation, the developer would not have to provide a fully comparative study, but the EIS would have to be sufficiently explicit to allow participants in the process, and indeed the court, to be satisfied as to how precisely the "environmental effects" were taken into account. Ms. Butler submits that the rejection of alternatives was clearly based on the EIS which itself contains ecological information (s. 5.3.0) drawing on the Constraints and Route Options Study – although the latter document does not analyse the spanning option at all. It seems to me that it is not possible to say that the EIS clarifies exactly how the environmental effects of the spanning option were taken into account.
>
> (d) The final interpretation, which was in effect that advocated by Ms. Butler, was that the competent authority must itself be satisfied that the developer has taken into account the environmental effects of the alternatives, but the manner in which he or she has done so need not be specified in the EIS. Such an approach would appear to involve a very low level of assurance that the directive had been complied with and would provide little by way of transparency for the court in its examination of the lawfulness of the decision.

82. *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59 is a somewhat unsatisfactory decision by McMahon J. on the question of whether a full assessment of alternatives is required. While McMahon J. held that this was not the case, his view of art. 5(3)(d) of the directive is that it involved "*loose and forgiving language*" and a "*low threshold*" which was "*not overly demanding*" (paras. 46 and 47). It is not at all clear to me how these views can be justified on the basis of the text of the directive. It is quite clear that a precautionary principle applies by virtue inter alia of art. 191 of the Treaty on the Functioning of the European Union, which states that "*union policy on the environment shall aim at a high level of protection…based on the precautionary principle*" and on principles including "*that preventive action should be taken*". It is also clear that the overriding requirement of a purpose of interpretation of EU law means that the directive must be given an interpretation which enhances its effectiveness and facilitates its application in a proportionate and transparent manner. These foundational principles of EU law are not fully taken into account in Klohn, although in fairness to McMahon J., that decision was handed down on 23rd April, 2008, which was after the adoption of the Lisbon Treaty but before it came into force on 1st December, 2009.

83. At p. 77 (para. 53) of the report, McMahon J. comments that to be "*overly formalistic*" as to the requirements on planning applicants would "*stifle commendable progress*", a curious formulation with which I have some difficulty. Having regard to the precautionary principle, there can be no presumption in favour of any particular development, especially, one might add, developments effecting European sites where a high level of protection is required. Thus, it is not the concern of the court to equate development with "*progress*", to ally itself with those who commend such progress, or to become unduly exercised as to whether such "commendable *progress*" is being stifled by applicants. Rather, the function of the court on judicial review is to assess the lawfulness of the decision in question, in the overarching context of the Charter-level commitment to a high level of environmental protection and the need to ensure effective implementation of EU environmental law overall.

84. It is true that the EIA directive has now been strengthened by the 2014 amending directive which requires a "*description*" of the reasonable alternatives rather than an "*outline*" of the main alternatives. However, that amendment does not of itself resolve the question as to what the 2011 directive actually means.

85. The question therefore arises as to the extent to which express information about the environmental impacts of the main alternatives considered by the developer needs to be specified in the EIS.

86. A further question arises as to whether the clause in art. 5(3)(d), "*taking into account the environmental effects*", applies only to the chosen option or also to the main alternatives studied. Here the spanning option (assuming it was a main option) was rejected on cost grounds rather than primarily having regard to environmental effects as such.

Whether the court can review the correctness of a board finding on the content of an EIS (or AA) in the case of manifest error

87. A further issue, which also arises in relation to the applicants' second ground, relates to the standard of review.

88. Review of the legality of decisions of EU authorities may be carried out on the standard of "*manifest error*": see Joined Cases 56/64 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 299; Case 55/75 *Balkan-Import Export v. Hauptzollamt Berlin-Packhof* [1976] ECR 19, para. 8; *Agence Europeénne d'Intérims v. Commission 56/77* [1978] ECR 2215 para. 20; Case C- 9/82 *Øhrgaard and Delvaux v. Commission* [1983] ECR 2379 para. 14; Case C-225/91 *Matra v. Commission* [1993] ECR I-3203 paras. 24 and 25; Case C-157/96 *National Farmers' Union* [1978] ECR I-2211 para. 39; Case T-19/95 *Adia Interim SA v. Commission* [1996] ECR II-321 para. 49; Case T-203/96 *Embassy Limousines and Services v. Parliament* T-203/96 [1998] ECR II-4239 para. 56; Case T-139/99 *AICS v. Parliament* [2000] ECR II-2849 para. 39; Case C-120/97 *Upjohn Ltd. v. Licensing Authority* [1999] ECR I-223; *SIAC Construction Ltd. v. Mayo County Council* [2002] 3 I.R. 148 per Fennelly J, at p. 176 (referring to "*clearly established error*").

89. In Upjohn at paras. 35 and 36 the Court of Justice required that European law did not require member states to establish a procedure for judicial review that was more extensive than that carried out by that court in similar cases, referring to the manifest error test at para. 34, but that nonetheless the national procedure for judicial review of decisions revoking marketing authorisations under directive 65/65 must enable the national court "*effectively to apply the relevant principles and rules of Community law when reviewing its legality*" (para. 36). This approach was affirmed in Joined Cases C-211/03, C-299/03 and C-316/03 to C-318/03 HLH *Warenvertriebs v. Germany* paras. 75 to 79. The decision in East Sussex expresses itself as following these decisions (para. 58), although the wording used in East Sussex does not expressly refer to manifest error.

90. As against the foregoing, where the EU rights at issue are ones where only a limited discretion arises, the standard of review may need to be pitched at a higher level: see Case C-92/00 *Hospital Ingenieure* [2002] ECR I-5553 para. 61 (see also Case C-462/99 *Connect Austria v. Telecom-Control-Kommission* [2003] ECR I-05197 para. 37 (as discussed in Angela Ward, *Judicial Review and the Rights of Private Parties in EU law* (2nd Ed.) (Oxford, 2007) pp 177-178)).

91. The Irish jurisprudence to date appears to recognise a distinction between compliance with the content of an EIS, as required by art. 94 of the 2001 regulations, and an assessment of the adequacy of the information so provided. It is clear that it is ultimately a matter for the court to be satisfied that art. 94 has been complied with. However, an assessment of the adequacy of the information has generally been regarded as primarily a matter for the discretion of the board (see *Kenny v. An Bord Pleanála* (No. 1) [2001] 1 I.R. 565, at 578 per McKechnie J., *Browne v. An Bord Pleanála* [1989] I.L.R.M. 865, *McCallig v. An Bord Pleanála and Ors.* (where Herbert J. held that "[t]*he adequacy of the information contained in an environmental impact statement is a matter for the respondent*" para. 119), *Craig v. An Bord Pleanála* [2013] IEHC 402 (in which Hedigan J. states expressly that O'Keeffe on reasonableness was the basis on which the court would review a decision by the board as to the adequacy of information provided in an EIS); *People Over Wind v. An Bord Pleanála* [2015] IEHC 271, at para. 100, per Haughton J. The language of para. 242 of People Over Wind is, however, close to a reasonableness test for the appropriate assessment. (See also *Balz v. An Bord Pleanála* (Unreported, High Court,25th February, 2016), paras. 55, 58, per Barton J.,; *Mulholland v. An Bord Pleanála* (No.2) [2006] 1 IR 453 at 465 per Kelly J., as he then was.)

92. In *Sweetman v. An Bord Pleanála* [2016] IEHC 277 para. 95 McDermott J. held that absent a "*fundamental procedural defect*" the decision on the appropriate assessment could only be challenged on grounds of reasonableness (citing *Sweetman v. An Bord Pleanála* [2010] IEHC 53, *Craig v. An Bord Pleanála* [2013] IEHC 402, *O'Keeffe v. An Bord Pleanála* [1992] 1 I.R. 39).

93. Ms. Butler submits that scrutiny involves "*more than O'Keeffe*" because the court will review for legal error as well as reasonableness.

94. Hogan J. in *Keane v. An Bord Pleanála* [2012] IEHC 324 posed the question as to whether the O'Keefe test should be replaced in such contexts by that of manifest error, relying on the comments of Clarke J. in *Sweetman v. An Bord Pleanála* [2008] 1 I.R. 277, at paras. 66-76, drawing on *SIAC Construction Ltd. v. Mayo Co Council* [2002] 3 I.R. 148. However, in *Ratheniska v. An Bord Pleanála* [2015] IEHC 18 paras. 73-76 and *People Over Wind v. An Bord Pleanála* [2015] IEHC 271, at para. 101 et seq., this approach was not followed by Haughton J.; nor was it followed by *Hedigan J. in Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226 para. 8.5, or by *McDermott J. in Sweetman v. An Bord Pleanála* [2016] IEHC 277 para. 95. (See also *Carroll .v An Bord Pleanála* [2016] IEHC 90).

95. In *Ratheniska v. An Bord Pleanála* (No. 2) [2015] IEHC 18 para. 35, Haughton J. considered that there was no uncertainty in the law, as did Fullam J. in *Carroll and Ors. v. An Bord Pleanála* [2016] IEHC 90, para. 36 et seq., and *Carroll and Ors. v. An Bord Pleanála* (No.2) (Unreported, High Court, 29th July 2016), refusing leave to appeal on that basis.

96. All other things being equal, given that this question of European law did to some extent trouble Clarke J. and Hogan J. in the decisions cited, one might be inclined to the view that it cannot properly constitute an *acte clair*. Mr. Valentine submits that the decisions in Sweetman and Keane had been overtaken by the Supreme Court decisions in Meadows and East Sussex. It is true that Clarke J. pointed out that irrationality was far from the only basis for judicial review and also that he was writing at a time prior to the clarification by the Supreme Court of the "anxious scrutiny" issue in Meadows. Mr. Valentine submits that Meadows was not mentioned in Keane and thus it was not explained why Meadows did not answer the point. I think that in answer to this somewhat indirect critique of Hogan J., the deportation context at issue in Meadows was not an EU law context (see on that point my judgment in *Y.Y. v. Minister for Justice and Equality* [2017] IEHC 176 and the remarks of the Supreme Court on that issue in *Y.Y. v. Minister for Justice and Equality* [2017] IESCDET 38 para. 11).

97. Mr. Valentine and Mr. Simons submit that the CJEU decision in Case C-71/14 *East Sussex County Council v. Information Commissioner* EU:C:2015:656; [2015] WLR (D) 399 holding that a judicial review procedure under the traditional English standard of reasonableness was sufficient to meet the requirement of access to a review procedure in the context of the directive on access to environmental information now clarifies and governs the position. The court noted at para. 53 that the requirement that the decision "*be reconsidered*" and "*reviewed administratively*" in art. 6(1) of directive 2003/4 "*do not determine the extent of the administrative and judicial review required by the directive. In the absence of further detail in EU law, it is for the legal systems of the Member States to determine that extent, subject to observance of the principles of equivalence and effectiveness*" (para. 53). The principle of effectiveness is not infringed by review that is limited in the manner of traditional English judicial review (para. 58). It is true that EIA, like access to environmental information, has its origin in the Aarhus Convention. However, by contrast, the habitats directive deals with a more searching requirement which Mr. Simons accepts is substantive rather than merely procedural; a finding of adverse impact on a habitat almost always results in refusal.

98. However, the fundamental answer to this point arises from the Court of Appeal decision in *N.M. (D.R.C.) v. Minister for Justice and Equality* [2016] IECA 217 per Hogan J. at paras. 53 and 54 which holds that contemporary judicial review constitutes an effective remedy for the purposes of art. 39 of the asylum procedures directive.

99. Hogan J. at para. 53 of N.M. comments that "*the judicial review court cannot review the merits of the decision*". To that extent he echoes the comments of Lord Brightman in Chief Constable of North Wales Police v. Evans [1982] 1 W.L.R. 1155 that "*[j]udicial review is concerned, not with the decision, but with the decision-making process*". In a previous capacity, he had commented in a Bar Review article "*Judicial review, the doctrine of reasonableness and the immigration process*" (2001, vol. 6. Issue 6 p. 329) that "*it is curious that this statement should be regarded as so authoritative, since part of it is clearly wrong … it is beyond argument that certain central doctrines of judicial review – reasonableness, irrationality and proportionality – are, of course, concerned with the merits of the decision itself and not simply with the decision-making process. Although it may seem heretical to say so, in those cases, judicial review operates as a form of limited appeal from the decision-maker*".

100. In N.M., Hogan J. goes on to say that it can nonetheless quash for unreasonableness (which seems to mean in this context O'Keefe and Keegan unreasonableness, i.e. a lack of any evidence capable of supporting the decision or flying in the face of reason

and common sense) or lack of proportionality or where the decision strikes at the substance of constitutional or EU law rights. It can ensure that the conclusions follow from the premises and also quash for material error of fact. One might perhaps ask what therefore can the court not do?

101. The answer appearing from caselaw to this question is that the court cannot decide that the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong (or even clearly wrong) on the merits, if there is material to support it and if the conclusion is reached by a logical process, without factual error and supported by reasons, and does not disproportionately interfere with rights.

102. The underlying reason why a court should not be permitted to find that an administrative or executive decision is wrong, or even clearly wrong, is the separation of powers. To do so the court would, as Lord Brightman said, "*be itself guilty of usurping power*" (Chief Constable of North Wales Police, p. 1173).

103. I made the point in *S.A. v Minister for Justice and Equality* (No.2) [2016] IEHC 646 para. 16, that cottage industry has grown up in immigration context of relying on Meadows to launch a merits-based appeal process of immigration decisions in the judicial review context. The same point must apply in other areas of administrative law. Ultimately, the position is that, to adapt a phrase of Rosalind English's (in a case report on the One Crown Office Row website cited in *Genovese v. Malta* (Application No. 53124/09, European Court of Human Rights, 11th October, 2011) per Judge Valenzia (dissenting) at para. 13 and in my judgment in *Rodis v. Minister for Justice and Equality* [2016] IEHC 360 at para. 23), the jaws of judicial review have already been opened wide enough. It is not necessary or appropriate to seek to widen them further, either under the guise of national or European law. Given the wide scope of judicial review in Ireland, the proposition that it provides an effective remedy is *acte clair*.

The second ground - alleged shortcomings in the appropriate assessment
104. The habitats directive 92/43/EEC contains a "*system of strict protection*" which "*presupposes the adoption of coherent and coordinated measures of a preventative nature*" (Case C-518/04 *Commission v. Greece*, not published in the ECR, para. 16, cited in Case C-183/05 *Commission v. Ireland* [2007] ECRI-137 para. 30). Art. 6(3) of the habitats directive incorporates the precautionary principle (Case C-258/11 *Sweetman v. An Bord Pleanála* [2013] 3 C.M.L.R. 16 para. 41).

105. The obligation to conduct an appropriate assessment is to be carried out "*in view of the site's conservation objectives*" (art. 6(3) of the habitats directive). Thus, where a development will not impact on those objectives, the requirement for appropriate assessment does not appear to arise (see Case C-127/*02 Landelijke Vereniging tot Behoud van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405).

106. As explained by the Court of Justice in *Sweetman* at para. 40, approval can only occur "*once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned*". Thus, identification of "*all aspects*" of the plan is a precondition for approval.

107. Furthermore, an approval decision must be made "*in the light of the best scientific knowledge in the field*".

108. On foot of an identification of all aspects combined with the best scientific knowledge, approval cannot happen unless the competent authorities "*are certain that the plan or project will not have lasting adverse effects on the integrity of that site*." The criteria for the appropriate assessment process, triggered by likely effects on a European site, being a special protection area or special area of conservation, arises under art. 6(3) of the habitats directive (as transposed by s. 177V of the 2000 Act (as inserted by the Planning and Development (Amendment) Act 2010). These requirements were discussed by Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400, where at para. 40 she sets out a number of criteria arising from the caselaw.

109. It is also clear that the conclusion that there is no adverse impact on the integrity of a European site must be arrived at beyond "*reasonable scientific doubt*" (see *Waddenzee*).

110. It is true that "*a bald assertion*" does not constitute scientific doubt (*Harrington v. An Bord Pleanála* [2014] IEHC 232, per O' Neill J., para 43) and that merely raising a doubt does not preclude the board from deciding whether it is reasonable (*Sweetman v. An Bord Pleanála* [2010] IEHC 53 per Hedigan J., at para. 12).

111. While the NIS is an important part of the appropriate assessment under the habitats directive (and the birds directive 2009/147/EC), it is clear from the decision of Barton J. in *Balz and Heubach v. An Bord Pleanála* (Unreported, High Court,25th February, 2016) at para. 229, that the appropriate assessment must include not simply an examination of the NIS but also the responses to it and submissions from interested parties. In that case Barton J. held at para. 230 that no reasons had been given for preferring one scientific view over another, and accordingly quashed the permission relying on Kelly and on *Rossmore Properties Ltd. v. An Bord Pleanála* [2014] IEHC 557 para. 237, per Hedigan J.

112. In this case, Mr. O'Higgins submits that the NIS and AA were defective for essentially two reasons: omissions in the information provided, and a lack of reasons.

Were there unlawful omissions in the information made available in the appropriate assessment
113. The applicants say that there were significant omissions in the information contained in the appropriate assessment, including in particular:

(a) The location of the construction compound (which was not identified other than obliquely by reference to the undertaking that it would not be placed on Natura lands or the lands of the applicants) and other information relevant to the construction process such as haul, routes and construction access, and details relating to the importation of soil;

(b) A rigorously scientific baseline study of the impact on protected species, including the underlying data as to precise times, places and methodology, which was missing from Mr. Goodwillie's report; and

(c) The other information identified in the inspector's s. 217 draft notification.

114. The question thus arises as to the extent to which such materials are required as part of the appropriate assessment, particularly the first two items.

Lack of information on construction details
115. As regards whether information on construction details can be omitted, reliance is placed by the respondent on *Boland v. An*

Bord Pleanála [1996] 3 I.R. 435, at 466, as applied in *Arklow Holidays v. An Bord Pleanála* [2006] IEHC 15, and *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226 (a decision in the EIA rather than AA context) in which it was held that decisions to impose conditions that certain matters are to be agreed between an applicant and the planning authority are lawful provided that the purposes, objective reasons and criteria for such agreement are set out in the decision. Such matters "*cannot be practically dealt with by way of individual conditions*" (per Clarke J. at para. 8.10 of Boland) and thus "*a considerable degree of flexibility in the course of construction will inevitably be required*". Clarke J. in *Arklow Holidays* was of the view that no breach of EU law arises by means of such "*delegation*" if the Boland criteria are applied (citing Case C-201/02 *R. (Wells) v. the Secretary of State for Transport* [2004] ECR I-723).

116. In the permission at issue in *Sweetman v. An Bord Pleanála* [2016] IEHC 77 per McDermott J.), it was a condition (no. (xi), see para. 86) that there would be a "*construction management plan*". McDermott J. held that the reasons for the condition were "*manifestly clear*" (para. 87).

117. It is notable that in *People Over Wind v. An Bord Pleanála* [2015] IECA 272 (per Hogan J.), the question certified and discussed was to what extent the detail of mitigation measures could be left by the board for post-consent "*agreement between the developer and named authorities*". In the present case, the construction details will be in an Environmental Operating Plan which is a unilateral act of the developer and does not need to be agreed with anybody.

118. Ms. Butler laid stress on the length of the schedule of environmental commitments, as in *Sweetman v. An Bord Pleanála* [2016] IEHC 77 where it ran to 35 pages. However, mere quantity of words is not much of an indicator. It is the specificity and bite of their contents that is important.

119. The question thus arises in an AA context is whether it is compatible with the attainment of the objectives of the habitats directive that details of the construction phase (such as the compound location and haul routes) can be left to post-consent decision, and if so whether it is open to a competent authority to permit such matters to be determined by unilateral decision by the developer, within the context of any development consent granted, to be notified to the competent authority rather than approved by it.

Lack of information on scientific studies

120. Mr. Goodwillie clearly had an affinity for, and deep knowledge of the area, even if one might point to certain issues regarding the extent to which the basis for his conclusions was fully documented. Ms. Butler submits that any alleged shortcomings in his study and NIS were not relevant because he never said that there were no otters in the area and the permission was granted on the basis of conservation objectives which assumed otter presence (see NPWS "*Conservation Objectives of site*" (SAC 002162) as exhibited at exhibit BH6 to Brian Holohan's affidavit, p. 8).

121. The issue, already-mentioned, as to where exactly the alluvial forests were located, is probably not the applicants' strongest point. There seems to be no real evidence that alluvial forests are affected by the development and accordingly the point appears to fall into the category of mere assertion held to be insufficient by O'Neill J. in Harrington.

122. Ms. Butler also condemns the inspector's analysis (p. 60) as to the need for further surveys because in coming to that view she mentions that in evidence at the hearing it was stated that "*there are no otterholds or otters (Annex IV species) in the area up to two hundred metres to the south and five hundred metres to the north of the scheme location*". She says that this is a misunderstanding because all that Mr. Goodwillie was saying was that none were observed, and it was accepted that otters used the whole river. That submission involves a degree of extrapolation and interpretation (of a negative kind) of the inspector's report, and I do not think one should put an interpretation on it that renders it incorrect unless that were necessary.

123. Ms. Butler submits that one of the premises of the conclusion was the view that derogation licences should be obtained pre-consent. She says this was "*legally incorrect*". But it is one thing to say that one is not obliged to require derogation licences in advance; it is another to say that one is not entitled to so require in a particular case. I do not think that there was in fact any error of law here.

124. It is notable that the inspector marshals a fair amount of argument and reasons in favour of her conclusion that the studies presented were inadequate. By contrast the board majors in assertion which it calls findings. The reasons for its assertions are not invariably apparent.

125. The NPWS written submission of 24th February, 2014 stated that "*if necessary*" the board "*should require additional information and/or hydrological or other specialist advice*", which perhaps is not quite a categorical statement that such information is necessary but certainly suggests that it may be necessary.

126. Dr. Patton, of the NPWS, in her evidence stated that "*there is a need for an up to … date survey*". Ms. Butler interprets this as meaning a post-consent survey. However, that is offered as an interpretation rather than as a definitive proposition. It is not a proposition I would be inclined to automatically accept, especially read in the light of the written submission which can only be read as referable to possible pre-construction surveys.

127. Insofar as Dr. Patton sought bat surveys and nesting bird surveys, Ms. Butler submits that the mitigation measure of letting trees lie on the ground as referred to by Dr. Patton was only the "*last-gasp*" mitigation measure given that the main mitigating measure was retaining trees intact (p. 12 of bat assessment attached to NIS). But it is a thin criticism of Dr. Patton to focus on the fact that she did not discuss other mitigation measures. Insofar as she suggested a thorough survey and non-removal during the bird nesting season, it is hard to see how these can be said to be unreasonable suggestions. It is not altogether clear that the reference to a survey relates to pre-consent as opposed to post-consent, pre-construction, information.

128. The NPWS written submission did not seek additional mitigation and Ms. Butler seemed to suggest that Dr. Patton's evidence contradicted this. But all evidence must be taken into account including oral evidence.

129. Reliance is placed on the fact that Dr. Patton did not make a closing submission which it is suggested means that the NPWS was not opposing the development. That may or may not be so, but, that in itself does not establish that there is no scientific doubt as to the lack of impact on a European site.

130. It is clear that the appropriate assessment must avoid adverse impacts on the objectives of the European site to a standard of beyond reasonable scientific doubt. One might have thought that therefore clarity and precision as to what the scientific position and evidence is would be required. Thus, if scientific opinion is calling for further information in relation to an application, one might expect

clarity in recording whether the scientific opinion in question considers that the further information is required before consent or only before construction. Unfortunately, the record of the evidence does not contain that rather essential detail. There is an audio recording of the hearing but as noted above, it is not suggested the board ever listened to this, and it has never been transcribed.

131. The question that appears to thereby arise is whether Directive 92/43/EEC has the effect that a competent authority is obliged to record, with sufficient detail and clarity to dispel any doubt as to the meaning and effect of such opinion, the extent to which scientific opinion presented to it argues in favour of obtaining further information prior to the grant of development consent.

132. The broader issue remains as to the scientific rigour of the ecology data. The board, in its conclusions on ecology (pp. 5 to 6 of its decision), accepted the ecology reports on the basis of their being based on "*a series of site visits over a number of years, coupled with expertise on local ecological conditions*" as well as the bat survey. It was therefore "*not necessary to request any further field surveys*". The board considered that the NIS was "*an authoritative report*" that clearly identified the impacts on European sites. The board decision overall, and in particular its discussion under the heading of appropriate assessment, is heavy on unreasoned assertions (which Ms. Butler calls "*findings*") and very short on reasoning. For example, "[t]he scope and methodology of the Natura impact statement was considered acceptable" (p. 9 of the board's decision). The only reason that could be implied for this is that the NIS is considered "*definitive*". Why it is definitive is not stated, but can maybe be implied from the earlier reference to it having been based on site visits and expertise. Ms. Butler's thorough, detailed and exhaustive submissions can perhaps be seen as adding a whole further layer of interpretation and comment upon the very Spartan reasoning of the board. The role for such a re-programming of the decision challenged appears to be open to debate in judicial review. There was nothing stopping the board from giving at least some of these reasons in its decision. It is notable that Finlay Geoghegan J. specifically refers in Kelly to the court on judicial review having to be satisfied that the AA was correctly conducted "on the basis of reasons stated in the decision".

133. Ms. Butler submits that the board does not have to do a "*point by point*" rebuttal of the inspector. This to some extent goes to the key question under this heading, as to whether Directive 92/43/EEC has the effect that the competent authority is required to give reasons or detailed reasons for rejecting a conclusion by its inspector that further information or scientific study is required prior to the grant of development consent.

Whether the reasons provided in the appropriate assessment were inadequate or lacking

134. Mr. O'Higgins submits that in tandem with these alleged omissions, there was a lack of reasons as to why the board accepted the material before it. He emphasises that Finlay Geoghegan J. held in Kelly at para. 49 that the analysis of an appropriate assessment was not a discretionary "*planning decision*", and that a court conducting a judicial review of the assessment must be satisfied on the basis of reasons stated in the decision that the appropriate assessment was lawfully conducted (see para. 48).

135. Barrett J. in *Connolly v. An Bord Pleanála* [2016] IEHC 322 said that the reasons needed to be addressed in a comprehensible way rather than furnishing an "*ocean of material relied on*" leaving it to the applicant to fish therein (para. 27).

136. Reliance is also placed by analogy on the decision in *Balz*, where severe shortcomings were found in the reasons provided in the context of the EIA (rather than the appropriate assessment), including a failure to set out how and why the board reached its conclusion (para. 167), the inclusion of a "*bald statement*" of rejection of the inspector's view (para. 170) and a failure to provide a rational explanation informative of the conclusions reached (para. 174).

137. The question therefore is whether Directive 92/43/EEC has the effect that a competent authority, when conducting an appropriate assessment, must provide detailed and express reasons for each element of its decision.

Reference to the Court of Justice

138. It was agreed between the parties that by reason of the new constitutional architecture which permits the Supreme Court in any case to make a determination permitting an appeal from the High Court, the High Court is never a court of last resort (even if leave to appeal to the Court of Appeal is refused).

139. Thus, in Grace and *Sweetman v. An Bord Pleanála* [2016] IESCDET 29, a determination which I quote only for the light it sheds on appeal procedure, and not as regards any question of substantive law, the Supreme Court granted leave to the applicants to appeal a decision of the High Court made under s. 50 of the 2000 Act where leave to appeal had been refused by Fullam J., who also refused to make a reference under Article 267 of the Treaty on the Functioning of the European Union. The Supreme Court noted that in part 5 of the determination that "*as was pointed out by this Court in* Kelly v. UCD [2016] IESC DET 30, *the new constitutional architecture does not permit for the exclusion* (*as opposed to the regulation*) *of an appeal to this Court whether from the Court of Appeal or direct from the High Court*". Therefore, given that the High Court is never a court from which no remedy arises, it seems to follow that even in a s. 50 case (or an analogous case under s. 5 of the Illegal Immigrants (Trafficking) Act, 2000), the High Court is never obliged to make a reference under Article 267.

140. However, if a question of EU law which is not *acte clair* arise, there are some reasons for considering that it might be more appropriate for it to be referred by the High Court rather than by an appellate court. If a reference appears inevitable (as opposed to where it is not appropriate in any event for one reason or another), to postpone it until the appellate stage is to effectively ask the appellate court to deal with the aftermath of the reference as a court of first instance. Whereas by referring the question at High Court level, the appellate court not only does not need to do so but also has the benefit of having the reply from Luxembourg digested and applied as seems appropriate to the judge dealing with the matter at first instance. In principle, that could only be of assistance to the court dealing with the matter on appeal.

141. It seems to me that the issues are not *acte clair* and on a discretionary basis that this is a case where it is appropriate and necessary to make such a reference at this point in all the circumstances. While I have considered requesting the expedited procedure, I do not consider that this case comes within the proper scope of that procedure as applied by Luxembourg because no imminent damage will be done to the environment by the delay in progressing the proceedings and therefore the present case falls outside the jurisprudence of the Luxembourg court as to that expedited procedure (see Order of President of the CJEU of 29 September 2016, not published, Case C-470/16 *North East Pylon Pressure Campaign v. An Bord Pleanála*, para. 11, citing Orders of the President of 16 March 2010 Case C-3/10 *Affatato*, not published, EU:C:2010:144 para. 13 and 28 November 2013 Case C-396/13 *Sähköalojen ammattiliitto*, not published, EU:C:2013:811 para. 15). I appreciate that delay is undesirable but that factor is outweighed by the appropriateness of seeking clarification from Luxembourg at this point in the proceedings.

Order

142. For the foregoing reasons I will order that questions be referred to the Court of Justice of the European Union as follows:

(a) whether Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna

and flora as amended has the effect that a Natura impact statement must identify the entire extent of the habitats and species for which the site is listed;

(b) whether Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended has the effect that the potential impact on all species (as opposed to only protected species) which contribute to and are part of a protected habitat must be identified and discussed in a Natura Impact Statement;

(c) whether Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended has the effect that a Natura impact statement must expressly address the impact of the proposed development on protected species and habitats both located on the SAC site as well as species and habitats located outside its boundaries;

(d) whether Directive 2011/92/EU of the European Parliament and Council of 13 December, 2011 on the assessment of the effects of certain public and private projects on the environment, as amended, has the effect that an environmental impact statement must expressly address whether the proposed development will significantly impact on the species identified in the statement;

(e) whether an option that the developer considered and discussed in the environmental impact assessment, and/or that was argued for by some of the stakeholders, and/or that was considered by the competent authority, amounts to a "*main alternative*" within the meaning of art. 5(3)(d) of Directive 2011/92/EU of the European Parliament and Council of 13 December, 2011 on the assessment of the effects of certain public and private projects on the environment, as amended, even if it was rejected by the developer at an early stage;

(f) whether Directive 2011/92/EU of the European Parliament and Council of 13 December, 2011 on the assessment of the effects of certain public and private projects on the environment, as amended, has the effect that an environmental impact assessment should contain sufficient information as to the environmental impact of each alternative as to enable a comparison to be made between the environmental desirability of the different alternatives; and/or that it must be made explicit in the environmental impact statement as to how the environmental effects of the alternatives were taken into account;

(g) whether the requirement in art. 5(3)(d) of Directive 2011/92/EU of the European Parliament and Council of 13 December, 2011 on the assessment of the effects of certain public and private projects on the environment, as amended, that the reasons for the developer's choice must be made by "taking into account the environmental effects", applies only to the chosen option or also to the main alternatives studied, so as to require the analysis of those options to address their environmental effects;

(h) whether it is compatible with the attainment of the objectives of Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended that details of the construction phase (such as the compound location and haul routes) can be left to post-consent decision, and if so whether it is open to a competent authority to permit such matters to be determined by unilateral decision by the developer, within the context of any development consent granted, to be notified to the competent authority rather than approved by it;

(i) whether Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended has the effect that a competent authority is obliged to record, with sufficient detail and clarity to dispel any doubt as to the meaning and effect of such opinion, the extent to which scientific opinion presented to it argues in favour of obtaining further information prior to the grant of development consent;

(j) whether Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended has the effect that the competent authority is required to give reasons or detailed reasons for rejecting a conclusion by its inspector that further information or scientific study is required prior to the grant of development consent; and

(k) whether Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended has the effect that a competent authority, when conducting an appropriate assessment, must provide detailed and express reasons for each element of its decision.

143. I will direct that the applicants prepare books of papers for Luxembourg to be lodged in the Central Office within a timescale to be discussed with counsel.