Neutral Citation: [2015] IEHC 271

THE HIGH COURT

COMMERCIAL

[2014/487JR]

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

BETWEEN

PEOPLE OVER WIND, ENVIRONMENTAL ACTION ALLIANCE IRELAND

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

LAOIS COUNTY COUNCIL, COILLTE TEORANTA AND THE DEPARTEMENT OF ARTS, HERITAGE AND THE GAELTACHT

NOTICE PARTIES

JUDGMENT of Mr. Justice Haughton delivered the 1st day of May, 2015

Introduction

1. In this application for judicial review the applicants seek an order of certiorari quashing the decision, dated 13th June, 2014, of the respondent, An Bord Pleanála ("the Board" or "the respondent") to grant permission to the second named Notice Party ("Coillte") in respect of the proposed development of an 18 turbine wind farm at Cullenagh, County Laois.

2. The first named applicant is a committee comprising representatives of some 70 concerned households in the area of the proposed development and it made observations/submissions in respect of the initial application for permission to Laois County Council and in respect of the appeal from the planning authority's decision to the respondent.

3. The second named applicant is a non-governmental environmental organisation established for the purposes of protecting the environment at Ballyroan, Co. Laois and the surrounding townlands. The second named applicant also objected to the planning application and made submissions/observations at the appeal stage.

4. The factual background is as follows. Coillte applied for planning permission for a development of an 18 turbine windfarm near Cullenagh, Co. Laois on 9th August, 2013 which was accompanied by an Environmental Impact Statement ("EIS") and a Natura Impact Statement ("NIS"). The proposed development included inter alia construction of a permanent meteorological mast, a single story 38kv substation with sanitary facilities and parking spaces, underground cabling and strengthening and widening of roads to be used during the construction and operation phases of the development. Members of the public, including the applicants and a number of public bodies and persons made submissions in relation to the application. On 1st October, 2013, officials of a number of departments of Laois County Council also submitted reports on the application.

5. On 2nd October, 2013, Laois County Council planning authority refused permission for the development on the basis that appropriate or adequate consideration had not been given to the effects of the development on the environment in the EIS or the NIS. The reasons for refusal are considered more fully below. Coillte then appealed the decision to the Board. Further information was provided to the Board by Coillte in relation to the development following the application. Ms. Joanne Kelly was appointed inspector and was tasked with producing a report on the proposed development which was completed on 11th February, 2014. The Board, after examining the information before it granted permission for the development on 13th June, 2014. The applicants later applied to the Court for judicial review of the Board's decision.

6. These proceedings were heard on affidavit in the Commercial Court.

Order Granting Leave

7. By order of Ms. Justice Baker made on 31st July, 2014, leave was granted on grounds (2)-(14) to seek an order of *certiorari* quashing the Board's decision granting permission for the proposed development along with any such further orders as the Court deems meet and the costs of the application for judicial review.

8. For completeness, grounds (1)-(14), delineated in para. (E) of the Statement Required to Ground an Application for Judicial Review, are outlined below:-

> "(1) The respondent failed to carry out a proper environmental impact assessment (EIA) as required under national and European Law.
>
> (2) The respondent failed to carry out a proper appropriate assessment (AA) as required under National and European Law.
>
> (3) The respondent had before it an environmental impact statement (EIS) that was inadequate in that it failed to properly describe the proposed development and its effects and contained material that was inaccurate and incorrect. Accordingly no or no lawful EIA was or could have been conducted.
>
> (4) The respondent had before it a natura impact statement (NIS) that was inadequate as it did not properly describe the proposed development or its effects on nearby European Sites. The planning authority and the notice party (the Department of Arts, Heritage and the Gaeltacht) identified significant lacunae in the information provided by the notice party developer, Coillte Teoranta. These lacunae were never satisfactorily addressed. Accordingly no, or no lawful AA was or could have been conducted.
>
> (5) The respondent failed to properly record its determination and failed to give any or any proper reasons for its

determination contrary to National and European Law.

(6) The respondent failed to have regard for the decision to refuse permission for the development by Laois County Council. The Council found that the proposed development would contravene development objective NH13/001 of the Laois County Development Plan 2011-2017 pursuant to s.37(2) of the Planning and Development Act 2000 the Board may only grant planning permission where permission has been refused by reason of material contravention of a development plan in specified limited circumstances. The Board had no regard to this section or its applicability to the decision of the planning authority. The said decision is ultra vires, void and of no legal effect.

(7) The applicant herein raised a request for information pursuant to the European Communities (Access to Information on the Environment) Regulations 2007 requesting a copy of the record of the environmental impact assessment and appropriate assessment carried out. The applicant received a response on 18th July 2014. This response stated that the EIA and AA conducted comprised all of the documents received during the course of the appeal. The respondent was unable to furnish, or direct the applicant to, any particular record of the assessment. This is contrary to the requirements of European Law.

(8) The respondent has nowhere produced an assessment of the development for the purposes of the EIA and Habitats Directive. The record in the Board's direction and decision is perfunctory and uninformative. It gives no proper account of the assessment undertaken. In particular, it fails entirely to engage with the decision of the planning authority. It also fails to engage with the recommendations and concerns of the officers of the planning authority and the Department of Arts Heritage and the Gaeltacht in the course of the consideration of the planning application and the identified deficiencies in respect of the information provided by the applicant for permission. These concerns were expressed again in the context of the appeal and were echoed by the applicants and the public concerned. The decision is contrary to law.

(9) The Board failed to require the submission of a proper revised EIS and NIS and/or failed to require proper further information from the developer. The Board also failed to hold an oral hearing into the appeal despite being requested to do so. At such a hearing, evidence could have been led by the notice party developer and, could have been tested by cross examination. Having regard to the identified deficiencies and concerns expressed in relation to the information available, the Board was not in a position to proceed to make a decision on the appeal.

(10) The Board's inspector recommended a refusal or permission. The Board has failed to give any or any proper reason for not following the recommendation of the inspector. Moreover, having regard to the fact that the inspector identified key deficiencies in the information in the appeal, it was not open to the Board to overlook such deficiencies and grant permission. No or not adequate reasons or justification is offered in this relation.

(11) The decision itself is void for uncertainty. Condition 1 of the grant of permission states as follows:-

> "1. The development shall be carried out and completed in accordance with plans and particulars lodged with the application, as amended by the plans and particulars submitted to An Bord Pleanála with the appeal, and was further amended by the revised plans and particulars submitted to An Bord Pleanála on 9th day of August, 2013, except as may otherwise by required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.
>
> Reason: In the interests of clarity."

(12) The application for permission was made to Laois County Council on the 9th August, 2013. It is entirely unclear what is meant by the phrase "as amended by the plans and particulars submitted to An Bord Pleanála with the appeal, and as further amended by the revised plans and particulars submitted to An Bord Pleanála on the 9th day of August, 2013." No information, revised plans or particulars were submitted to the Board on 9th August, 2013.

(13) The decision itself leaves over in its conditions key matters to be agreed with the planning authority post consent. This is contrary to the requirements of EIA and AA which requires such matters to be determined before consent is given.

(14) The Board has failed to keep and/or maintain a proper file recording its decision. The applicant has obtained a copy of the file from An Bord Pleanála. This file is in disarray, follows no particular order, appears to be incomplete, and is impossible to follow. The Board has referred to this file in its correspondence with the applicant dated the 18th of July as being part of the record of its decision making. The file that is available for public inspection provides no record of the decision making process and is impossible to understand. Again, the Board has failed to maintain a proper record of it deliberations contrary to law."

9. Although not adverted to on affidavit, it appears from a submission made by Mr. Collins BL, who moved the leave application on the applicants' behalf, that the failure to grant leave to seek relief on ground (1) was a simple error of omission in the leave order. However, this Court does not feel it necessary to speak to the minutes of the leave order because, for reasons explained later in this judgment, ground (1) as framed is in such general terms that it does not comply with the requirements of Order 84, rule 20(3) which prohibits assertions in general terms and imposes a requirement that grounds be stated precisely. In any event the applicants' complaints in relation to the Environmental Impact Assessment ("EIA") are stated with somewhat more particularity in grounds (3), (8), (9) and (13).

10. On the application of Coillte these proceedings were admitted to the Commercial List by order of Mr. Justice Kelly made on 30th September, 2014 . At that time it was indicated to the Court that the other notice parties, Laois County Council and the Department of Arts, Heritage and the Gaeltacht ("DAHG") would not be taking any part in the proceedings. Accordingly, the application as it proceeded was opposed by the respondent and Coillte. No issue was taken as to the applicants' *locus standi* to bring or maintain these proceedings.

Scope of Judicial Review – Grid Connection

11. A preliminary issue arose as to the scope of this judicial review having regard to the terms of the leave order. The applicants

raised complaints in relation to the EIS, the EIA and the Appropriate Assessment ("AA") under Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora ("the Habitats Directive"). In seeking to quash the Board's decision in their written and opening oral submissions and in the second affidavit of Ms. Paula Byrne sworn on 29th January, 2015, the applicants sought to argue that, particularly in carrying out the EIA, the Board was obliged to have regard to the direct and indirect environmental impacts of the proposed wind farm and the grid connection on a cumulative basis. They sought to argue that as there was no description of ***the grid connection*** in the planning application or the EIS there was consequently no assessment of the environmental impact of the grid connection which is an integral or fundamental part of the overall development. In making this argument they sought to rely on the authority of *O'Grianna v. An Bord Pleanála* [2014] IEHC 632, a decision of Peart J handed down on 12th December, 2014.

12. In the *O'Grianna* case, Peart J had to consider a similar argument in relation to a planning permission granted by the Board in respect of a 6 wind turbine wind farm in County Cork. In that case, as in the present case, the application indicated that it wasn't possible to determine the line or form of the grid connection at the date of application for planning permission so the planning application did not include an application for permission relating to the grid connection. Peart J found that there had not been any assessment of the potential environmental impact of the second phase of the wind farm development, namely the grid connection, which he considered to be "an integral part of the overall development of which the construction of the turbines is the first part" (para. 27). He agreed with the applicants that under Article 3 of Council Directive 2011/92/EU (the "EIA" Directive) the Board was obliged to undertake an assessment of significant environmental impacts of the proposed development on its own and cumulatively with the plans for the grid connection. At para. 28 he stated:-

> "It seems to me that the fact that the developer is at the mercy of ESB Networks as far as the details of the plans for that connection to the grid is concerned, cannot absolve the developer from compliance with the Directive in every respect."

13. In concluding, Peart J at para. 32 stated:-

> "Rather, it points to a prematurity in the seeking of permission for the construction of the wind farm ahead of the detailed proposals for its connection to the national grid from ESB Networks.

14. It became apparent during the course of this case that the facts that fell to be considered in *O'Grianna* were, in this respect, similar to the facts in the present case. It therefore became clear to the Court that, had this matter been fully and properly raised at the leave stage, the applicants were in a position to show substantial grounds sufficient to persuade the Court to grant leave.

15. Having heard submissions from all parties in relation to this issue I determined that this argument fell outside the grounds in respect of which leave was granted, and that therefore the applicants were not entitled to pursue it. In so doing, I indicated that I would give my reasons for such decision when giving my ultimate decision in the matter. Accordingly, in this section of this judgment I give those reasons.

16. Mr. Devlin SC for the applicants argued that this ground of challenge was encompassed by a number of grounds pleaded in para. (E) in the Statement of Grounds. He conceded that it was not expressly mentioned there or in the grounding affidavits sworn for the purposes of the leave application by David Maloney and Paula Byrne on 25th July, 2014 and 28th July, 2014 respectively, although it is clearly raised by Ms. Byrne in her affidavit sworn on 29th January, 2015.

17. Mr. Devlin SC pointed particularly to grounds (E)(3), (4), (8) and (9) – some of the "principal grounds" – and under the heading "Factual Background", to grounds (17), (19), (20), (22), (23), (36), (37) and (42). He also sought to rely on the fact that the applicants in their submissions to the local planning authority at first instance expressed concern at the level of information in the EIS and pointed to the absence of any description or detail of the proposed grid connection. He further relied on sections of the "Planners Report" of Ms. Emer Uí Fhátharta from Laois County Council to the planning authority, where it is stated in the EIA Report under appendix B of the Planners Report that the grid connection should be considered an integral part of the EIS so that all cumulative effects can be assessed adequately. He also relied on the Planners Report itself, wherein it is noted that the "European Commission Guidance on Wind Energy Developments and Natura 2000 sites state that grid connection is an integral part of considering the impacts of a proposed development in accordance with Article 6(3) of the Habitats Directive".

18. In terms of how the Court should address whether the case thus made out came within the scope of the pleadings, Mr. Devlin SC referred to *Sweetman v. An Bord Pleanála & Ors* [2008] 1 IR 277, p. 291 at para. 41 where Clarke J addressed whether a general plea before him challenging a failure to provide judicial review at a non-prohibitive cost could be interpreted as setting out a wider challenge that the form of review itself was inadequate. Clarke J stated:-

> "On any fair or reasonable reading, both of the individual clauses in the statement of grounds, or in the statement of grounds taken as a whole, same can only be interpreted as setting out a challenge based on a contended for failure to provide judicial review at a non-prohibitive cost."

19. Mr. Devlin SC indicated that the approach in that case of a "fair or reasonable reading" was the approach that this Court should take in relation to the Statement of Grounds, a proposition with which the respondent or Coillte did not disagree. Mr. Devlin SC also referred to *Fitzpatrick v. Board of Management of St. Mary's* [2013] IESC 57 where McKechnie J at para. 35 stated:-

> "On a judicial review application moved under O. 84 of the Rules of the Superior Courts 1986 to 2013, the scope of the relief sought and the grounds upon which such might be obtained are to be identified from the order of the High Court granting leave, subject only to any amendment or variation subsequently allowed. Unless expressly or by interpretation, implicitly, within such order, no relief or ground which differs therefrom can be argued."

20. Again this seems correct in principle – the ground may be expressed or interpreted as being implicit in the wording used.

21. Mr. Devlin SC also relied on the decision of the Court of Justice of the EU ("CJEU") in *Altrip & Ors v. Land Rheinland – Pfalz* (Case C-72/12). This was concerned with whether German law properly transposed provisions of Directive 2003/35/EC, amending Directive 85/337/EC (which introduced EIAs) regarding the implementation of approved public participation measures arising from the Aarhus Convention. That case is distinguishable on its facts in that the German law that was impugned permitted an applicant to bring an action only in circumstances where no EIA had been undertaken. There was no such right of appeal where an EIA was carried out in an irregular manner.

22. Mr. Devlin SC also relied on Article 10a of Directive 85/337/EC for the proposition that in such challenges there is an "objective of

giving the public wide access to justice…", and he quoted from para. 36 of the judgment of the CJEU:-

> "In providing that the decisions, acts or omissions referred to therein must be actionable before a court of law through a review procedure to challenge their substantive or procedural legality, the first paragraph of Article 10a of Directive 85/337 has in no way restricted the pleas that may be put forward in support of such action…"

He also quoted from para. 45 of that judgment:-

> "Where, there being no rules fixed in the sphere by Union law, it is for each Member State to lay down, in its legal system, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law, those detailed rules…, in accordance with the principle of equivalence, must not be less favourable than those governing similar domestic actions and, in accordance with the principle of effectiveness, must not make it in practice impossible or excessively difficult to exercise right conferred by Union law…"

23. In relation to the principle of equivalence it seems that this does not assist the applicants as the same domestic procedural rules relating to judicial review, detailed in the Planning and Development Act, 2000 as amended ("PDA 2000") and Order 84, apply whether the challenge is based on EU law or domestic law.

24. Mr. Devlin SC also quoted para. 52 from the judgment:-

> "It appears, however, with regard to the National law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, in order to establish impairment of a right, to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked. That shifting of the burden of proof onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments."

25. Mr. Devlin SC drew from this support for the proposition that the Court should have regard to the complexity of procedures and the technical nature of EIAs in addressing the scope of the judicial review and that a generous construction should therefore be given to the wording used in the Statement of Grounds.

26. The reliance on para. 52 seems particular to the facts of that case and not supportive of any general proposition that the Court should extend some latitude to applicants in interpreting pleadings because of the "complexity of the proceedings in question" or "the technical nature of EIAs".

27. Finally, Mr. Devlin SC called in aid *R(on the application of Wells) v. Secretary of State for Transport, Local Government and the Regions* – (Case C-201/02). That case concerned registration of an old mining permission for which an EIA was required but not obtained and whether the remedy of revocation should be available to Mrs. Wells. Mr. Devlin SC relied on para.s 64-67 and 70 in which the Court stated:-

> "…it is clear from settled case law that under the principle of co-operation and good faith laid down in art 10 EC…the member states are required to nullify the unlawful consequences of a breach of Community Law…the member states are required to nullify the unlawful consequence of a breach of Community law…
>
> Thus, it is for the competent authorities of a member state to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an Impact Assessment…
>
> The member state is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.
>
> The detailed procedural rules applicable are a matter for the domestic legal order of each member state, under the principle of procedural autonomy of the member states, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)…
>
> The answer to the third question must therefore be that under art 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in art 2(1) of Directive 85/337.
>
> The detailed procedural rules applicable in that context are a matter for the domestic legal order of each member state, under the principle of procedural autonomy of the member states, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community Legal Order (principle of effectiveness)."

28. The Court accepts that there is a clear obligation on member states and the courts. So far as Ireland is concerned, it has implemented its obligations under the EIA Directives by enactment of the PDA 2000. So far as the courts are involved in the provision of an effective remedy, there is access inter alia by way of judicial review regulated by s. 50 of the PDA 2000, under s. 50A and in the procedural rules set out in Order 84 of the Rules of the Superior Courts (as amended from 1st January, 2012). These constitute the "domestic legal order" subject only to equivalence and effectiveness. Mr. Devlin SC appeared to argue that because EIA requirements are the subject of Community law there is an overriding obligation on this Court, which supersedes procedural provisions in the PDA 2000 and Order 84, to entertain, consider and determine the grid connection issue even if it has not been as fully and comprehensively pleaded as those provisions would require. In the view of the Court, this submission is not well made in light of the repeated acknowledgement by the CJEU in the *Wells* case that procedural rules are a matter for the domestic legal order, in this case Irish domestic law.

29. That this is so tends to be confirmed by the text of the EIA Directive. This Directive superseded the original EIA Directive- Council Directive 85/337/EC, as amended. The EIA Directive specifically follows the Aarhus Convention relating to public participation. 2 recitals should be mentioned :-

> "(20) Article 6 of the Aarhus Convention provides for public participation in decisions on the specific activities listed in

Annex I thereto and on activities not so listed which may have a significant effect on the environment.

(21) Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of that Convention."

30. Article 11 then relates to access to review procedures. Articles 11(1) and 11(2) are particularly relevant :-

"1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged."

31. This provision clearly reflects the intention of the EU that member states should determine within their own domestic legal system procedural provisions governing the judicial review. There is clearly nothing in the provisions in the PDA 2000 or Ord. 84 that would prevent or impair the applicants' right to have raised the point concerning grid connection which they say is encompassed by the terms of their Statement of Grounds.

32. Mr. Devlin SC argued that the question of grid connection and deficiency highlighted by Laois County Council were "centre stage" throughout the planning process and the proceedings. The Court should approach its task by interpreting the grounds in light of the obligation to provide an effective remedy.

33. Mr. McDonald SC responded on behalf of Coillte, pointing out that both of the applicants raised questions around grid connection in their submission to the local planning authority and the Board and were therefore well aware of the alleged deficiencies in the EIS and EIA at all material times. However, they did not specifically raise the issue in the Statement of Grounds when leave was granted.

34. Counsel referred in some detail to s.s 50 and 50A of the PDA 2000.

35. Section 50(2) stipulates that no person can question the validity of any decision of inter alia the Board "otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986)…". In s. 50(6) it is provided that an application for leave to apply for judicial review under Order 84 "…shall be made within the period of 8 weeks beginning on the date of the decision…".

Section 50(8)(a) provides that the High Court may extend the 8 week period:-

"… but shall only do so if it is satisfied that –

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

36. In referring to s. 50A, Mr. McDonald SC emphasised subs. (3) which provides that the Court shall not grant leave unless "it is satisfied that – (a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed." Subsection (5) provides that:-

"If the court grants section 50 leave, no grounds shall be relied upon in the application for judicial review under the Order other than those determined by the Court to be substantial under subsection 3(a)."

37. Mr. McDonald SC then relied on certain parts of the new Order 84 promulgated by Ministerial Order in S.I. No.691 of 2011 and effective for all applications for judicial review commenced on or after 1st January, 2012. He pointed out that:-

• Sub rule 20(2)(a) requires the use of a form for the Statement of Grounds, Form No. 13 in Appendix T, which includes the details listed in (a)(i) – (v) of the sub rule and in particular (a)(ii) "a statement of each relief sought and of the particular grounds upon which each relief is sought".

• Sub rule 20(3) states:-

"It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely, each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

• Sub rule 20(4) empowers the Court at the leave stage to allow the Statement of Grounds to be amended and for further and better particulars to be stated, in the following terms:

"The court hearing an application for leave may, on such terms, if any, as it thinks fit –

(a) allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise,

(b) where it thinks fit, require the applicant's statement to be amended by setting out further and better particulars of the grounds on which any relief is sought."

> • Sub rules 21(3) – (5) empower the Court to extend time for a leave application but, only when satisfied that there is "good and sufficient reason" and the reason for delay was "either – (i) outside the control of, or (ii) could not reasonably have been anticipated by" the applicant. The Court may have regard to the effect which an extension may have on a respondent or third party (sub rule 21(4)) and an application for extension "shall be" grounded upon an affidavit setting out and verifying the reasons for the delay (sub rule 21(5)).

38. It was not disputed that these were the domestic procedural provisions that were applicable. Mr. McDonald SC submitted that these provisions show the legislative intention to establish a stringent but "not unforgiving" regime for challenges to planning decisions. The grounds must not be general but should be precise and particularised. The requirement to seek leave and establish substantial grounds at that stage is an essential "filtering process".

39. The period of 8 weeks, he contended, was ample time for the analysis of the impugned decision and for the preparation of a Statement of Grounds which firstly states precisely each ground and secondly gives particulars which are the basis of those grounds. This 8 week period satisfies the principle of equivalence. In this respect counsel relied on *TD and others v. The Minister for Justice, Equality & Law Reform* [2014] IESC 29, a decision of the Supreme Court. In that case the Court considered the much shorter 14 day period allowed by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000 for challenge by way of judicial review to most asylum and immigration decisions – which, it was previously found, did not infringe the Constitution – and found that it did not offend the principle of equivalence. In his judgment in that Court, Fennelly J referred with approval to dictum in *McNamara v. An Bord Pleanála* [1998] 3 IR 453 in which Keane J (as he then was) found that the 2 month limitation period in respect of challenges to planning decisions, as it then existed, applied to all such decisions whether the grounds of challenge were based on EU law or domestic law and therefore did not offend the principle of equivalence.

40. In further support of the contention that the grounds must be pleaded with precision, counsel relied on *AP v. The DPP* [2011] IESC 2. In that case, the applicant sought to prevent a fourth trial on the grounds that it would be an abuse of process and unfair but sought to argue a further ground of delay at a late stage. Murray CJ (as he then was) referred to the need for precision and the tendency at substantive hearing "for new arguments to emerge…which in reality go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds." He concluded:-

> "In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this Court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained."

41. A similar statement appears in the judgment of Denham J in that case and in para. 9 she states that the High Court Judge in addressing issues outside the grounds granted for review "fell into error". Hardiman, J at para. 12 stated:-

> "In too many judicial review cases, it will be found that little attention has been paid to the absolute necessity for a precise defining of the grounds on which relief is sought until the case is actually before the Court. In my view, this case furnishes an extreme example of this unfortunate tendency."

42. Mr. McDonald SC derived further support for a strict approach from an earlier planning judicial review decision of Barr J in *McNamara v. An Bord Pleanála* [1996] 2 ILRM 339 in which he declined to allow the applicant to argue that there were specific defects in the EIS based on a general "catch- all" plea as it is was defective and failed to comply with statutory requirements. While Barr J had no doubt that the specific points raised after the statutory period for challenge were substantial grounds he decided that:-

> "…it is not open to the court to consider them if the board is correct in its submission that they were not notified to it and all other parties within the statutory time limit."

43. Barr J was persuaded in this by the decision of the Supreme Court in *KSK Enterprises Ltd. v. An Bord Pleanála* [1994] 2 IR 128 in which Finlay CJ, after analysing the then relevant statutory provisions, commented:-

> "From these provisions, it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should at a very short interval after the date of such decision in the absence of a judicial review be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."

44. In applying this dictum, Barr J at p. 351 stated:-

> "Ground (e) is a broad, general "catch- all" plea which tells the developer little or nothing as to the actual nature and basis for the challenge and what it should do to meet the case which will be presented against it on judicial review. Ground (a) is also too wide and ought to have specified in what respects the EIS was alleged to be defective and/or failed to comply with statutory requirements. The applicant is not entitled to rely on a general complaint about the EIS as an umbrella to justify subsequent specific allegations not notified as grounds within time. As to ground (f); this raises the fundamental argument that the board's decision in granting permission was irrational and therefore void. However, the allegation of irrationality as formulated in ground (f) which is confined to traffic only, is in general terms and lacks specifics. In my view it does not comply with the statutory requirements as to notification of grounds of objection within time."

45. This application of the principles, albeit pre-dating the statutory provisions that now apply outlined earlier in this judgment, nonetheless shows how the courts have approached pleadings in planning judicial reviews.

46. Mr. McDonald SC also pointed to the affidavit sworn on behalf of Coillte by Mr. Jude Byrne on 24th September, 2014 to support the application to admit these proceedings to the Commercial List and to the statement of Mr. Byrne indicating the time constraints applicable to the funding that Coillte hopes to obtain in order to implement the proposed development. In para. 6 of his affidavit of the 24th of September 2014, Mr. Byrne refers to "REFIT II" ("Renewable Energy Feed in Tariff") which is a funding scheme whereby a minimum price for electricity generated over a 15 year period is guaranteed. In order to qualify, the project must meet certain time dependent conditions.

47. Ms. Nuala Butler SC on behalf of the respondent adopted the submissions of Mr. McDonald SC and argued that the respondent's Statement of Opposition could not be read as addressing the grid connection issue now raised by the applicants and did not in fact deal with such issue because it was never raised. She argued that neither the Board nor Coillte understood the grid connection point

to be made by the applicants in their Statement of Grounds and that just because the issue was raised in the Planners Report doesn't mean that the ground can be argued. Both Ms. Butler SC and Mr. McDonald SC referred to the specific detailed plea in the Statement of Grounds in the *O'Grianna* case as exemplifying the manner in which the applicants in this case ought to have raised this matter in their Statement of Grounds at the leave and substantive stages. Ms. Butler SC asserted that there is no such plea in the Statement of Grounds and indeed no reference whatsoever to the grid connection nor to criticism of a failure on the part of the Board to carry out a cumulative assessment under the EIA, taking into account the grid connection with the proposed development. Ms. Butler SC submitted that the repeated amendments to s. 50, and particularly the addition of s. 50A, indicate the strictness of the approach to these matters intended by the legislature. She relied on the earlier McNamara case of *McNamara v An Bord Pleanála* [1995] 2 ILRM 125, in which Carroll J cited with approval the dictum of Costello J in *Scott v. An Bord Pleanála* (High Court 1994 No. 274 JR – unreported 27th July, 1994) concerning the relatively new provision of the Local Government (Planning and Development) Act 1992 that required an applicant for judicial review of a planning decision to show substantial grounds:-

> "It seems to me that what the court has to be satisfied about is that there are substantial grounds for declaring the decision invalid. To comply with this the court must examine and assess the grounds on which the decision is challenged. In this case the court does not have to reach a decision on disputed questions of fact. If I am satisfied that there are substantial grounds, then I must allow the application. If I am not so satisfied then I must refuse the application."

48. She cited to similar effect the decision of the Supreme Court in the Scott case [1995] 1 ILRM 424. Ms. Butler SC argued that the new rules which came into effect on 1st January, 2012 were intended to tighten up the requirements in relation to pleadings and also the requirement that the factual basis for each ground be set out. The rules are tighter now than were the rules considered by Barr J in his decision in the *McNamara* case. She argued that s. 50A overrides Order 84 rule 23, which of course is of general application to judicial review cases. She also relied on my decision in *Ratheniska v. An Bord Pleanála* [2015] IEHC 18 in which I declined to allow the applicants to pursue additional arguments in respect of which leave had not been granted and where the complaints/arguments had been raised very late in the day. Ms. Butler SC argued that the High Court has a discreet role under s. 50/s. 50A of the PDA 2000 and that it has no legal obligation or power to seek out defects or deal with complaints in respect of which leave has not been granted.

49. With regard to whether the involvement of the EIA Directive warrants a different approach to construing the scope of the judicial review from the Statement of Grounds, Ms. Butler SC submitted that it did not and that such a contention was not supported by the decision of the CJEU in *Altrip*. She drew the Court's attention to *Peterbroeck v. Belgian State* (Case C-312/93). Although this was a case concerning tax, Ms. Butler SC argued that it raised principles which are equally applicable to the present case. Peterbroeck had argued a new plea in relation to the relevant tax liability before the Brussels Court of Appeal; the Belgian State contended that this new plea was inadmissible because it was raised outside a time limit under Belgian law. The Court of Appeal had agreed with the Belgian State. The question before the CJEU was then characterised in para. 11 as follows:-

> "Having regard to the facts of the case before the national court as set out in its judgment making the reference, that court in substance seeks to ascertain, first, whether Community law precludes application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, is to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period."

50. As to that question, at para. 12 the CJEU said:-

> "(T)he Court has consistently held that, under the principle of cooperation laid down in Article 5 of the Treaty, it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down their detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law."

51. The CJEU proceeded at para. 14:-

> "For the purpose of applying those principles, each case which raises the question whether national procedural provision renders application of Community law impossible or excessively difficult must by analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."

52. Ms. Butler SC argued that it would not have been "impossible or excessively difficult" for the applicants to have raised the grid connection ground at the leave stage and that no principle of European law could be invoked to justify the Court giving a broad or strained construction of the Statement of Grounds to allow the applicants to argue this point.

Decision of the Court

53. The Court accepts that applications for judicial review are governed by s. 50 and s. 50A of the PDA 2000 and by Order 84 of the Rules of the Superior Courts 1986 as inserted by S.I. No.691 of 2011. These rules in essence require that an applicant seek leave and that this will only be granted on substantial grounds and that these must be pleaded "precisely", "giving particulars where appropriate" and they must "identify in respect of each ground the facts or matters relied upon as supporting that ground" (Order 84 rule 20(3)). It is indeed remarkable the extent to which the legislature has elaborated on these procedures in primary legislation.

54. These are stringent procedural requirements which allow little room for manoeuvre either for applicants or for the Court post the leave order. In terms of how these provisions (and the now repealed provisions of the 1992 Act that preceded them) have been applied in the Irish courts, the Court accepts the submissions of the respondent and Coillte. In particular, the Court takes note of Article 11 of the EIA Directive and accepts that the procedural rules laid down in domestic law comply with Article 11. Furthermore, it is quite clear that applicants for judicial review of planning decisions are enabled by the applicable domestic legislation to bring challenges whether based on domestic law provisions or directly applicable EU law. The Court takes a view that it was not impossible, or even excessively difficult, for the applicants to have raised a grid connection point at the leave stage.

55. The Court also accepts that in assessing the scope of the Statement of Grounds the approach that should be adopted is that of a "fair and reasonable reading" – but not from the point of view of one or other parties to the proceedings but rather from the point

of view of the Court on an objective basis.

56. Adopting this approach and addressing the grounds in para. E more particularly relied upon by Mr. Devlin SC as being those that could be construed in his favour, the Court concludes as follows:-

> • (E)(3) – This ground refers in general to a failure in the EIS to properly describe the proposed development and its effects and that it contained material that was inaccurate and incorrect. However, it made no specific mention of the grid connection or a failure to describe same. The factual basis for this ground appeared in para.s (E)(17), (18), (19), (20), (22) and (23). However, in none of these paragraphs was any mention made of the grid connection or a failure in the EIA to take into account the cumulative effects, direct and indirect, of the development taken together with the grid connection. It is true that paragraphs mentioned above from the Factual Background section refer to reports from officials of a number of departments of Laois County Council which were submitted with the planning application. It is also try that they identified alleged "significant deficiencies" in the information provided, and when considered, did raise the grid connection issue. However, it must be borne in mind that these reports referred to a multitude of different issues arising on the application and the EIS upon which they commented. How therefore were the respondent, notice parties or the Court to be aware of the actual alleged deficiencies relied upon by the applicants unless these were mentioned precisely and with detail in the Statement of Grounds? The answer to this rhetorical question must be that they couldn't be expected to be aware of a particular deficiency unless precisely pleaded – as was the case, for example, in the case of Noise Data and Haul Routes. It could not be said that the respondent or notice parties were fairly put on notice that this point would be raised. The attempt by the applicants to bring the grid connection/cumulative effect argument within these paragraphs was an attempt to apply general pleas to a specific and detailed complaint which was not pleaded, contrary to Order 84 rule 20(3).
>
> • (E)(4) – This ground pleaded that there was an inadequate description of the proposed development in the NIS and that the planning authority and DAHG identified significant lacunae in the information provided by Coillte. However, neither in ground (4) nor in the factual grounds that followed did the Statement of Grounds identify the grid connection/cumulative effects of that connection as being one of the "significant lacunae in the information" complained of by the applicants. In addition to the paragraphs under Factual Background already mentioned above, para. (37) criticised the decision of the Board for failing to account for how it overcame "the deficiencies identified by the planning authority, the [DAHG] and the public". However, those deficiencies are not anywhere defined as including consideration of the grid connection and its cumulative effect. More particularly, in para. (38) the plea dealing specifically with the AA refers to screening and the report of Ms. Uí Fhátharta but makes no reference to the grid connection and, in respect of the latter report, refers specifically only to the inadequacy of a bird survey. In para. (42) the applicants pleaded in relation to the decision in the EIA that it was:-
>
> > "entirely unclear how the Board purported to overcome the identified shortcomings and inaccuracies in the information provided with the application. The Board simply did not have the information that it required to conduct an assessment. The Council and its own Inspector identified key information that was absent, and, notwithstanding, the Board has purported to conduct an EIA. This is legally impossible."
>
> This is another example of a general plea that fails to make any specific mention of the gird connection.
>
> • (E)(8) – This ground alleged a failure on the part of the Board to produce an EIA or AA and criticised the recording of same in the Board's decision. It also alleged failure "entirely to engage with the decision of the planning authority" and with the recommendations and concerns of the planning authority and the DAHG in relation to "the identified deficiencies in respect of the information provided by the applicant for permission". Once again, this plea was in such general terms that it required particularity and detail in order to encompass the gird connection which was absent both within the paragraph itself and the ensuing Factual Background.
>
> • (E)(9) – This criticised the Board for failing to require the submission of a proper or revised EIS and NIS and failure to require "proper further information from the developer" and concluded "[h]aving regard to the identified deficiencies and concerns expressed in relation to the information available, the Board was not in a position to proceed to make a decision on the appeal." Again, this general plea did not of itself identify the grid connection/cumulative effect as a deficiency and this omission was not made good in the ensuing grounds.

57. The inference that the respondent and third party ask the Court to draw from the raising of this ground late in the day is that it had not occurred to the applicants prior to the application for leave . It only emerged as a potential ground for review of the decision following the delivery of the *O'Grianna* decision by Peart, J on 12th December, 2014. That is certainly consistent with the chronology of events – the ex parte application for leave was made and granted on 31st July, 2014, the Coillte Statement of Opposition was filed on 11th November, 2014 and the respondent's Statement of Opposition was filed on 14th November, 2014. Neither of those Statements of Opposition addressed the question of grid connection/cumulative effect. Peart J's decision was handed down in December and the grid connection/cumulative effect argument was first raised by the applicants in the second affidavit sworn by Ms. Paula Byrne on behalf of the applicants on 29th January, 2015. In para. 23, the deponent states- "the grid connection is nowhere outlined described or detailed in the EIS and no assessment was undertaken by the Board." She goes on to quote from the first applicant's submission to Laois County Council which referred to the grid connection and its implications for the proposed development; and also, in para. 24, to the submission by the Planning Officer of Laois County Council on foot of the application in the Planners Report. The issue was also dealt with at some length in the applicants' written submissions.

58. The Court considers that it can reasonably draw this inference and accordingly is of the view that the grid connection/cumulative effect argument only emerged as a result of the *O'Grianna* decision. This reinforces the Court's view that the applicants did not intend to raise this point through the grounds pleaded in the Statement of Grounds and that they did not in fact receive leave in respect of this ground.

59. Finally, it should be noted that, while the Court may under Order 84, rule 21(3) extend the period within which an application for leave to apply for judicial review on any particular ground may be made, no such application was made to this Court either prior to the hearing or at hearing, notwithstanding the importance of the grid connection/cumulative effect complaint. The applicants would of course have had to demonstrate "good and sufficient reason" for seeking an extension of time and that the failure to seek leave for this particular ground in July 2014 was because of circumstances outside of their control or "could not reasonably have been anticipated". They would also have had to show on affidavit the reasons for the failure to make the application at the leave stage. These are onerous requirements and if the only reason that could have been advanced for failing to seek leave on this particular ground in July 2014 was that there was a development in jurisprudence in December 2014, that would not have satisfied the Court or

given it jurisdiction to extend the 8 week period to allow the further ground to be pursued.

60. I now propose to deal with the grounds that were properly raised and pursued.

Ground (3) – Adequacy of the Environmental Impact Statement
61. In ground (3) the applicants plead that:-

> "The respondent had before it an environmental impact statement (EIS) that was inadequate in that it failed to properly describe the proposed development and its effects and contained material that was inaccurate and incorrect. Accordingly no, or not lawful EIA was or could have been conducted."

62. It is convenient here to also consider some related pleas in the Statement of Grounds. In ground (9) it is pleaded that "the Board failed to require the submission of a proper or revised EIS…and/or failed to require proper further information from the developer".

63. The applicants rely on the observations of a number of public bodies and Government Departments which criticised various facets of the EIS provided by the RPS Group ("RPS") on behalf of Coillte. The applicants placed particular reliance on shortcomings identified in the Planners Report of Laois County Council which favoured refusal of permission, and appendices to same which included an EIA conducted by the Council.

64. These included failure to consider emissions from generators and materials on site; turbidity monitoring of discharges of suspended matter during construction phase; material safety data sheets; inadequate bird surveys that did not comply with Scottish Natural Heritage guidelines; failure to assess noise impact at sensitive receptors closest to the proposed turbines and failure to analyse noise impact based on wind speeds of 25m/s; concerns about water supply and local wells; decommission proposals for site restoration; consideration of sites outside of Coillte ownership as alternatives; inadequate public consultation; inadequate consideration of the impacts on tourism; concern that mitigation measures be dealt with in a construction environmental management plan instead of within the EIS; no reference to cumulative impacts of other wind farm developments on terrestrial ecology; the absence of detail in respect of certain other fauna; insufficient detail in relation to mitigation proposed to minimise impact on the River Barrow and River Nore Special Area of Conservation ("SAC"); inadequate information for "landscape and visual assessment" and on mitigation of visual impact; concern about the proximity of the haul route to the round tower in Timahoe; shadow flicker impact; potential damage to road structures or dwelling houses on haul routes.

65. The applicants also relied on an observation to Laois County Council made by the DAHG on 1st October, 2013 as identifying significant deficiencies in the information presented in the EIS. The document asserts that the impacts on protected fauna from proposed bridge repair and bridge/culvert widening and road widening associated with the development had not been adequately assessed; it focuses on a bat survey which Coillte carried out indicating little or no potential for roost loss, except where there are alterations to the structures such as bridges leading to the site, but no such alterations were planned. It was pointed out that this was at odds with other parts of the EIS which indicated that bridge alterations would be required. It indicated the nature of the bat surveys required, and that these should include roosts which might be affected by the cutting of overhanging road side trees. The DAHG also indicated that the impacts of bridge works on crayfish, kingfisher and other protected bird species needed to be assessed.

66. On 2nd October, 2013, Laois County Council planning authority refused permission, citing as the first of its reasons for refusal that it was not satisfied that, having completed an EIA, the proposed development would not have significant impacts on the environment due to the inadequacy of information provided in the EIS by RPS. The planning authority felt that the effects of the development on the environment were not appropriately or adequately considered by RPS in the EIS provided to the planning authority.

67. The County Council's second reason, the inadequacy of the AA, will feature later in this judgment.

68. The applicants assert in (E)(22) that despite the "identified shortcomings in the information provided in the EIS and NIS, the Board decided not to request either a new EIS or NIS, nor did it raise any formal request for further information" pursuant to s. 131 of the PDA 2000. They further highlight the submissions made by members of the public which raised shortcomings in the information provided. Laois County Council made a short appeal submission, signed by Ms. Emer Uí Fhátharta and dated 25th November, 2013 in which it stated that the County Council stood by its earlier determination.

69. Mr. Gavin of Water Services also made a submission reinforcing his earlier views to Laois County Council planning authority in which he raised issues as to wind speed analysis and the placement of noise receptors. He noted that while Coillte stated that the placement of noise receptors was agreed with Laois County Council, he was never party to same. He asserted that if there was such an agreement there would be some form of record.

70. While Coillte consistently positively asserted that there was an agreement over the monitoring locations, there was never any evidence adduced by or on behalf of the applicants beyond this assertion by Mr. Gavin that if there was agreement there should have been a record of it. The Court cannot draw an inference from this observation in a supporting document to Laois County Council's appeal submission to conclude that there was no such agreement. The only evidence before the Court was that of RPS in the EIS indicating that the locations were agreed in advance with Laois County Council – there was no evidence directly contradicting this. In the circumstances, the Court finds that the monitoring locations were agreed in advance between RPS and some person or persons representing Laois County Council.

71. In other respects, Mr. Gavin repeats a criticism previously made that there was a failure to assess the impact of various construction activities in locations beside each other, and maintained that this was not addressed in Coillte's appeal submission. He also repeated his criticism that analysis should have occurred up to wind speeds of 25m/s.

72. The Board and Coillte argued that the EIS was not deficient and did not contain material that was inaccurate or incorrect. They asserted that the information before the Board was not limited to the EIS but included all of the information contained in the Board's file, including the appeal documentation lodged by Coillte. They assert that the Board was entitled to make a determination as to the adequacy of information before it – including the adequacy of the EIS and, being so satisfied, was enabled to carry out an EIA.

73. The Board and Coillte rely on 3 aspects of the evidence in support of their contentions. Firstly, they rely on the thoroughness and comprehensiveness of the EIS. This comes in at 3 volumes – volume 1 is a "Non Technical Summary" running to some 25 pages. Volume 2 is the "Main Report" running to some 318 pages. Volume 3 is entitled "Technical Appendices" and is a thick volume with Appendices A-P containing the results of reports, surveys, assessments, photo montages, sub station drawings, forest management plans, drainage design, consultation materials, etc. Mr. Jim Gannon of RPS, who compiled the EIS, swore a grounding affidavit in which he stated that the DAHG, in their submission of 1st October, 2013, and the reports informing the Planners Report did not recommend

that planning permission be refused for the proposed development. Rather, they identified additional information that should be sought, further assessments that should be carried out or certain conditions that should be attached to permission if granted.

74. Secondly, the Board and Coillte placed reliance on additional information contained in the Coillte appeal documentation and in Coillte's responses to a number of observations made at the appeal stage. These documents were opened to the Court and the Board and Coillte asserted that they contained a lot of additional information including the results of a new survey and further detailed reasoning in support of the original EIS. The text of the appeal document runs to some 127 pages, and is followed by Appendices including a "Bridge Survey" of some 12 bridges on the proposed access routes to the development site, consisting of detailed infantry and inspection reports on each bridge accompanied by relevant photographic evidence and details of proposed works in the context of the proposed development. The second appendix was a "Structural Assessment of Timahoe Round Tower" – clearly in response to criticisms of the EIS at the first stage of planning. Appendix C headed "Forestry Surface" dealt with forestry and the Freshwater Pearl Mussel ("FPM"). There were other appendices dealing with advertisements and public participation in the process and in all these further appendices cover in excess of 300 pages of print. In the appeal document Coillte's experts dealt in detail with the EIA undertaken in the Planners Report that was before Laois County Council and also dealt in detail with the AA which will be dealt with later in this judgment.

75. Coillte also relied on a detailed response some 35 pages in length to the observation of Mr. Seamus Fingleton who made a principled objection to the wind farm, and also highlighted perceived inadequacies in the EIS in respect of the human beings section, tourism, impact on property values, negative impacts on economic activity, noise assessment, community impact, insufficient analysis of the visual perspective, inaccurate analysis on protected views, perceived inconsistency with the county development plan, compliance with European Landscape Convention, the cumulative impact of the proposal, and deficiencies in the photo montage methodology. Each of these aspects was responded to in turn. The other response of Coillte was a combined one to observations made on the appeal by the second named applicant, Mr. Ricky Whelan and Tracy and Stephen Hood. This response running to over 44 pages again dealt item by item with the various observation/objections raised by these observers. The Board and Coillte contend that the new and additional material was all information that was before the Board, and that it was entitled, indeed duty bound, to take it into account in assessing whether there was adequate information to carry out an EIA.

76. Thirdly, the respondent and Coillte rely on the Inspector's Report. While the Board declined the petition from local residents to convene an oral hearing, it did appoint Ms. Joanna Kelly of the Board's inspectorate to provide a report on the appeal. Her report considered all of the relevant documentation and included a full site inspection with an inspection of the immediate environs and surrounding area including nearby settlements conducted over 2 separate site visits. She also took photographs which were appended. Her report was comprehensive and ran to some 75 pages. Her assessment addressed the likely significant effects of the proposal with due regard to the mitigation measures proposed and she set out what she considered to be the likely significant effects.

77. While the inspector considered that the EIS complied with the law, ultimately she recommended that permission be refused for 3 reasons:-

> • First, the development by reason of excessive quantity and the overall height of the turbines proposed, in conjunction with the sighting and spatial extent of the turbines across the site, would appear visually dominant and have a disharmonious impact on the existing visual characteristics of the area.
>
> • Second, having regard to the location of houses in close proximity to the turbines and the absence of mitigation measures in relation to shadow flicker, the turbines would have an undue negative impact on the residential amenities in the area.
>
> • Third, works required to the haulage routes and in particular areas which might require improvements to facilitate the transportation of proposed turbines were not adequately addressed.

78. The inspector considered the EIS submitted with the application was in compliance with the Planning and Development Regulations 2001 as amended ("2001 Regulations") and contained the information specified in para. 1 of schedule 6. In coming to this conclusion she noted the observations of third parties and Laois County Council. Firstly, she commented by quoting from a case relied on by the respondent and Coillte in these proceedings, *Klohn v. An Bord Pleanála* [2009] 1 IR 59, in which McMahon J at p. 63 stated:-

> "It is also worth emphasising that the environmental impact statement is a document submitted by the developer, the terms of which are set when it is submitted. In contrast the environmental impact assessment is a process which is an ongoing exercise undertaken by the decision maker. A great deal can happen and a great deal of information can be accumulated, between the lodging of the environmental impact statement by a developer and the final decision by the planning authority or by An Bord Pleanála."

79. Secondly, the inspector correctly stated that her task was to identify the likely significant environmental effects resulting form the development.

80. She considered that there was an EIS summary in non-technical language. With regard to alternatives to the proposed wind farm the inspector considered that there was a "low bar in respect of the consideration of alternatives and the details provided within the EIS would comply in respect of the requirements of outlining the main alternatives." She was satisfied that the EIS adequately identified the sites considered and set out reasons why the appeal site was more appropriate. She was satisfied that the EIS contained the relevant information specified in schedule 6 of the 2001 Regulations including description of the project and land use requirements; the main characteristics; emissions arising; description of aspects of the environment likely to be significantly affected and of the likely significant effects; and an indication of any difficulties in compiling the information.

81. Before turning to the Board's decision on the appeal it is necessary to refer to certain provisions of the PDA 2000 and the regulations made thereunder.

82. Under s. 172(1) of the PDA 2000, the planning authority or the Board, as the case may be, are required to undertake an EIA where a proposed development of a class specified in schedule 5 of the 2001 Regulations excceds a quantity, area or limit specified in that schedule (subs. (1)(a)). An EIA is also required where the planning authority or the Board determines that a proposed development of a class specified under schedule 5 would be likely to have significant effects on the environment even though it does not exceed a quantity, area or limit specified in schedule 5 (Subs.(1)(b)).

83. In carrying out an EIA under s. 171A(1) of the PDA 2000, the planning authority or the Board are required to "identify, and describe and assess" in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the

Environmental Impact Assessment Directive, the direct and indirect effects of the proposed development on the following:-

(a) human beings, flora and fauna;

(b) soil, water, air, climate and the landscape;

(c) material assets and the cultural heritage,

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

84. Article 3 of the EIA Directive, as amended by Directive 2014/52/EU which became effective from 16th May, 2014, provides:-

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

(a) population and human health;

(b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;

(c) land, soil, water, air and climate;

(d) material aspects, cultural heritage and the landscape;

(e) the interaction between the factors referred to in points (a) to (d)."

It was not suggested that, to the extent that this makes some minor changes to the EU legislative regime, this had any relevance to the challenge in these proceedings.

85. Where a proposed development falls under s. 172(1)(a), section 172(1B) of the PDA 2000 applies. This provides:-

"An applicant for consent to carry out a proposed development referred to in subsection (1)(a) shall furnish an environmental impact statement to the planning authority or the Board, as the case may be, in accordance with the permission regulations."

86. Regulation 94 of the 2001 Regulations provides:-

"An EIS shall contain-

(a) the information specified in paragraph 1 of Schedule 6,

(b) the information specified in paragraph 2 of Schedule 6 to the extent that –

(i) such information is relevant to a given stage of the consent procedure and to the specific characteristics of the development or type of development concerned and of the environmental features likely to be affected, and

(ii) the person or persons preparing the EIS may reasonably be required to compile such information having regard, among other things, to current knowledge and methods of assessment, and

(c) a summary in non-technical language of the information required under paragraphs (a) and (b)."

87. Schedule 6 to the 2001 Regulations provides:-

"Information to be contained in an EIS

1. (a) A description of the proposed development comprising information on the site, design and size of the proposed development.

(b) A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse affects.

(c) The date required to identify and assess the main effects which the proposed development is likely to have on the environment.

(d) An outline of the main alternatives studied by the developer and an indication of the main reasons for his or her choice, taking into account the effects on the environment.

2. Further information, by way of explanation or amplification of the information referred to in paragraph 1, on the following matters:-

(a) (i) a description of the physical characteristics of the whole proposed development and land-use requirements during the construction and operational phases;

(ii) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

(iii) an estimate, by type and quantity, of expected residues and emissions (including water, air and soil pollution, noise, vibration, light, heat and radiation) resulting from the operation of the proposed development;

(b) a description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular:

• human beings, fauna and flora,

• soil, water, air, climatic factors and the landscape,

• material assets, including the architectural and archaeological heritage and the cultural heritage,

• the inter-relationship between the above factors;

(c) a description of the likely significant effects (including direct, indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative) of the proposed development on the environment resulting from:

• the existence of the proposed development,

• the use of natural resources,

• the emission of pollutants, the creation of nuisances and the elimination of waste,

and a description of the forecasting methods used to assess the effects on the environment;

(d) an indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information."

88. Regulation 111(1) specifically requires that "the Board shall consider whether an EIS received by it in connection with an appeal complies with article 94…".

89. Regulation 111(2) provides:-

> "Where the Board decides that an EIS does not comply with article 94… it shall issue a notice under section 132 of the Act requiring the applicant to submit such further information as may be necessary to comply with the relevant article."

90. Section 132 of the PDA 2000 provides:-

> "(1) Where the Board is of opinion that any document, particulars or other information may be necessary for the purpose of enabling it to determine an appeal or referral, the Board may, in its absolute discretion, serve on any party, or on any person who has made submissions or observations to the Board in relation to the appeal or referral, as appropriate, a notice under this section –
>
> (a) requiring that person, within a period specified in the notice (being a period of not less than 2 weeks beginning on the date of service of the notice) to submit to the Board such document, particulars or other information as is specified in the notice, and
>
> (b) stating that, in default of compliance with the requirements of the notice, the Board will, after the expiration of the period so specified and without further notice to the person, pursuant to section 133, dismiss or otherwise determine the appeal or referral.
>
> (2) Nothing in this section shall be construed as effecting any other power conferred on the Board under this Act to require the submission of further or additional information or documents."

91. Section 172(1D) then provides:-

> "The planning authority or the Board as the case may be, shall consider whether an environmental impact statement submitted under this section identifies and describes adequately the direct and indirect effects on the environment of the proposed development and, where it considers that the environmental impact statement does not identify or adequately describe such effects, the planning authority or the Board shall require the applicant for consent to furnish, within a specified period, such further information as the planning authority or the Board considers necessary to remedy such defect".

92. Section 172(1G) requires inter alia that:-

> "In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, shall consider –
>
> (a) the environmental impact statement..."

93. Section 37(1)(b) of the PDA 2000 was relied upon by the Board and Coillte as being of critical importance. It provides, so far as is relevant:-

> "(b) subject to paragraphs (c) and (d), where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given...".

94. The Board and Coillte submitted that this means that the Board has a *de novo* jurisdiction and it is in no sense bound by the decision of the local planning authority or the Planners Report that formed the basis of the local authority decision in this instance.

95. They also submitted that the Board was entitled to take into account the Inspector's Report insofar as it contains additional material and carries out an EIA.

96. Turning to the Board's decision it is notable that the Board did not request Coillte to submit further information or a revised EIS (or indeed NIS). On p. 2 of its decision the Board listed 9 matters to which it had regard and this included "submission[s] made in connection with the planning application and appeal, and the report of the Inspector". The Board then concluded that it was satisfied that there was sufficient information to undertake an AA and an EIA. Having undertaken an EIA in relation to the development, the Board largely adopted the inspector's assessment of environmental impacts with the exception of the 3 matters identified by the inspector in her report. The Board concluded that the proposed development, by itself or cumulatively with other plans or projects, would not be likely to have significant effects on the environment.

97. The Board then dealt specifically with the 3 matters in respect of which it came to different conclusions to the inspector and provided its reasoning for same.

Decision of the Court

98. It has been consistently held in the courts that it is for the deciding authority to determine whether the EIS and the information contained therein satisfies the requirements of the Regulations and is adequate. In *Kenny v. An Bord Pleanála* [2001] 1 IR 565 the applicant sought to impugn a decision of the Board on the ground, inter alia, that the EIS was so defective that it did not comply with the statutory requirements. McKechnie J, at p. 578 held:-

> "Once the statutory requirements have been satisfied I should not concern myself with the qualitative nature of the Environmental Impact Study or the debate on it had before the inspector. These are not matters of concern to this court. The [planning authority] and the respondent, as these bodies must under the regulations, were satisfied as to the Environmental Impact Statement, with the inspector and the respondent also being satisfied with the evidence, both documentary and oral, produced at the oral hearing. That in my view, concludes the matter."

99. McMahon J in *Klohn v. An Bord Pleanála* [2008] IEHC 111 also held that "[t]he adequacy of the information supplied in the EIS…is primarily a matter for the decision maker…".

100. Thus, the adequacy of the information supplied in the EIS is primarily a matter for the decision-maker. Secondly, the interval between the making of the EIS and the EIA will inevitably mean that the decision-maker will have gathered information from many other sources by the time a decision is called for by it. Moreover, the assessment process which it is obliged to carry out, the EIA, will no doubt be greatly informed by its own expert knowledge and its expertise in this area, an input that undoubtedly will, in many cases, fill any remaining information deficit in the documents submitted to it. In these circumstances, it is not surprising that a great deal of discretion is left to the decision maker in making this call. From this, it can also be seen that a deficiency in the EIS submitted by the developer does not invariably inflict a fatal wound on the assessment process which is carried out at a later phase in the process, with the benefit of additional submissions and observations informed by its own expertise. The effect of a flaw in the EIS on the subsequent assessment will, of course, depend greatly on the facts of each case.

101. While the local planning authority took the view on the basis of the Planners Report that the EIS was deficient and did not even seek further information, the Board, as it was entitled to do, took a different view. The Board had considerably more information available to it than the local planning authority and this formed part of the EIS such that it considered it could carry out the EIA. In particular, the Board had before it a very detailed appeal document which included a survey of the haul routes and detailed responses from Coillte to the observations on the appeal by certain parties. The Board clearly stated that it took into account all of this information/documentation and that it determined that it had sufficient information to carry out an EIA as required by s. 172(1D). In circumstances where the Board is so satisfied there was no obligation on it to seek further information. The standard of review applicable to the Board's decision in this respect is that set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39. The Court cannot interfere with the decision merely on the grounds that "…it is satisfied that on the facts as found it would have raised different inferences and conclusions or…it is satisfied that the case against the decision made by the [Board] was stronger than the case for it." In order to show that the Board has acted irrationally, it would be necessary for the applicants to establish that the Board "had before it no relevant material which would support its decision." There clearly was relevant material before the Board. Nor could it be said that in relying on this material, the Board's decision was "fundamentally at variance with reason and common sense". Accordingly, the applicants must fail on this ground. It follows from this that the Board was entitled to conduct an EIA.

Recording and Adequacy of the Environmental Impact Assessment

102. This section encompasses the applicants' complaints relating to the EIA, in grounds (5), (7), (8), (9), (10) and (13) and it is convenient to deal with these together. In large part, the applicants relied on the conclusions of the inspector which led her to recommend refusal of the permission, namely arising from the landscape/visual impact, effect of shadow flicker and noise and the haul routes to the site.

103. The applicants also rely on the inadequacy of information received and placed before the Board based on the County Council planning authority's Planners Report. Once it is accepted, as the Court has done, that:-

> 1. There was a factual and rational basis for the Board's decision, that it had sufficient information; and
>
> 2. There was a sufficient identification and description of the direct and indirect effects of the development on the environment;

it follows that the Board was entitled and enabled to carry out and complete an EIA.

104. For the same reason, the applicants' contention that there was no valid EIA because of inadequacies in the description of the likely effect meant that full public participation in the process was not possible, cannot be sustained. There is no complaint that there was any failure to comply with the statutory requirements in the advertising of the application. Nor is there a complaint that there was a failure to make the relevant documentation, including the EIS, available or to conduct the appropriate statutory consultations e.g. with the DAHG, Inland Fisheries Ireland ("IFI"), The Forest Service, and the Irish Aviation Authority.

105. The applicants contended that the information presented on appeal was "largely unchanged" from that considered inadequate by Laois County Council's planning authority and the DAHG. They contended that the Board should have exercised its power and obligation under s. 172(1D) to seek further information. However, this obligation does not arise where the Board decides, as it did, that it had adequate information. The submission is also incorrect in so far as the Board had significantly more information than Laois County Council had at first instance, arising from the appeal documentation and the detailed response of Coillte to the Planners Report and to the observations on appeal. The appeal therefore did seek to address the perceived deficiencies brought to Coillte's attention.

Did the Board carry out an Environemntal Impact Assessment?
106. Article 3 of the EIA Directive, as amended by Directive 2014/52/EU which became effective from 16th May, 2014, provides:-

> "The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:
>
> (a) population and human health;
>
> (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
>
> (c) land, soil, water, air and climate;
>
> (d) material aspects, cultural heritage and the landscape;
>
> (e) the interaction between the factors referred to in points (a) to (d)."

107. It is not disputed that in *Commission v. Ireland* (Case C-50/09), the CJEU held at para. 37:-

> "In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case."

108. The CJEU further reasoned at para. 40 that:-

> "However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3…Indeed, that assessment, which must be carried out before the decision-making process…involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors".

109. It was pursuant to this finding that the legislature enacted amendments to the PDA 2000, including s. 171(A) which adopted the language of Article 3 (in its then form) in its reference to an EIA being an assessment which "includes an examination, analysis and evaluation…of the direct and indirect effects of a proposed development…" and the requirement under s. 172(1J)(c) that the Board set out "the main reasons and considerations on which the decision is based".

110. The applicants contend that there was no evaluation by the Board in this instance contrary to s. 171A and that, accordingly, the EIA was incomplete. They call in aid the decision of Ms. Justice Finlay Geoghegan in *Kelly v. An Bord Pleanála* [2014] IEHC 400. The applicants plead in this respect that the decision of the Board was "perfunctory and uninformative" and that it gave no proper account of the assessment undertaken. They say particularly that the Board's inspector recommended refusal of permission and the Board failed to give any or any adequate or proper reason for not following the recommendation of its inspector.

111. The respondent and Coillte responded that an EIA was made, and is evident from the decision, and that the "main reasons" for its decision in this regard are set out, in particular its reasons for differing from the 3 matters which prompted the inspector to recommend refusal. They argued that the fact that the inspector made a negative recommendation does not mean that that must be accepted by the Board; the Board is entitled to differ in its opinion. Nor does it mean that the Board cannot adopt and agree with the inspector in so far as the inspector considered that an EIA was possible and made various findings in favour of the proposed development. In this regard, they contended that the Board was fully entitled to rely on the examination, analysis and evaluation of the inspector, without setting out in full in the EIS, the additional information provided on appeal and the inspector's assessment. They rely particularly on s. 172(1H) which provides that the Board "may have regard to and adopt in whole or in part any reports prepared by its officials…".

112. They submitted that the *Kelly* case, while setting out the legislative provisions with regard to EIA, was primarily concerned with the AA under the Habitats Directive and in that context they accepted it as authoritative. They pointed out that Finlay Geoghegan J set out the fundamental difference that the EIA is not determinative of the decision to grant or refuse planning permission and that the Board has discretion to grant planning permission regardless of the outcome of the EIA.

Decision on whether the Board carried out an Environmental Impact Assessment
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 an EIA on the proposed development. Having taken into account the range of information and documentation on file for the appeal, the court frinds 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 the decision. It also points to specific information arising from the documents to which it also had regard when coming to its conclusion.

115. As we have seen, 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. The Board then concludes at p. 8:-

> "It is therefore considered that, subject to compliance with the conditions set out below, that proposed development would accord with the National, Regional and County policies set out above, would not seriously injure the amenities of the area or of property in the vicinity, would not result in detrimental visual or landscape impacts, would not give rise to water pollution, would not be injurious to the cultural heritage of the area, would be acceptable in terms of traffic safety and convenience, and would not be prejudicial to public health. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area."

116. It is manifest from this wording that the Board came to and made its decision in the manner outlined above. Furthermore, there was evidence before the Board from which it could have reached its conclusion. The Court applies the reasoning of McMahon J in the *Klohn* case under part VII to its approach to the EIA in the instant case:-

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

117. This overall conclusion of the Court applies equally to the 3 aspects of the development which prompted the inspector to recommend refusal. However, as the observations, the Planners Report and the reports upon which it was based all formed the background to the inspector's recommendations, it was incumbent on the Board in its decision to deal specifically with these aspects and to give its reasoning for departing from the inspector's recommendation, in carrying out its EIA. The necessity for the Board to address these matters directly in its decision arises from the fact that were it not to do so, it would be open to the principled criticism that it gave no reason for departing from a particular recommendation of its inspector. Accordingly, I now turn to these matters identified by the inspector.

Visual Impact

118. The inspector undertook analysis of the "Landscape and Aesthetic Impacts" at some length in para. 14.2.0 running to some 4 pages. Her view was that the development would create some visual confusion and conflict and that the spatial extent and height of the wind farm needed to be reduced to ensure harmony with the landscape. She felt that the visual impact of the turbines could be considered "moderate to significant" and she would have liked a further photo montage or 3 dimensional model of the turbines in the vicinity of the Pike.

119. The Board did not accept the inspector's recommendation and laid out its reasoning for same at p. 6. It had regard to such matters as the commercial forestry landscape of the site, the neighbouring agricultural landscape, the absence of designated views and landscape amenity protection. Having considered that no cumulative visual impact would arise in connection with other existing or permitted wind farms, the Board went on to state that it did ***not*** accept:-

> "that it would be reasonable to require the current applicant to undertake a cumulative assessment in respect of potential future projects in the vicinity that have not yet been proposed, and consider that this matter would be more appropriately addressed in the relevant future planning applications."

120. The Court is acutely conscious that any wind farm, particularly one with as many turbines as the proposed development, will have an effect on the visual amenity of the site and surrounding area. Local planners and the Board must however have regard to national, regional and local policy guidelines aimed at achieving a renewable energy target of 16% of overall energy consumption by 2020. This is in line with Ireland's international obligations to meet the requirements of the Kyoto Protocol. The local planning authorities and the Board have the unenviable task of taking the decisions that will facilitate the implementation of this policy but which will also inevitably have a visual impact. While some residents may not be unduly concerned, others will understandably be deeply unhappy at the effect on their lives, home or property. However, provided the planning authority/the Board takes into account all relevant considerations, the law, including the EIA Directive as implemented into Irish Law, allows the granting of permissions where the proposed development will have visual impact, even a significant impact.

121. To an extent, whether a proposed development has a significant impact is a subjective judgment, although in the case of a local planning authority or the Board it is a collective decision and there are guidelines that must be considered.

122. In the instant case the Board was entitled to take a different view to that of the inspector and to conclude that while the development would be visually prominent in some views it was nonetheless "acceptable". Although this differing opinion was based essentially on the same evidence, the decision was permissible. In *O'Donohoe v. An Bord Pleanála* [1991] ILRM 750, Murphy J stated (at p. 759):-

> "In the present case, however, the essential issue was whether the buildings which it was proposed to erect constituted an overdevelopment of the site. The planning authority and Mr. O'Grada, the bord's inspector, thought it was and the bord thought it was not. It seems to me that the indisputable data permitted both conclusions. The site was delineated on the plan attached to the planning application and the dimensions of the proposed four bedroomed bungalow were likewise indicated thereon. It seems to me that that information alone would have entitled the bord rationally to have formed the view that the proposed development would not constitute overdevelopment of the site notwithstanding the fact that others whose views are entitled to respect took a diametrically opposite view. No matter how vigorously one might disagree with the conclusion reached by the bord it would be impossible to say that it 'flies in the face of fundamental reason'."

123. Regardless of what view the Court may take of the positioning and likely visual impact of these turbines, there was evidence before the Board in relation to visual impact and in particular a series of photo montages which allowed it to come to the decision it did.

124. With regard to the Board's view that there would be "no significant cumulative visual impact" from the development, the applicants were critical of the failure of the Board to take into account the combination of effects of the proposed development with other developments, including other possible developments. However, no authority was cited for the proposition that the Board was obliged to consider an unknown, undetermined and as yet unclear or possibly unconnected development. In *Ratheniska*, I followed the decision of Kearns J (as he then was) in *Sloan v. An Bord Pleanála* [2003] 2 ILRM 61, where he stated at p. 72:

> "It was submitted that the respondent had no obligation to consider matters which must be the subject of a separate application for approval of a separate scheme as part of its obligation to consider all matters relating to a scheme submitted to it for approval. Roads by their nature are necessarily inter-related. The illogical consequence of following the applicants' argument would be that no decision could be made on the 3km stretch of roadway without at the same time

considering the entire of the Euro route EO1 from Larne to Rosslare".

125. In my view, the Board correctly concluded that it would not be reasonable to require the current applicant to undertake a cumulative assessment of potential future projects in the vicinity that have not yet been proposed. These are indeed more appropriately addressed in the relevant future planning applications. This may be of small comfort to those applicants most affected by the visual aspect of this development but nonetheless, it is a fact that in considering any further wind farms in the vicinity, the relevant local authority and on appeal the Board must take into account the combined visual effect of any such proposal with this proposed development.

Noise Impact

126. Although noise impact on residential properties does not feature specifically in the inspector's concluding recommendations, she does earlier criticise the "unacceptably overbearing impact" of the turbines and she criticises the monitoring reported in the Noise Impact Assessment recorded in Appendix B of the Technical Appendices of the EIS. She states that a number of residential properties or noise sensitive receptors that should have been monitored were not included in the survey. Also, by reference to the data in the EIS she opines in para. 14.3.9 that the proposed wind farm may be audible at lower wind speeds than that examined in the EIS downwind of turbines at locations 04 and 01.

127. At para. 14.3.11 she concludes:-

> "In the absence of a full background noise survey for the existing environment of the properties in closet proximity to the turbines, and in the absence of definitive information regarding the type of turbines to be used particularly to achieve any mitigation measures required, it is not considered that appropriate and full consideration has been given to the likely effects of the proposed development would have on the nearest noise receptor."

128. An issue arose as to whether the monitoring locations had in fact been agreed between Laois County Council and Coillte. As the Court has already observed, it accepts on the basis of the evidence before it that the monitoring locations were agreed in advance between RPS and representative(s) of Laois County Council. This finding however is not critical because the Board had before it, and clearly considered, the inspector's view that the most sensitive noise "receptors" or residences closest to the sites of turbines in the vicinity of the Pike had not been monitored.

129. In coming to its decision in relation to this matter, the Board had regard to the distance of residential properties from the development (minimum 600 metres) which it considered to be acceptable and as the primary mitigation measure. It also had regard to the "comprehensive" noise monitoring carried out. It was of the view that noise would not seriously injure the amenities of the properties in the vicinity. The Board considered the approach taken by Coillte in choosing the seven noise monitoring locations as reasonable, based as it was on preliminary modelling. This part of the decision must be read in conjunction with condition 7 which imposes limits of "(a) 5dB(A) above background noise levels or (b) 43dB(A) Leq, 10min" and provision for noise compliance monitoring, which was introduced in the interests of residential amenities.

130. When one considers the EIS (chapter 8 and Appendix B) and Coillte's appeal documentation, it is clear there was ample evidence before the Board from which it could have come to its decision with regard to noise and condition 7. The EIS shows that RPS followed approved guidance for assessing the existing background noise environment for the proposed development and the applicants took no issue with this.

131. Coillte addresses the Planners Report criticism that no monitoring occurred at particular dwellings closest to the proposed turbines in the appeal documenation. Coillte believed that the author of the Planners Report misunderstood the use of the accepted approach of utilising proxy locations as demonstrative of the noise environment at all neighbouring properties. It must also be recalled that the Court has accepted that RPS agreed the positioning of the receptors with Laois County Council. Also RPS Consultants in fact engaged specialist noise consultants Hayes McKenzie Partnership to undertake the noise impact assessment.

132. Moreover, the Wind Energy Guidelines for Planning Authorities (2006) published by the Department of Environment, Heritage and Local Government state that noise is unlikely to be an issue for properties more than 500 metres from the nearest turbine.

133. Accordingly, the applicants' claims that the Board failed adequately or properly to identify, assess or evaluate the direct or indirect effects of the proposed development from noise must fail.

Shadow Flicker

134. In their criticism of the Board's decision with regard to shadow flicker the applicants relied on the inspector's view that in the absence of mitigation measures there would be an undue negative impact on residential amenities in the area. The inspector noted in particular that the information was not sufficiently clear or sufficient for Coillte to come to the conclusion that all housing in the area was below the potential for shadow flicker interference and that therefore no mitigation measures were required. She maintained that some evidence in the EIS would seem to contradict this contention and that the source of some variables used in the WindPro software gauging shadow flicker was not provided.

135. The Board expressly disagreed with the inspector on this issue, having had regard to the distance of the residential properties from the turbines (a minimum of 600 metres), the provisions of the Wind Energy Development Guidelines, and "the comprehensive… shadow flicker modelling undertaken in respect of houses in the vicinity". It was satisfied that "shadow flicker would not seriously injure the amenities of property in the vicinity". The Board accepted the assumptions used by Coillte, the calculations undertaken and variables used in the shadow flicker model.

136. Appendix I of the EIS deals with the Shadow Flicker Analysis and it is clear from a reading of this schedule that the Board was entitled to take the decision that it did and that in fact the inspector had fallen into error. The appendix shows that each sensitive receptor (dwelling houses close to the proposed development) is considered and the relevant data entered into the WindPro programme and reductions relating to sunshine incidence applied.

137. Accordingly, the Board had evidence before it from which it could come to the conclusion that it did and indeed the applicants' complaints appear to have no foundation whatsoever, based as they were on an error or misunderstanding in the Inspector's Report. It should also be noted that the Board did in fact decide to impose a condition relating to shadow flicker as outlined in condition 8. Furthermore, non-compliance with condition 8 could be the subject of enforcement proceedings by the local authority or any affected party.

Haul Routes

138. The inspector concluded:-

> "The extent of works required to ensure the haul route is capable of being used by the exceptionally wide load vehicles is also not considered to have been adequately addressed."

139. Coillte in a robust section of the appeal document addressed this along with a broad response to the Planners Report which suggested inadequacy of detail in relation to traffic, including construction traffic. Coillte relied on chapter 18 of the EIS and Appendix J in which was presented a detailed route survey. Coillte also relied upon a Structural Survey of the haul route among other surveys and produced a number of reports to accompany the appeal document including a Bridge Survey and Timahoe Tower Survey. Both in the EIS and in the appeal document, Coillte submitted that a detailed Traffic Management Plan would be developed at construction phase and submitted to Laois County Council for agreement prior to implementation.

140. Having had regard to the documents identified in the preceding paragraph, the Board, in deciding not to follow the opinion of the inspector, noted that it:-

> "…was satisfied that, for the purposes of Environmental Impact Assessment, a thorough assessment of all required infrastructural improvement works had been undertaken in respect of the construction access route, and that the works required to facilitate the delivery of oversized loads to the subject site were clearly set out. The Board noted that the completion of these road and structural improvement works would be necessary in advance of the delivery of turbines to the site, as set out in the Environmental Impact Statement."

The Board attached a number of standard conditions for the type of development proposed, requiring "a construction-stage traffic management plan, pre- and post-construction road condition surveys, and the imposition of a bond in this regard." A Construction Management Plan to be agreed with the planning authority was also required under condition 17.

141. The applicants argued that the Board did not have sufficient detail in relation to the haul routes to enable it to carry out an EIA. They submitted that imposing conditions which postponed detail on the works to be done on the proposed haul routes to subsequent agreement between the developer and the local authority meant that observers and the Board, as decision maker, were deprived of the opportunity to properly consider the direct or indirect effects of the construction phase on the environment.

142. The respondent and Coillte argued that there was sufficient information before the Board for it to complete the EIA in respect of the haul routes and that s. 34(4) of the PDA 2000 empowered the Board to impose conditions that would include mitigating measures. They relied on s. 34(5) which establishes that:-

> "[t]he conditions…may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development; if the planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination."

143. The Court is satisfied that the Board was entitled to differ from the inspector in relation to the adequacy of the information before it. It was entitled to place reliance on its own expertise and decide that it was in a position to carry out an EIA and to assess and evaluate the direct or indirect effects of the construction phase of the proposed development on the proposed haul routes – based particularly on the information in the EIS, Appendix J of same and Appendices A and B in the appeal document.

144. It is also clear that the Board in principle is entitled to leave over to further agreement between the developer and the local authority certain matters of detail and in this respect can impose conditions under s.s 34(4) and 34(5) of the PDA 2000. What is left over for agreement must however, be a technical matter of detail- see *Boland v. An Bord Pleanála* [1996] 3 IR 435. If that test is satisfied then there will be no breach of the requirement that the final planning permission be subject to proper scrutiny in that the planning authority will have to be satisfied as to the appropriateness of agreement on the particular technical matter that is left over. Coillte in its written submission referred in particular to *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 15, where the applicant was refused leave to apply for judicial review on the ground that there was not an adequate EIA carried out in circumstances where a number of conditions required a bedrock survey and an archaeological appraisal of the site. In that case, Clarke J referred to the judgment of the CJEU in the *R(Wells)* case. He held that there was no breach of the EIA Directive where the Board imposes a condition which complies with the test set down by the Supreme Court in the *Boland* case. On the application for a certificate for leave to appeal to the Supreme Court in the *Arklow* case reported at [2006] IEHC 102, Clarke J stated at para.s 11-13:-

> "The Directive requires that there be a proper scrutiny of a project of the type to which it relates in accordance with the broad process specified in the Directive. It is, however, the case that the detailed procedural rules applicable to such scrutiny are left to the determination of the domestic legal order of each member state provided that they are not less favourable than those governing similar domestic situations: see *Wells v. Secretary of State…*
>
> Where a condition of a planning permission granted by the Board refers a matter back to the planning authority for further agreement there will be no breach of the requirement that the final planning permission be subject to proper scrutiny in that the planning authority (which is after all a competent authority in respect of planning matters) will have to be satisfied as to the appropriateness of agreeing to whatever matters are left over.
>
> The argument in respect of leave in this case turned on the contention that the public would not be involved in such latter process. It is, of course, correct to state that the public has not direct involvement in the process whereby the developer and the planning authority reach agreement in accordance with a matter left to such agreement by virtue of a condition contained in the first respondent's planning permission. However, the full context needs to be taken into account. Firstly, as pointed out by counsel for the first respondent, it is important to note that in order to meet the *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 criteria, the matter left over for agreement must amount to a technical matter of detail which is within the proper responsibility of the planning authority and which may require re-design in the light of practical experience. Therefore, in order that the public not have an involvement in the agreement process, the matter which is to be the subject of agreement must be a matter amounting to a technical question of detail."

145. The Court also notes the decision of Hogan J in *Keane v. An Bord Pleanála* [2012] IEHC 324 in which the applicant sought to argue that the permission was defective because no proper EIA was carried out and in particular that the haul routes had not been assessed. Hogan J stated at para. 14:-

> "Viewed objectively, it is difficult to see how the likely effects complained of could be regarded as having potentially significant effects on the environment. Even assuming that matters turned out for the worse, the impact is likely to be

confined to damage to local bridges and access roads. While such an outturn would have to be regretted, such damage is, in principle, at least, reversible and, furthermore, the developer would be liable for these costs. The potential impact is further minimised by the fact that condition 16 requires the Council to conduct a road survey both before and after the turbines have been hauled over the road network."

146. In the view of the Court the conditions in the instant case relating to further agreement on the haul routes relate to technical matters of detail. These matters of detail will have to be agreed between the developer and the local authority. Admittedly, while members of the public will not have an input in relation to those agreements, nonetheless, following the authority of Clarke J in the *Arklow* case, further agreement will provide the additional appropriate scrutiny required to ensure that direct or indirect environmental effects are either eliminated or kept within limits that are acceptable to the planner. The Court is also persuaded that it should adopt the same approach as Hogan J in the *Keane* case. The Court is therefore satisfied that the Board had ample evidence before it upon which to make its decision with regard to haul routes and that it gave full and proper reasons for not following the recommendation of the inspector in this regard.

Failure to Properly Record Determination

147. This ground was not pursued at any great length in argument. The applicants relied on a failure on the part of the Board in its decision to fully or properly record its determination – the suggestion that the record was "perfunctory and uninformative". The applicants also relied on a formal request for information requesting a copy of the record of the EIA and AA to which response was given on 18th July, 2014 to the effect that the EIA and AA conducted comprised all of the documents received during the course of the appeal. In ground (14) it was also asserted that the Board failed to keep or maintain a proper file recording its decision and that the file retained by An Bord Pleanála was "in disarray" and contained no record of the decision making process.

148. To a large extent these points have already been rejected earlier in this judgment. The Court is satisfied from p. 3 of the Board's decision that, having determined that it had sufficient information for the purpose, it proceeded to undertake both an AA and an EIA. It is expressly clear from p. 4 of the decision that the Board completed an EIA. It is equally clear that the Board records in that section its conclusion and decision that the proposed development "would not be likely to have significant effects on the environment". This is the record of its decision/determination and no further record is required under domestic or European law.

149. When the decision is considered as a whole, and in combination with those parts of the Inspector's Report which the Board accepted and adopted, the description of the record/decision as "perfunctory" or "uninformative" is simply not justified. In any event and as I observed in relation to a similar argument raised in the *Ratheniska* case (see para. 127):-

> "The mere fact that the resulting decision might be perceived to be "uninformative and perfunctory" clearly does not of itself amount to any ground for review."

150. With regard to the second point, the Board, in its response dated 18th July, 2014 to a request for a copy of the EIA, explained that all information from the commencement of the appeal up to and including the Board's direction is included in the Board's file and is available in its entirety.

151. A similar response was provided to the request for the record of the AA. Although the allegation was made in the course of the proceedings that this was inadequate, no serious argument was propounded to suggest that the record relied upon by the Board as set out in the letter of 18th July, 2014 failed to comply with any identified legal requirement in relation to the making or publication of the record of the decision on either the EIA or AA.

152. Section 172(1J) of the PDA 2000 provides:-

> "When the planning authority or the Board, as the case may be, has decided whether to grant or refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public:
>
> (a) the content of the decision and any conditions attached thereto;
>
> (b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;
>
> (c) having examined any submission or observation validly made,
>
> (i) the main reasons and considerations on which the decision based, and
>
> (ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;
>
> (d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset that major adverse effects;
>
> (e) any report referred to in subsection (1H);
>
> (f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and;
>
> (g) the views, if any, furnished by other Member States of the European Union pursuant to section 174."

153. The content of the decision and conditions attached are evident from the decision itself and also the Board's directions that preceded it which are in similar terms. As already indicated, the Board did evaluate the direct and indirect effects of the proposed development which appears from the decision and those parts of the Inspector's Report which it adopted. The Board gives its main reasons and considerations both for its decision and for the attached conditions.

154. The applicants failed to identify any part of s. 172(1J) which they claimed had not been satisfied by the Board's decision or the availability of the record thereof to the public. The gravamen of their complaints seems to be that the public planning file was "in a mess" when it was inspected. However, the almost inevitable consequence of making the Board's planning file available to the public for inspection is that in a case such as this where many parties are interested and numerous inspections of the file are undertaken,

the file will become disordered. That of itself cannot amount to a failure to comply with s. 172(1J) or be considered withholding from the public relevant documentation or information. It cannot of itself amount to grounds for judicially reviewing the impugned decision. This is particularly so where the applicants make only a general complaint and are not able to point to any particular information or documentation as being "missing" from the file.

Failure to carry out a Proper Appropriate Assessment
155. Grounds (2), (4), (8) and (13) bear on this issue.

Legislative Background
156. The Habitats Directive provides legal protection for habitats and species of European importance established under the EU-wide network of sites known as Natura 2000 sites protected under SACs. Also protected under these Nature 2000 sites are birds species in Special Protection Areas ("SPAs") designated under the Conservation of Wild Birds Directive (79/409/EEC) as amended by Directive 2009/147/EC ("the Birds Directive").

157. Article 6 of the Habitats Directive provides-

> 1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.
>
> 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.
>
> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

158. The Habitats Directive and the Birds Directive are implemented in domestic law by Part XAB of the PDA 2000 which applies to any "European Site", which includes SACs and SPAs (s. 177R(1)). Under s. 177S, "competent authorities" must:-

> "take appropriate steps to avoid in a European Site the deterioration of natural habitats and the habitats of species as well as the disturbance of the species for which the site has been designated, insofar as such disturbance could be significant in relation to the objectives of the Habitats Directive".

In the context of the proposed development, "competent authority" includes in the first instance Laois County Council and in relation to the impugned decision, the Board.

159. Section 177T(1) provides:-

> "In this part-
>
> …
>
> (b) A Natura impact statement means a statement, for the purposes of Article 6 of the Habitats Directive, of the implications of a proposed development, on its own or in combination with other plans or projects, for one or more than one European site, in view of the conservation objectives of the site or sites.
>
> (2) Without prejudice to the generality of subsection (1),…a Natura impact statement…shall include a report of a scientific examination of evidence and data, carried out by competent persons to identify and classify any implications for one or more than one European site in view of the conservation objectives of the site or sites."

160. Under s. 177U, there must be a preliminary "screening for appropriate assessment" of a proposed development to assess "in view of best scientific knowledge, if that….proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site".

161. Where screening indicates that an AA is required, s. 177V applies which, in so far as is relevant, provides:-

> (1) An appropriate assessment carried out under this Part shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not a draft…proposed development would adversely affect the integrity of a European site and an appropriate assessment shall be carried out by the competent authority, in each case where it has made a determination under section 177U(4) that an appropriate assessment is required…
>
> (2) In carrying out an appropriate assessment under subsection (1) the competent authority shall take into account each of the following matters:
>
> (a) the…Natura impact statement...;

(b) any supplemental information furnished in relation to any such…statement;

(c) if appropriate, any additional information sought by the authority and furnished by the applicant in relation to a Natura impact statement;

…

(e) any information or advice obtained by the competent authority;

(f) if appropriate, any written submissions or observations made to the competent authority in relation to the application for consent for proposed development;

(g) any other relevant information.

(3) Notwithstanding any other provision of this Act, or, as appropriate, the Act of 2001, or the Roads Acts 1993 to 2007 and save as otherwise provided for in sections 177X, 177Y, 177AB and 177AC, a competent authority...give consent for proposed development only after having determined that the…proposed development shall not adversely affect the integrity of a European Site."

Background Facts Relating to Appropriate Assessment

162. Against this legislative background RPS on behalf of Coillte undertook screening and established that there were no Natura 2000 sites within the proposed development site but that the proposed development might have significant effects on two Natura 2000 sites, namely the River Barrow and River Nore SAC and the River Nore SPA. Accordingly, they carried out a NIS and an AA. The applicants' claims related principally to inadequate assessment of the potential impact of the proposed development on the drainage of water from the proposed site, particularly during the construction phase and the adverse impact that this could have on the Habitat of the FPM in the River Barrow and River Nore SAC, lying downstream of the proposed development.

163. The National Parks and Wildlife Service (NPWS) published conservation objectives in respect of the River Barrow and River Nore SAC ("the Guidelines"). In their introduction they note that:-

> "The overall aim of the Habitats Directive is to maintain or restore the favourable conservation status of habitats and species of community interest".

164. The Guidelines assert that when following these objectives "it is essential that the relevant backing/supporting documents are consulted, particularly where instructed in the targets or notes for a particular attribute." In the list of "qualifying interests" the species listed include FPM *Margaritifera Margaritifera*" (status under review) and the Nore Freshwater Pearl Mussel *Margartitifera Durrovensis* ("NFPM") (which remains a qualifying species). The supporting documentation listed includes some 5 reports relating to freshwater mussels, 2 of which are particular to the NFPM and 4 of which are authored by biologist Dr. E. A. Moorkens whom the parties agreed was an expert in relation to the FPM/NFPM.

165. It should be noted at the outset that this is the only site in the world for this hard water form of the NFPM. Its population was estimated by Dr Moorkens in 2009 to be 300 adult individuals, with no evidence of breeding since 1970. It is limited to a stretch of the River Nore of some 15.5 km in the vicinity of Ballyragget. The NPWS target is to restore the population to 5000 adults by breeding and introducing juveniles and young mussels and to reduce the decline of the adult population. Maintenance of sufficient juvenile salmonids and habitats for same is necessary as they are required for the juvenile cycle of the NFPM's lifetime. There are however serious issues relating to the quality of the NFPM habitat due to less than ideal sub stratum sedimentation. Restoration of an appropriate hydrological regime to deal with the sub stratum is therefore an NPWS target.

166. RPS made a detailed examination in their NIS of the potential for alterations to the NFPM habitat which could be caused by the development. RPS also outlined the "Freshwater Pearl Mussel Sub-Basin Management Plan" in which it is noted that the objectives and measures contained in same must be considered by the developer in moving the project forward.

167. In respect of the FPM and NFPM, Table 4.4 in the NIS entitled "Summary of Impacts on the Qualifying Features of the River Barrow and River Nore SAC" notes that the species are "[v]ery highly sensitive to pollution". RPS concluded that no direct effects were recorded in the vicinity of the proposed wind farm development and possible bridge works on the species. As to indirect effects, they concluded that these "may occur during proposed wind farm development and possible bridge works…"

168. Due to this possible indirect effect on the FPM and the NFPM, RPS detail in s. 4.6 of the NIS an array of mitigation measures to be implemented for the reduction and prevention of suspended solid pollution so that discharges to watercourses shall not exceed 35mg/l of total suspended solids. The Court notes that at the appeal stage this was reduced to 25mg/l. Due to these measures, RPS concluded that the development would not have a significant effect either individually or in combination with other plans or projects on the conservation objectives of the River Barrow and River Nore SAC or the River Nore SPA.

169. The applicants pointed out that there is no reference in the NIS or the Board's decision to any of the reports or research of Dr. Moorkens listed in the Guidelines' bibliography, notwithstanding that the NPWS in the Guidelines stated that it is essential to have regard to this relevant background/supporting documentation. They also noted that there was no reference to any documentation referring to the FPM.

170. The Court notes that prior to completing the NIS, Coillte/RPS undertook written consultation with IFI and the NPWS.

171. In response to the planning application, by observation dated 1st October, 2013 the DAHG expressed various concerns. With respect to the mussels, the DAHG reasoned that impacts on the NFPM were not adequately assessed in the NIS, particularly in relation to impacts associated with the proposed additional clear-felling of trees and bridge works. It noted that the proposed mitigation measures had not been assessed to determine if they were adequate and that the cumulative effect of the development with other projects on the NFPM had not been considered.

172. The Court notes that these observations were relatively limited in nature. The general observation that the impacts of the development on the NFPM had not been adequately assessed appear alongside 4 other concerns mentioned in the observation, namely the clear felling of trees, bridge works, the 35mg/l total suspended solids limitation and cumulative impacts in association with

other developments.

173. The Planners Report, which took into account the various observations from officers in Laois County Council agreed with the DAHG observation that the NIS was inadequate in relation to impacts of the proposal on the FPM.

174. The planner noted that the grid connection, in respect of which there was no proposal in the application, was an integral part when considering the impacts of the proposed development under the Habitats Directive. However, for the reasons previously indicated in this judgment the Court cannot have regard to any complaint by the applicants referable to the grid connection because this was not the subject of any ground in respect of which leave was granted.

175. In refusing permission, the planning authority in its decision dated 2nd October, 2013 stated that it was not satisfied on the basis of the AA and information contained in the EIS and NIS that proper consideration had been given to the environmental effects of the development or that the integrity of the SAC and SPA would not be adversely affected by the development.

176. Before passing to the appeal it should be noted that Dr. Moorkens was not an observer in respect of the planning application to Laois County Council, nor were her services retained by any party and the only reference in the NIS was in the context of the NPWS conservation objectives.

177. At the appeal stage, Coillte again engaged RPS to prepare their appeal. In s. 4.4.3 they deal specifically with the River Barrow and Nore SAC and the SPA, emphasising at the outset that protection of the FPM population was one of the "primary considerations in devising and assessing the layout and extent of the wind farm proposed by Coillte in the first instance". It is asserted that the application incorporates best practice mitigation measures agreed in consultation with IFI. It is accepted that, notwithstanding the distance between possible future affected watercourses and the SAC, indirect impacts on the NFPM are possible. Reliance is placed however on the mitigation measures outlined in s. 4.6 of the NIS to alleviate the impacts. At p. 104 of the appeal document, para. 22, it is stated "[s]cientific literature exists which states that the distance at which freshwater pearl mussel populations may be at risk from site disturbing forest operations is up to 6km. The nearest population of mussel from the Cullenagh site is known to be 12km." A footnote to this indicates that the scientific literature relied on by RPS was a 1997 study "of the effects of stream hydrology and water quality in forested catchments on fish and invertebrates".

178. The applicants point out that this particular literature is not referenced in the Guidelines' bibliography in their conservation objectives for the River Barrow and River Nore SAC. They further point out that. RPS do not refer to any of Dr. Moorkens publications in the appeal document particular to the high water quality required by populations of FPM.

179. The Court notes here that the distance of the proposed development from the known populations of FPM, while a factor relied upon by RPS in their submission, is not critical in that they rely primarily on the mitigation measures which they submit would be sufficiently robust. They go on to rely on the fact that IFI raised no objection to the proposed development. They then addressed the DAHG's concerns outlined above relating to tree felling, bridge works and possible cumulative impacts in conjunction with other projects.

180. In terms of 'best scientific knowledge' there is a passage, which the Court regards as significant, concerning the NFPM within s. 1.2 of Appendix C of the appeal document lodged by Coillte which states:-

> "The population continues to age, and as older mussels die, they are not replaced. The conclusion from studies of the Nore is that the single extant M. durrovensis population in the River Nore is un-viable and on the verge of extinction. Expert opinion has indicated that the current 300 adult mussels cannot sustain M. Durrovensis into the future and that significant efforts are needed to increase the size of the population. Assisted breeding has been identified as the only method by which the current population of 300 adult mussels can be increased in the medium to long term. As a result, adult mussels have been taken into captivity in an attempt to breed glochidia. A programme was set up in 2005, funded by the National Roads Authority and NPWS. In 2008 and 2009, female mussels in captivity successfully released live glochida, a number of which attached to the gills of host fish. Juvenile mussels did not survive in the facility, so the location was moved in 2009, and currently live juvenile mussels have completed their first growing season. It is hoped that juvenile mussels will be translocated to suitable habitat within the Nore catchment, or held in captivity until conditions improve in the habitat. The objective is to create at least two viable, self-sustaining populations of M. Durrovensis from mussels bred in captivity, each population totalling a minimum of 5,000 mussels. There is considerable urgency to identify potential receptor sites and to return them to favourable habitat condition and water quality".

181. As this document formed part of the appeal, the Court observes that this information was before the Board at the date of the impugned decision. It also appears that the information quoted above came to be included in this documentation on 28.1.2011 and was therefore of recent origin. This has relevance to the obligation on the decision maker to consider the best available scientific knowledge at the date of the decision, an aspect that will be discussed later in this judgment.

182. Addressing the concerns of the DAHG with regard to the adequacy of mitigation measures to be implemented in relation to the NFPM, RPS on behalf of Coillte firstly proposed a measurable limit of 25mg/l in respect of total suspended solids. Secondly, they stated that they would not exceed the current levels of total suspended solids as established through monitoring/survey over the summer and winter seasons. Measures were also outlined as to how these limits would be observed. The Court was informed at the date of hearing that such monitoring was being undertaken but had not yet been completed. The overall significance of these proposals is that Coillte was committing, at worst, to maintaining the status quo in terms of suspended solids in the water draining from the development site.

183. At pp. 120-121 of the appeal document, RPS address the planner's criticisms of the NIS and repeat the material relied upon in response to the DAHG observations.

184. In addition to the appeal document, Coillte, in response to certain observations at the appeal stage, lodged 2 further responses with the Board. One of these was a response to various observations of the second named applicant and other objectors who are members of the first named applicant, including Tracey and Steven Hood. The Hood's observations concerned inter alia suspended solids methodology, flooding hydrology, the FPM, river flows and siltation. The detailed response of RPS (whom it will be recalled availed of hydrological expertise) on behalf of Coillte runs for some 21 pages and addresses their hydrological concerns.

185. The Court notes certain points of relevance:-

- That questions of hydrology were dealt with in the EIS.

• That the method of measuring suspended solids is not, as suggested, "unproven and invalid", nor is it true that the level of "25mg/l is purely arbitrary and meaningless".

• RPS responded that "turbidity is a measurement of water clarity where solids in the water obstruct the transmittance of light through the sample. Turbidity is an important water quality parameter that can indicate the presence of dispersed suspended solids, algae and other micro organisms, organic material and other minute particles." They stated that "there is a strong correlation between turbidity and total suspended solids and both parameters can be measured together with a total suspended solids probe, which is used in monitoring water quality around the world". RPS give reasons for disregarding a survey referred to by the Hood's in their submission and give examples of where continuous monitoring of water quality with turbidity is used in 2 infrastructure projects in FPM catchments (Donegal and Connemara). They also refer to the appeal document in which it is stated that "such monitoring shall be carried out in line with Irish Freshwater Pearl Mussel Regulations and in particular the fourth schedule of S.I. 296 2009 to ensure that water quality in the Freshwater Pearl Mussel habitat is maintained at levels which support a fully functioning recruiting population".

• They seek support for the 25mg/l level on the basis that this was the level taken from current IFI Guidance 2007.

• With regard to the suggestion that run off from impervious areas such as hard stands would impact the hydrological balance, RPS stated that there would be no net change to the hydrological balance from the works as all catchment basins would be maintained and surface water management for the site would include attenuation for all proposed impervious areas to existing run off. This would be achieved through the use of throttle pipes to limit discharge to existing run off rates to the 1:100 year flood event. Accordingly, RPS said that there would be no change in flood risk.

186. The second response related to observations sent by Ms. Uí Fhátharta on behalf of Laois County Council in a submission dated 25th November, 2013 with attached submissions.

187. DAHG did not make any observation or submission to the Board in respect of the appeal. The respondent and Coillte placed considerable reliance on this, having regard to the fact that the DAHG, through the agency of the NPWS, is responsible for the conservation objectives under the Habitats Directive relating to the NFPM. They argued that the Board was entitled to take the view that the NPWS, in light of the mitigation measures advanced in the appeal document, no longer had concerns about adverse impact from the project on the integrity of the SAC. It is noted that IFI, a statutory consultee, also did not lodge any observation at the appeal stage.

188. The Board's Inspector's Report considers all of the documentation including the EIS, NIS, appeal documentation, observations and responses. There is also a specific section (14.7) concerning AA.

189. The inspector noted that an indirect relationship arises between the development and the Natura 2000 sites. Significant threats may arise on the sites' conservation objectives and qualifying interests pertaining to habitat fragmentation, water provision, obstruction to water movement including fish movement and disturbance to species associated in the Annexes.

190. At para. 14.7.7 the report addresses particularly the FPM and NFPM and notes that:-

> "…sedimentation poses the biggest threat to the qualifying interest, the Freshwater Pearl Mussel and Nore Freshwater Pearl Mussel. The conservation objectives and notes of relevance to these species indicate that significant sedimentation has been recorded during all recent mussel monitoring surveys. Recruitment of juvenile mussels is being prevented by the poor quality of the river substrate. I note the publication by the NPWS "Freshwater Pearl Mussel Assessment", in June 2013 and the map which indicates the distribution of the mussel. Text provided by the NPWS indicates that "freshwater pearl mussel is a globally threatened, long-lived and extremely sensitive species that can be impacted by many forms of pollution, particularly sediment and nutrient pollution and by hydrological and morphological changes, which may arise from developments, activities or changes in any part of the catchment. Accordingly, conservation and protection of the species must occur at the catchment level. Owing to the likelihood that the development or activity may occur some distance from the impact, it is the assessment and quantification of risk that requires the greatest attention during the ecological or environmental impact assessment."

191. After considering the information before her, the inspector concluded that the proposal would not have a significant impact on the FPM or the NFPM.

192. The Court notes that the inspector's view is not solely based on the geographical separation between the proposed development site and the nearest population of mussels but is broadly based on other considerations arising on the evidence before her and before the Board, including the mitigation measures proposed. It will also be recalled that her recommendation, which was to refuse permission for the proposed development was based on visual impact, shadow flicker, noise and the extent of work required on haul routes which she felt had not been adequately addressed – and not in any reasons concerned with the AA or any suggested adverse effect on the integrity of the SAC.

193. During the screening exercise carried out by RPS, it was decided that the proposed development might have significant indirect effects on the River Nore SPA and/or the Kingfisher. However, the AA carried out by RPS confirmed that the development would not have a significant effect either individually or in combination with other plans or projects on the conservation objectives of the River Nore SPA. The applicants did not in written or oral legal submissions pursue any contention that the Board's decision should be quashed based on the inadequacy of information with regard to the River Nore SPA, potential effects on the habitat or species or that the AA carried out in relation to the River Nore SPA by the Board was inadequate.

194. The screening exercise also concluded that there would be no impact by the proposed development on the Slieve Bloom Mountain SPA or the Hen Harrier and no indirect impact, or impact in combination with any other project, as the development site was not a suitable habitat for the Hen Harrier and it was outside the feeding territory of the species. While the inspector noted observers' concerns about the impact on the Hen Harrier, she followed similar reasoning and came to the same conclusion as RPS.

The Board's Decision on Appropriate Assessment

195. As previously indicated in this judgment, the Board, in coming to its decision, outlined the matters listed (a)-(i) to which it had regard. These included "(h) the range of mitigation measures set out in the documentation received," and "(i) the submissions made in connection with the planning application and the appeal, and the report of the Inspector."

196. The Board was satisfied that there was sufficient information before it to undertake an AA. At the screening for an AA stage of

the exercise, the Board concluded that the development would not have any likely significant effect on the Slieve Bloom Mountains SPA. At the AA stage, which considered the River Barrow and River Nore SAC and the River Nore SPA, the Board concluded that "[s]ubject to the implementation of the identified mitigation measures,…the proposed development, by itself or in combination with other plans or projects…would not adversely affect the integrity of the River Barrow and River Nore [SAC] or the River Nore [SPA], in view of the conservation objectives of these sites." In coming to this conclusion the Board had regard to a number of matters which it then listed.

197. A number of the conditions imposed by the Board are specifically referable to mitigation measures in respect of the River Barrow and River Nore SAC and the potential for adverse affect on the integrity of the FPM (and in particular the NFPM) habitat sites. These conditions are numbers 4, 11, 13, 16 and 17.

198. The effect of condition 4 would appear to be to import into the permission an automatic requirement that Coillte comply with all mitigation measures identified in the EIS, the NIS and the appeal documentation. This would include those parts of the appeal document relating to the lower limit on suspended solids in water discharged from the site of 25mg/l and relating to winter and summer monitoring of the existing position with regard to suspended solids and the commitment not to exceed current levels during the construction phase or subsequently during the operational phase of the proposed development.

199. The Court also notes condition 17(k) which requires that water run off during construction is to be controlled such that no silt or other pollutants enter watercourses. This sets an even stricter safeguard in respect of discharges to watercourses during the construction phase. Although this will not apply during the operational phase, it was accepted in argument on behalf of the applicants that their challenge to the validity of the Board's AA decision related to their fears at the construction phase.

The Applicants' Submissions

200. In arguing that there was no AA, the applicants relied firmly on the requirements for an AA as set out in Article 6(3) of the Habitats Directive and as interpreted in the CJEU case law summarised by Finlay Geoghegan J in the Kelly case where she stated at para.s 39-40:-

> "Section 177V(1) must be construed so as to give effect to Article 6(3) of the Habitats Directive, and hence, an appropriate assessment carried out under the section must meet the requirements of Article 6(3) as set out in the CJEU case law. If an appropriate assessment is to comply with the criteria set out by the CJEU in the cases referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination.
>
> It must be recalled that the appropriate assessment, or a stage two assessment, will only arise where, in the stage one screening process, it has been determined (or it has been implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site. Where that is the position, then, in accordance with the preceding case law, the appropriate assessment to be lawfully conducted in summary:
>
> (i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.
>
> (ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.
>
> (iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."

201. The applicants argued that Article 6(3) goes to jurisdiction. Unless the Board has before it all appropriate information allowing it to identify, in the light of best scientific knowledge, all aspects of the development allowing it to make complete, precise and definitive findings and conclusions, it cannot be in a position to make an AA decision. It was argued that the analysis and evaluation cannot take place if there are lacunae in the information necessary for the decision.

202. The applicants asserted that there were significant lacunae in the information before the Board in 2 particular respects. First, the mitigation measures in respect of surface water draining from the development site or passing through watercourses or streams outside the site but impacted by the haul routes, were too nonspecific. Second, in so far as the Board's decision left over elaboration and detail of these mitigation measures to further agreement between Coillte and the local authority, IFI, the NPWS or other parties, in respect of which there would be no public consultation or participation, there would be no possibility for the examination, analysis and evaluation under Article 6(3). It would not be possible to establish, in advance of the consent to the development whether such mitigation measures would protect the integrity of the River Barrow and River Nore SAC.

203. The applicants also argued that the AA had to be undertaken and the decision made in light of the conservation objective of restoring the NFPM and its habitats downstream of the proposed development. It was argued that it was not sufficient for a decision to merely preserve the integrity of a European Site – it must in this instance allow conditions to exist which would facilitate the improvement of the water quality and habitat, with specific limit values in respect of solids or other matter in suspension established after considering the best scientific evidence in the field.

204. The applicants also argued that in reaching its decision, the Board failed to have regard to the best scientific knowledge in the field.

Dr. Moorkens' Evidence and the 'Best Scientific Knowledge'

205. In support of these arguments the applicants sought to rely on the evidence of Dr. Moorkens, Environmental Scientist, set out in an affidavit which she swore on 23rd January, 2015. The respondent and Coillte both objected to the admissibility of this evidence primarily on the basis that it included new evidence and opinion evidence not before the Board at the time of the impugned decision. Objection was also made on the basis that some of the opinion expressed related to hydrological matters not within Dr. Moorkens' particular expertise and on the basis that the affidavit was filed very late in the day. The parties agreed that the Court should receive and consider the evidence in this affidavit *de bene esse* and in its judgment determine its admissibility.

206. From her affidavit it is apparent that Dr. Moorkens is highly educated in the field of natural sciences and environmental science. Her masters and doctorate specialised in "Molluscan conservation" and her species speciality was the FPM and the NFPM. It was clear that she has particular national and international experience and expertise in relation to FPMs and it was not disputed that she is the principle Irish expert in respect of the FPM and probably the world expert in respect of the NFPM. She regularly publishes works and lectures on these topics and has worked previously with RPS and separately produced guidance documents for the wind farm and forestry sectors on her area of expertise. One of her exhibits was an article which she co-authored "Assessing Near-Bed Velocity in a Recruiting Population of the Endangered Freshwater Pearl Mussel (*Margaritifera Margaritifera*) in Ireland." This article resulted from a short study in 2013 of a sustainably recruiting FPM population in a west of Ireland River.

207. A number of matters should be noted. First, the article did not relate to the NFPM, but only FPM, the conservation status of which in the River Nore SAC is under review. Secondly, it was not published until September 2014 and therefore post-dated the impugned decision. Thirdly, and in so far as the conclusion and discussion in the article might equally apply to the NFPM, it would seem that the sensitivity of the freshwater mussels to fine sediment infiltration or higher levels of suspended solids is something that was already mentioned in the NPWS conservation objectives and therefore before the Board.

208. Returning to the content of Dr. Moorkens affidavit, to a considerable extent this does not present any new information that was not already before the Board. In other respects the affidavit recites the legal background and basis for AAs which is not in dispute. She refers to the Laois County Council Development Plan which refers to "foster[ing] an improvement in the conservation status" of the NFPM. She suggests that there were lacunae in Coillte's submission which "made no effort to establish the catchment management changes needed in the proposed development area in order to be compatible with a Nore Frehwater Pearl Mussel population with the potential to improve to favourable condition." While Dr. Moorkens placed reliance on the DAHG submission, it seems to the Court that their submission does not go so far as to require catchment management changes prior to the granting of permission. Dr. Moorkens fails to note that the DAHG did not see fit to make any submission or observation in response to Coillte's appeal to the Board.

209. In para. 18, Dr. Moorkens is critical of the fact that the inspector in her report does not mention seeking or obtaining expertise on the species. While this is so, the Court found it surprising that none of the parties involved in the planning application or appeal, including observers and Laois County Council, consulted with or engaged Dr. Moorkens, notwithstanding that she is the known expert on FPM and in particular the NFPM. It would of course also have been open to Dr. Moorkens to have made submissions to the planning authority or the Board as an observer. No evidence was presented or adduced to explain why Dr Moorkens never became involved in the process.

210. The Board had information from 2011 Overview of Freshwater Pearl Mussel in Catchment' being part of 'Forestry Development', 'Forestry and Freshwater Pearl Mussel Requirement Form 1.9 Application details Nore Catchment', 28th January 2011. before it indicating the need for assisted breeding of the NFPM and an ongoing breeding program from 2009 with the hope that juvenile mussels "will be translocated to suitable habitats within the Nore catchment", so it is extraordinary that the actual introduction of juvenile NFPM into the River Nore was taking place in July, 2014 only weeks after the Board's decision (13th June, 2014). Presumably this re-introduction program had been in gestation for a number of years with heightened preparations in place shortly prior to the Board's decision. It does not appear that any party saw fit to bring to the Board's attention to the advanced state of this re-introduction program.

211. The Court also notes that in criticising the 25mg/l total suspended solids as inadequate, Dr. Moorkens fails to address the further mitigation measures considered by the Board and ultimately the subject matter of conditions in the Board's decision. In the view of the Court, this greatly undermines the weight that might otherwise be attached to her opinion because potential adverse impacts cannot be fully assessed without considering the suite of mitigation measures. The scientific expertise most relevant to the design and efficacy of the mitigation measures was that of hydrology. RPS in preparing the EIS, the NIS, the appeal document and responses to observers, had recourse to hydrological expertise and relied on same in the preparation of the proposed mitigation measures.

212. Accordingly, the Court takes into account Dr. Moorkens' evidence on affidavit in so far as it helpfully sets out and supports the legal case for asserting that the AA was flawed because it assessed the project with reference to the status quo and the deteriorated conditions of the catchment rather than from the point of view of the conservation objective of restoration and support of improved habitat conditions which the applicants say is required under Article 6(3) of the Habitats Directive. In so far as the affidavit contains new evidence that was not before the Board, the Court is compelled to disregard such evidence. In so far as it contains opinion evidence that does not on its face take into account the detailed mitigation measures proposed by RPS on behalf of Coillte and incorporated into the impugned decision by conditions and other conditions imposed by the Board, the Court does not consider such evidence helpful.

213. The respondent and Coillte also submitted that the planning authority/the Board cannot be expected to source and contract directly with the most prominent experts in the field when undertaking AA. They say this would be impracticable, perhaps impossible. I accept this as correct. The obligation identified by Finlay Geoghegan J in *Kelly* is for the AA "to identify, in the light of the best scientific knowledge in the field" all aspects of the development that may affect the European site. Reference to written materials or secondary sources repeating or distilling the "best scientific knowledge" is acceptable provided these sources are such as to enable examination and analysis by the decision maker of the effects of the development site, including mitigation measures.

Submissions of the Respondent and Coillte

214. The respondent made written and oral submissions. Coillte adopted these submissions and made further submissions. They submitted that the AA was adequate and complied with Article 6 of the Habitats Directive and jurisprudence of the CJEU.

215. In particular, in relation to the NFPM and FPM and the possible adverse effect on them and their habitat downstream of the development site, the respondent and Coillte relied on the suite of mitigation measures proposed in the EIS/NIS, as modified by the appeal document. They also relied upon the further measures incorporated by the Board in its decision and the issues to be the subject matter of agreement between the developer and Laois County Council and others particularly prior to the construction stage.

216. In terms of the "best scientific knowledge", they contested the admissibility of and the weight to be attributed to Dr. Moorkens' evidence and I have dealt with this above. They relied on the fact that the relevant mitigation measures are hydrological in nature and that RPS in presenting the NIS and appeal document either had or engaged the appropriate expertise to design and present such measures.

217. It was argued that what Article 6 requires is an assessment that concludes that the proposed development will either have a neutral or, alternatively, a positive effect on the species or habitat and that it does not require that the proposed development will have the effect of restoring a habitat already damaged or at risk. The respondent placed particular reliance on the opinion of

Advocate General Sharpston in *Briels and Others v. Minister van Infrastructuur en Milieu* (Case C-521/12) to support 2 propositions:-

> • First, that mitigation measures form part of the plan or project which effectively minimise its impact and must be taken into account under the AA pursuant to Article 6(3);
>
> • Secondly, that a mitigation measure is one that lessens the negative effect of a project with the aim of ensuring, if possible, that the integrity of the site is not adversely affected while some significant and/or transient effects might not be totally eliminated.

218. As to any suggestion that the Board had any obligation to contact Dr. Moorkens to avail of her expertise, it was pointed out that most of her materials as referred to in the NPWS conservation objectives were unpublished. This was not an issue canvassed by the applicants and was not raised in their Statement of Grounds or written submissions. It had been first mentioned in the course of the hearing and was not part of the case made.

219. The respondent and Coillte also referred to the limited extent to which Laois County Council officers and the Planners Report raised inadequacies in the AA in the context of the NFPM or FPM – with their submissions effectively adding nothing to what the DAHG had submitted in its letter. It was pointed out that the appeal documentation addressed all matters in observations made at the appeal stage.

220. With regard to aspects of the mitigation measures left over to be agreed under the conditions, the respondent and Coillte argued that these were matters of detail. Once agreed they would be on the planners file and therefore available to the public or available under a Freedom of Information request. Mr. McDonnell SC on behalf of Coillte drew on the authority of *Boland v. An Bord Pleanála* [1996] 3 IR 435 which set out criteria to which the Board was entitled to have regard in deciding whether to impose conditions leaving a matter to be agreed between the developer and the planning authority.

221. Although that case related to a planning decision that pre-dated the Habitats Directive, he submitted that it applied by analogy and entitled the Board to leave to further agreement matters which were essentially technical or matters of detail where the Board already has before it sufficient information and detail to make a principled decision under Article 6(3). It was therefore submitted that it was entirely appropriate to insert condition 17(k) – albeit that it was a standard condition. Accordingly, the respondent and Coillte rejected the argument that the Board had in some way delegated its AA function to further agreement.

Discussion

222. In the context of the applicants' claim that there was an obligation on the Board not to grant permission in respect of the proposed development unless satisfied that it had the effect of restoring the conservation objectives of the River Barrow and River Nore SAC, it is necessary to make some observations on Article 6(1)(2) and (3) the Habitats Directive quoted at para. 157 above (it is common case that Article 6(4) has no application to this case).

223. Article 6(1) refers to "necessary conservation measures" to be established by "appropriate management plans" and "appropriate statutory administrative or contractual measures". It does not refer to 'restoration' but clearly the management plans or other measures may include restoration of a habitat or species as an objective. In the instant case, the appropriate management plans/measures are those put in place by the DAHG and Laois County Council in its development plan and other plans referred to in the EIS/NIS. It also encompasses The European Communities Environmental Objectives (Freshwater Pearl Mussel) Regulations 2009 (S.I. No.296 of 2009), setting out environmental quality objectives for the habitats of FPM populations across the State as identified in the first schedule. This S.I. requires the production of sub-basin management plans with programs of measures to achieve each of these objectives and it sets out the duties of public authorities in respect of those plans and programs. This S.I. also applies to the NFPM. Pursuant to that Instrument, the relevant sub-basin management plan was adopted. It is noted that Regulation 9 provides that it:-

> "[s]hall be the duty of a public authority listed in the Second Schedule to these Regulations to take such steps as are necessary and appropriate to the discharge of its functions to implement the measures identified in a sub-basin management plan."

Under the second schedule this applied to all "relevant local authorities", which would include Laois County Council, An Bord Pleanála and also Coillte Teoranta. Also listed is "the Minister for Environment, Heritage and Local Government". Accordingly, there is a wide range of responsibility for the conservation of the FPM/NFPM habitat that clearly does not stop at the impugned decision.

224. Article 6(2) enshrines the obligation to "avoid…the deterioration" of the habitat and the disturbance of the species "insofar as such disturbance could be significant in relation to the objectives to the Directive." The deliberate use of the word "deterioration" indicates that the obligation on member states is a negative one, namely to take appropriate steps to avoid deterioration. It does not place on member states the legal obligation to take positive steps to ***restore*** a habitat to a favourable conservation status where historically that status was/is unfavourable or at risk. That would be an obligation of an entirely different magnitude that would potentially place a considerable burden – not least financial – on member states. If restoration was intended to be a binding obligation it would have been stated in clear and unequivocal terms and would probably have been stated subject to qualifications, reservations and exceptions. Indeed it would be a radical measure that would require extensive consultation and discussion at all levels within the EU and might warrant separate legislation.

225. Secondly, the use of the phrase "insofar as disturbance could be significant in relation to the objectives of this Directive" is important because it shows that the EU does not take an absolutist approach but will tolerate insignificant disturbance of a species. Implicit from this wording is the concept that appropriate steps may not be necessary if the disturbance is minimal or negligible.

226. Article 6(3) relates directly to AA and is therefore most relevant. It relates to any plan or project likely to have a significant effect on a site, which can only be approved if "it will not adversely affect the integrity of the site". There is no requirement in Article 6(3) that consent should be refused if a member state's conservation objective for a habitat or species is restoration and the particular project being considered does not have the effect of restoration or some beneficial effect.

227. The interpretation placed on Article 6(3) of the Habitats Directive by the CJEU in *Sweetman & Ors v. An Board Pleanála* (Case C-258/11) is also instructive as it had to consider the criteria to be applied when assessing the likelihood that a plan or project will adversely affect the integrity of a site. The CJEU stated at para. 32:-

> "[i]n appraising the scope of the expression 'adversely affect the integrity of the site' in its overall context, it should be made clear that…the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light

> of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species...whilst Article 6(4) merely derogates from the second sentence of Article 6(3)."

228. Ms. Butler SC on behalf of the respondent referred the Court to the *Briels* case Briels and Others v. Minister van Infrastructuur en Mileau (Case C-521/12). The CJEU decided the reference on 15th May, 2014 agreeing with the final conclusion of Advocate General Sharpston but did not discuss these issues to the same extent as the Advocate General. and the Opinion of Advocate General Sharpston which the Court finds to be helpful on the issues of restoration (or "positive effect") and the relevance of mitigation measures. That case concerned a reference from a Dutch court concerning a challenge to a road widening project in the Netherlands which affected a SAC habitat known as the Molinia Meadows. The Ministerial Order directed certain measures with a view to ensuring the creation of new meadows elsewhere to replace or augment those affected. The referring party wished to know, essentially, whether the integrity of a site is adversely affected within the meaning of the Habitats Directive if the project includes the creation of an area of that natural habitat type of equal or greater size within that site and if so whether that creation is to be regarded as a compensatory measure within the meaning of the Directive. The Advocate General in her assessment considered the term "mitigation measure", noting that it was not a term used in the legislation or defined in case law. At para.s 30-33 she stated:-

> "It is generally agreed among environmental specialists, and it appeared to be common ground among those presenting argument at the hearing, that plans or projects likely to have an effect on the environment should be assessed in the light of a 'mitigation hierarchy'. The content of that hierarchy may be expressed in greater or lesser detail and in slightly varying forms but its essence may be stated thus: 'compensation for residual harm is a last step and comes after consideration of how harm can be avoided in the first place and then, if that is not possible, how harm can be minimised through mitigation'. The three major steps or levels are thus, in decreasing order of preference: avoid, mitigate, compensate.
>
> A comparable hierarchy can be seen in Article 6 of the Habitats Directive, although there is no mention of mitigation as such. Article 6(1) requires the establishment of conservation measures, namely, in accordance with Articles 1(a), 2(2) and 3(1), those measures necessary 'to maintain or restore' the natural habitats 'at a favourable status'. That level is thus rather higher than simple avoidance, in that it involves active maintenance or even improvement of the quality or extent of habitats. Next, Article 6(2) requires the taking of appropriate steps to avoid any deterioration or disturbance. With a view to ensuring the same level of protection, Article 6(3) allows plans or projects to be approved only if they 'will not adversely affect the integrity of the site concerned'. Finally, Article 6(4) requires all necessary compensatory measures to be taken whenever a plan or project, even though it does adversely affect the integrity of the site, must be carried out for imperative reasons of overriding public interest and there are no alternative solutions.
>
> Thus, although Article 6 of the Habitats Directive does not specifically mention mitigation measures, it cannot reasonably be argued that there is no place for them within its structure. I agree with all those who have submitted observations, and with Advocate General Kokott in the passages I have cited above, that measures which form part of a plan or project and which effectively minimise its impact may be taken into account when assessing, in accordance with Article 6(3), whether that plan or project adversely affects the integrity of a site. It seems clear, however, that Article 6(1) requires active conservation management, rather than a mere absence of negative impact, and that Article 6(4) concerns situations in which whatever measures can be implemented in order to reduce an adverse impact have proved insufficient in the context of the assessment under Article 6(3).
>
> All those who have submitted observations agree, therefore, that 'mitigation measure' designates a relevant concept for the purposes of Article 6(3) of the Habitats Directive, which is different from that of 'compensation measure' in Article 6(4). In addition, the place of Article 6(3) in the structure of Article 6 as a whole corresponds to the place of 'mitigation' or 'minimisation' in the mitigation hierarchy as generally accepted."

229. This Court finds itself in agreement with the Opinion of the Advocate General. In so far as Article 6(1) is concerned, the State has established the necessary measures and management plans with a view to conserving the FPM and NFPM and their habitats, in accordance with Annexes I and II of the Habitats Directive. These are the measures necessary at the highest level to "maintain or restore" the species and habitat. The principle obligation in terms of conservation and restoration at this level falls to be implemented on behalf of the State by the DAHG. In practice, this is carried out through the agency of the NPWS which in this instance set the conservation objectives. It is however important to note that these objectives of the NPWS arise from a different brief and different responsibility to that of a local authority or the Board. The NPWS brief includes, specifically, the restoration to a favourable status of SACs and SPAs. It is not concerned with conservation alone – it has a wider brief.

230. It is the Court's view therefore that in general, restoration to favourable conservation status of a SAC site is not an objective that a planning authority or the Board on appeal is or can be required to ***impose***, whether under Article 6 or domestic law, on an applicant for planning permission. This general proposition carries particular force where the SAC falls outside the development site.

231. The Court, as did Advocate General Sharpston, finds support for this by reference to Article 6(2) where the second tier of protection/conservation is a requirement that member states take appropriate steps to avoid "the deterioration of natural habitats and the habitats of species as well as disturbance of species" within SACs. This second tier protection again is a matter for member states and not imposed directly on local planning authorities or the Board. However, to the extent that it is imposed on them by virtue of the PDA 2000, that legislation adopts the terminology of the Habitats Directive and accordingly, it is the prevention of "deterioration" that is the imposed obligation. There is no statutory obligation imposed to ensure restoration.

232. The Court also agrees with Advocate General Sharpston that Article 6(3) is directed at considering plans or projects which may affect the integrity of a European site but which in the light of mitigation measures may be approved if they "will not adversely affect the integrity of the site concerned…". In para. 50 of her Opinion she goes on to state:-

> "On the one hand, not only is a mitigation measure necessarily bound up with the effect which it is intended to mitigate – so that it must concern the same site and the same habitat type – but it must, in order to be considered in the context of Article 6(3), form an integral part of the plan or project under consideration. It may…be included in the original plan or project or be inserted as a condition at a later stage (but before approval of the plan or project), to deal with predicted effects. The mere fact that a measure is likely to mitigate the effects of a plan or project is not, however, enough: it must be specific to that plan or project and not part of any independent framework."

233. This Court concurs with these views. In the instant case the mitigation measures were part and parcel of the application for planning permission. This applies also to the modified/additional mitigation measures indicated in Coillte's appeal document. It also

applies to the conditions considered by the Board as part of its AA and imposed by the Board in its decision. It is beyond dispute that the mitigation measures are specific to the wind farm plan/project and not part of any independent framework. It is also clear that they are designed and intended directly to mitigate any adverse affects in relation to surface water run-off.

234. Moreover, and as the Advocate General points out in para. 51 of her Opinion "…the measures must form a legally binding condition for the implementation of the plan or project if it is to be given approval." The manner in which the mitigation measures are incorporated into conditions in the impugned decision means that they will be legally binding such that if breached, they can be the subject of enforcement proceedings by the local authority or any interested party under the PDA 2000. The Court will return later to the question of aspects of the mitigation measures being left over to subsequent agreement.

235. As can be seen in para. 33 of her Opinion, Advocate General Sharpston equated "mitigation" with "minimisation" and she returned to this subject in para. 36:-

> "The basic semantic distinction between mitigation (or minimisation or reduction) and compensation (or offsetting) does not appear to me to be very controversial. In the context of Article 6(3) and (4) of the Habitats Directive, a mitigation measure must be one which lessens the negative effects of a plan or project, with the aim of ensuring, if possible, that (while some insignificant and/or transient effects might not be totally eliminated) the 'integrity of the site' as such is not adversely affected."

236. The CJEU in the *Briel* case took a similar interpretation of the measures that fall to be reviewed under Article 6(3). They stated at para. 28 that the precautionary principle required national competent authorities to take "into account [among other things] the protective measures forming part of that project aimed at ***avoiding or reducing*** any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site." (emphasis added)

237. The CJEU in the *Sweetman* case had taken a similar view, where it stated at para. 39:-

> …it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be ***preserved at a favourable conservation status***; this entails…the ***lasting preservation of the constitutive characteristics*** of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive." (emphasis added)

238. The idea that insignificant or minimal effect/disturbance with a habitat or habitat species may be acceptable- in the sense that Article 6(3) is not absolutist in its approach- is not one that is expressly enunciated in Article 6(3) or in the PDA 2000. It may arise from consideration of what is the "integrity" of the site concerned. The Oxford English Dictionary defines it as "the state of being whole; the condition of being unified or sound in construction". Taking a narrow interpretation of the term "integrity of the site" would be inconsistent with the Advocate General's Opinion and the concept of a "mitigating measure". In the view of the Court it is not likely that the Council intended Article 6(3) to be absolutist in its prohibition on any plan or project adversely affecting the integrity of the site, however small that adverse effect. In my view, Advocate General Sharpston took a practical and realistic approach when indicating that a plan or project could still be approved notwithstanding that "some insignificant and/or transient effects might not be totally eliminated". This, it seems to me, is a reasonable approach and one that allows the deciding authority to apply a small degree of flexibility in assessing the extent and severity of any possible adverse effect on the integrity of the site concerned. It also accords with my comments on Article 6(2).

239. Accordingly, while the Board was obliged to, and did have regard to, the conservation objective of restoration (as it was part of the NIS), the Board was not required by Article 6(3) or Part XAB of the PDA 2000 to refuse permission on the basis that the proposed development and mitigation measures did not necessarily have a beneficial effect in terms of restoring the habitat of the NFPM. The passage quoted above from the CJEU decision in the *Briel* case does not make reference to a national competent authority being required to review measures having restorative effects on the particular site, only those avoiding or reducing impacts. Similarly, the CJEU in *Sweetman* did not make reference to restoration to a favourable conservation status, only the maintenance of same. The AA in this case did take into consideration the conservation objectives including the objective to restore the site or population from unfavourable or declining status to a favourable condition. However, in order to qualify for approval it was not requisite that the developer reduce the pre-existing pressure on the mussel habitat or improve the conditions within the habitat area. It was sufficient therefore that the assessment, including examination and evaluation of the mitigation measures, was considered to be neutral or such that it would not lead to deterioration of the habitat.

240. This Court is firmly of the view that the Board was entitled to consider the appeal in its entirety, including the mitigation measures as an integral part of the proposal. The fact that it considered "the detailed mitigation measures proposed in respect of water quality, including control of sediment, the preliminary drainage design submitted, and the scale of the filling coupes proposed" is expressly stated on p. 4 of the decision.

241. It should be emphasised in this context that the Board had before it in the EIS details of the existing drainage which indicated that the site had been forestry since the late 1930s and that varying drainage methods had been employed throughout the site depending on the best practice at the time of cultivation. The Board also had before it evidence of ongoing forestry operations within the proposed development site and within the SAC. It also had evidence that the NFPM was not known to have reproduced successfully in the River Nore since 1970. The implication of this evidence was clear – environmental changes over many years had already impacted on the habitat site to such an extent that self regeneration of the species has not occurred for several decades. The detail of the NPWS document outlining the conservation objectives indicates that the main reason for this has been sedimentation and problems with the sub stratum quality. The suite of mitigation measures address the hydrology of the site. Even to a lay person they appear to be comprehensive and detailed and are meaures that in all probability will be an improvement on the existing drainage from the development site where routine forestry operations continue to be undertaken. It is not difficult therefore to understand why RPS in Appendix E of the NIS at p. 40 concluded that with the implementation of best practice and the recommended mitigation measures, the proposed wind farm development would not have a significant effect either individually or in combination with other plans or projects on the conservation objectives of the SAC and SPA.

242. The Court's view is also that, when one considers the mitigation measures, the Board had ample evidence before it on which it could reasonably conclude that the proposed development would not adversely affect the integrity of the SAC.

243. Of great significance in the context of Article 6 was the proposal in Coillte's appeal document that "the limits proposed to be imposed on the levels of total suspended solid within the stream draining the proposed development site should be altered and set to reflect those levels of suspended solids which ***currently exist*** within those watercourses prior to any clear-felling or construction

activities commencing."

244. Accordingly, the proposal was that there would be continuous monitoring of the total suspended solids undertaken on all streams draining the site across both summer and winter seasons, work that the Court was informed is ongoing. This would identify an average seasonal total suspended solids level within streams currently draining the site. Based on this, a total suspended solids limit would be imposed as part of the proposed development based on the averages resulting from this survey, to be agreed with the NPWS and IFI. The significance of agreeing this with the NPWS is that it is the agency within the DAHG with primary responsibility for the conservation of the habitat and mussels within the site.

245. This provision would seem designed to achieve a situation where there is no deterioration of the water quality from the proposed development site entering the tributaries of the River Nore upstream of the relevant habitats.

246. Paragraph 53 under s. 4.4.3 of the appeal document was also relevant:-

> "In order to achieve the required quality for surface water discharge, run-off from the site will be collected and passed through appropriately sized settlement ponds prior to discharge to the receiving water. Should more stringent discharge standards be required, it will be possible to utilise high rate mobile settlement units (such as SiltBuster, or equivalent) in order to provide additional treatment. It should also be noted that no in-stream works are proposed as part of the proposed development and all turbines have been located to be a minimum of 50m from any watercourse."

247. This was a clear indication to the Board that more stringent discharge standards would, if required, be adopted. Although the applicants argued at the hearing that the siltbuster unit may use flocculants which in themselves might be a source of pollution (although there was no evidence to this effect), this was countered by the suggestion that not all siltbusters utilise flocculants. Considerations of that nature are precisely the type of technical matter upon which the Board would be expected to have some expertise or, if it felt necessary, to obtain further expert advice it could have done so.

248. The Court agrees with the respondent that all of the mitigation measures, including those of a hydrological nature, are incorporated into the permission as granted by virtue of condition 4 which stipulates that they shall be "implemented in full". Condition 11 requires "[w]ater supply and drainage arrangements, including the disposal of surface water" to comply with the requirements of the planning authority for such works and again ensures that the mitigation measures put in place meet the planning authority requirements. These conditions are expressly intended to protect the environment and to prevent pollution.

249. Condition 13 is expressly directed at "maintaining water quality" during the construction stage, and requires that "[c]onstruction-stage plans and particulars of the proposed drainage work shall be submitted to, and agreed in writing with, the planning authority" and other related matters.

250. Condition 16 is also a highly relevant in this context in that it requires a "Construction-Stage Ecology Management Plan" to be submitted to, and agreed in writing with, the planning authority prior to commencement of the development. This is to include details of pre- and post-construction fauna surveys (carried out following consultation with the NPWS) and details of the sequencing of construction and removal of vegetation, again following consultation with the NPWS and IFI.

251. Condition 17 in the view of the Court also contains an important mitigation measure, albeit that this appears to be a condition of a standard type requiring that a Construction Management Plan be submitted to, and agreed in writing with, the planning authority prior to commencement of the development and that it relates primarily to construction practices. Condition 17(k), on its face, imposes a further mitigation measure that protects the SAC. In the view of the Court, it superimposes on the other mitigation measures, and in particular the numerical limits on total suspended solids, a requirement that no silt whatsoever is carried from the development site in surface water. This may in practice be a very onerous requirement, indeed it is possible that it is such a stringent requirement that Coillte may not be able to comply with it. Theoretically therefore, it may be that Coillte will be unable to carry out the proposed development pursuant to the permission granted by the Board. That however is not the concern of the Court. Mr. Devlin SC argued that this was a mitigation measure which had never been identified and in respect of which there could not have been any proper analysis or evaluation. It is true that it had not been previously identified as a possible mitigation measure but it does form part of the Board's decision and AA which in itself is expressed to be subject to "the implementation of the identified mitigation measures". On p. 4 of its decision, the Board expressly refers to mitigation measures "including control of sediment". In any case, it is difficult to see what further evaluation is required because condition 17(k) is self explanatory and is an absolute and apparently additional prohibition on preventing silt or other pollutants entering the watercourse. It is also notable that the condition is buttressed by the requirement that:-

> "[p]rior to the commencement of construction, proposals for the environmental monitoring of construction works on site by an environmental scientist or equivalent professional, including the monitoring of the implementation of construction-stage mitigation measures, and illustrating compliance with the requirements set out above, shall be submitted to, and agreed in writing with, the planning authority, together with associated reporting requirements."

252. With regard to the argument that the Board's decision is flawed because it leaves over to subsequent agreement between the developer and the local authority (in consultation with others in certain instances) certain aspects of the mitigation measures, the Court has carefully considered the decision in *Boland v. An Bord Pleanála* [1996] 3 IR 435. The permission in that case was granted subject to a number of conditions which required the Minister for Marine (the Developer) to agree matters with the planning authority including plans for the management of ferry traffic. In the Supreme Court, Hamilton CJ summarised with approval a passage from Murphy J in *Houlihan v. An Bord Pleanála* (unreported, High Court, Murphy J, 4th October, 1993) where he had expressed the view that:-

> "(a) some degree of flexibility must be left to any developer who is hoping to engage in a complex enterprise;
>
> (b) the extent to which flexibility or uncertainty is permissible in a planning permission is largely a matter of degree;
>
> (c) technical matters or matters of detail could be left to the agreement of the planning authority and the developer without invalidating the statutory decision of the Board;
>
> d) the Board had the right to delegate to the planning authority to agree with the developer the revisions of the lay-out consequent upon the re-siting of the boundary;
>
> (e) to give a power by way of delegation from the Board to approve all or any route for the effluent discharge main

provided only that it is in an easterly direction constituted an improper abdication by the Board of its responsibilities in the particular circumstances of the case and that he would have no difficulty in upholding the condition if the condition imposed by the Board had prescribed that the main should be rerouted along a wide but defined pathway on a particular line to be selected with the approval of the planning authority."

253. Hamilton CJ at p. 466 then set out the criteria that would govern whether a matter could be left to agreement subsequent to the decision in the following terms:-

> "In imposing a condition that a matter be left to be agreed between the developer and the planning authority, the Board is entitled to have regard to:
>
> (a) the desirability of leaving to a developer who is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise;
>
> (b) the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience;
>
> (c) the impracticability of imposing detailed conditions having regard to the nature of the development;
>
> (d) the functions and responsibilities of the planning authority;
>
> (e) whether the matters essentially are concerned with off-site problems and do not affect the subject lands;
>
> (f) whether the enforcement of such conditions require monitoring or supervision."

254. In the *Boland* case, the Supreme Court decided that the matters stipulated in the conditions were essentially technical matters or matters of detail and that the respondent had not improperly abdicated its statutory duties to the planning authorities.

255. Blayney J who agreed with the Chief Justice added another criterion which seemed to him to be relevant. At p. 472 he said:-

> "It is this: could any member of the public have reasonable grounds for objecting to the work to be carried out pursuant to the condition, having regard to the precise nature of the instructions in regard to it laid down by the Board, and having regard to the fact that the details of the work have to be agreed by the planning authority?"

256. This decision of course did not relate to an AA. It must be accepted that the nature of an AA is different to the normal planning decision in respect of which the local authority or the Board retains a discretion to grant or refuse permission. This is notwithstanding that the proposed development may not accord with good planning and development in all respects or may indeed contravene County Development Plans. In respect of an AA, the potential adverse effects on the integrity of the European Site must be properly described, examined and evaluated. This includes the mitigation measures. However, the point made by the Supreme Court in Boland is that in complex enterprises there will be technical matters and matters of detail which can be left to subsequent agreement between the developer and a local authority and in the Court's view this applies also to a development which requires an AA. This is emphasised when one considers the extent of the suite of mitigation measures that is proposed and the level of detail in the documentation of RPS and Coillte. It is also important to note that, in so far as details have been left to further agreement, this has to be reduced to writing and in certain instances requires prior consultation with the NPWS and/or IFI.

257. Furthermore, the applicants have not been able to point to any particular aspect left over to subsequent agreement which could be regarded as central or of such importance or magnitude that it would be an abdication of the Board's functions under the PDA 2000. The Court takes the view that the matters that have been left over are either technical matters or matters of detail. It is further of the view that to require, in the case of a proposed development of this sort, that all details of design and implementation down to the last drain, be submitted at the planning or pre-decision stage would be wholly impracticable. It would be to place an additional and unreasonable burden in terms of time and expense on every developer involved in any proposal, however large or small. It would lead to a proliferation of information and detailed design documentation that, in most moderate to large size developments, would be unmanageable. Thus, the Court's view is that it was entirely reasonable in this instance for the Board to leave over for further agreement matters such as the detail of the size and position of proposed drains and settling ponds and the type of bunding and filtration devices that might be used in order to comply with the conditions imposed. This finding should not be taken as applying the criteria established in the *Boland* case to all AAs carried out by planning authorities or the Board. Rather, there are sufficient parallels to allow some analogy to be drawn between the approach in that case and the proper approach to mitigation measures conditioned in a planning proposal requiring AA.

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258. The Board was entitled to determine, as it did, that it had information before it (including the NIS and EIS) sufficient to carry out an AA. There were no significant lacunae and in this regard the applicants are not entitled to assert in this case that the information with regard to the grid connection was deficient.

259. In carrying out the AA, the Board was entitled to approve the development once satisfied that it would not adversely affect the integrity of the River Barrow and Nore SAC and specifically the habitat of the FPM/NFPM and those species. The Board was so satisfied.

260. The Board was not required to be satisfied that the development would have a 'positive' or 'improving' or 'restorative' effect on the mussels or their habitat (i.e. in line with the NPWS objective of "restoration to a favourable conservation status"), nor was it obliged to impose conditions requiring 'restoration'.

261. The suite of mitigation measures contained within the development proposals and the conditions form an integral part of the proposed development. They were sufficiently specific for the Board to carry out the AA and they were properly considered by the Board as part of the AA.

262. There was ample evidence before the Board that the mitigation measures would protect the integrity of the SAC.

263. The Court rejects the submission that the Board failed to carry out the AA in the light of 'the best scientific knowledge' available. The Board considered the best scientific evidence was contained within the NPWS conservation objectives document, the Forestry

Service document from 2011 and the hydrological evidence contained in the EIS and appeal submissions which was informed by the RPS hydrologists.

264. Even though insignificant or transient effects on the SAC might not be totally eliminated by the mitigation measures, provided the integrity of the site as such is not adversely affected the planning authority/the Board is entitled to approve the development.

265. The Board was entitled to leave over to subsequent agreement between Coillte and the local authority, in consultation as required with other state agencies, technical matters or matters of detail, including the details of mitigation measures. The matters left over in the conditions for such agreement do relate to detail or technical matters and were properly left over.

266. Accordingly, the Board carried out a proper AA which 'engaged' with all observations and included sufficient findings, examination and analysis. Their determination on the AA was properly and clearly set out in the Board's decision.

267. The Applicants accordingly fail on the grounds under consideration in this section of my judgment.

Ground (6) – Contravention of Development Plan
268. Ground (6) reads as follows:-

> "The respondent failed to have regard for the decision to refuse permission for the development by Laois County Council. The Council found that the proposed development would contravene development objective NH13/001 of the Laois County Development Plan 2011-2017. Pursuant to section 37(2) of the Planning and Development Act 2000 the Board may only grant permission where permission has been refused by reason of material contravention of a development plan in specified limited circumstances. The Board had no regard to this section or its applicability to the decision of the planning authority. The said decision is ultra vires, void and of no legal effect."

269. This ground was pursued in written legal submissions but not in legal argument at the hearing. It is not difficult to understand why when one considers the text of s. 37(2) of the PDA 2000:-

> "(a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.
>
> (b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—
>
> (i) the proposed development is of strategic or national importance,
>
> (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
>
> (iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
>
> (iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

270. In refusing to grant permission, the planning athority did not use the phrase "materially contravene" when outlining that the development would breach objective NH13/001 of the Laois County Development Plan 2011-2017– it merely refers to "contravene". This important distinction was recognised by O'Malley J in *Nee v. An Bord Pleanála* [2012] IEHC 532 – a case in which the Court came to the conclusion that the omission of the word "material" must have been a deliberate choice on the part of the Council. No evidence has been put before this Court to suggest that, by the wording it adopted, Laois County Council intended to refer to a material contravention.

271. It was suggested by the applicants in their written submission that, in light of the County Council's decision, the Board was advised to undertake an inquiry as to whether or not the council considered the contravention to be material and that the Board undertook no such inquiry.

272. This argument fails to take into account that the underlying reason for Laois County Council indicating contravention of its development plan was that it was not satisfied that a proper AA had been carried out. By contrast, the Board considered that it had sufficient information to carry out an AA and proceeded to carry out an AA, concluding that the proposed development would not adversely affect the integrity of the SAC or SPA. Having so concluded, the question of whether or not there was a contravention or material contravention of the County Development Plan on this basis no longer arose. As has been mentioned, s. 37(1)(b) provides that the effect of the Board's decision is "to annul the decision of the planning authority as from the time when it was given" i.e. it is a *de novo* jurisdiction. The effect of the Board's decision was to annul the decision of Laois County Council to the effect that there was no adequate AA. The question of contravention/material contravention therefore no longer arose for consideration or decision by the Board and section 37(2)(b) had no relevance. This ground therefore must fail.

Other Grounds
273. Ground (7) – this ground pleaded that the letter of 18th July, 2014 from the respondent to the applicants in response to their request for a copy of the record of the EIA and AA (inter alia) was inadequate and that no record of the assessment was furnished. As this Court has already found that the Board's decision itself contains sufficient record of the EIA and AA within its wording and by reference to the documents to which it refers, it follows that this ground cannot be made out.

274. Ground (9) – within this ground it is pleaded that the Board "also failed to hold an oral hearing into the appeal despite being requested to do so". This ground was not pursued in legal argument. Under s. 134(1) of the PDA 2000 "[t]he Board may, in its absolute discretion, hold an oral hearing of an appeal…". Under s. 134A(1) it can "in its absolute discretion" hold an oral hearing where it considers it "necessary or expedient for the purposes of making a determination in respect of any of its functions under this Act or

any other enactment". In this case a petition was presented on 18th November, 2013 by a large number of persons opposed to the proposed development requesting an oral hearing. The respondent gave a direction dated 3rd January, 2014 simply stating:-

> "The submissions on this file were considered at a Board meeting held on 2nd January, 2014.
>
> The Board decided that an Oral Hearing should not be held."

275. Accordingly, the respondent exercised its statutory discretion not to hold an oral hearing. No more detailed ground or legal argument was presented to this Court to suggest that that decision was in some way flawed or should be set aside. Accordingly, this ground also must fail. It may however be commented that such were the concerns of local people that a large number of them signed this petition seeking a hearing. It is apparent from the papers considered by the respondent on this appeal, the observations and submissions made both in respect of the initial application and on the appeal that local residents had many concerns about the proposed development. Given the nature and scale of the wind farm this is not surprising. While respecting the Board's right to determine in its absolute discretion that an oral hearing should not be held, it is unfortunate that no reasons were given for this preliminary decision. However, whether there was any basis for challenging that decision to refuse an oral hearing on the basis that no reasons were given does not arise in this case.

276. Grounds (11) and (12) ¬– these grounds relate to an erroneous reference in condition 1 of the respondent's decision to revised plans and particulars submitted to the Board "on the 9th day of August, 2013". It is common case that this was the date of the application by Coillte to Laois County Council for the planning permission and not the date of lodgement of any amended, revised plans or particulars. This ground was not pursued presumably because it is accepted by the applicants that under s. 146(A) of the PDA 2000, the planning authority or the Board, as the case may be, is empowered to amend a planning permission granted by it inter alia for the purposes of correcting any clerical error therein.

277. Ground (13) – this ground challenged the leaving over in the conditions of key matters to be agreed with the planning authority post consent. This has already been dealt with in sections of this judgment dealing with the EIA and AA.

Conclusion

278. The applicants fail on all grounds and accordingly this application is dismissed.