Neutral Citation: [2015] IEHC 572

THE HIGH COURT

COMMERCIAL

[2014 No. 579 JR]

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

BETWEEN

EDWARD BUCKLEY

AND

EDEL GRACE

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

ECOPOWER DEVELOPMENTS LIMITED

NOTICE PARTY

AND

DEPARTMENT OF ARTS HERITAGE AND THE GAELTACHT (DAHG)

NOTICE PARTY

JUDGMENT of Mr Justice CREGAN delivered the 29th day of July, 2015.

Introduction
1. The Applicants in this case are seeking to quash a decision of An Bord Pleanála made on 12th August, 2014 to grant a ten year planning permission to Ecopower Developments Ltd to build 22 wind turbines in Co. Tipperary.

Procedural history
2. The Applicants issued their statement required to ground the application for judicial review on 6th October, 2014 and obtained leave to apply by way of judicial review. The statements of opposition of the Respondent and Notice Party were filed on 19th December, 2014. In addition, numerous affidavits with voluminous exhibits have been filed by the Applicants, the Respondent and the first Notice Party to these proceedings.

Outline chronology of events
3. A broad outline of the chronology of main events is set out below as follows:

16th December 2012 – The first Applicant, Edward Buckley signed a planning application consent letter.

7th January 2013 – The Developer submitted an application to the Planning Authority which included an Environmental Impact Statement and a Natura Impact Statement.

6th February 2013 – Carmel Buckley, the wife of the first named Applicant, lodged an objection. This was received by the Planning Authority on 8th February, 2013.

28th February 2013 – Tipperary County Council, the planning authority, made a request for further information from the developer.

5th July 2013 – The Developer sought an extension of time to respond to the request for further information.

11th July 2013 – The Planning Authority agreed to extend time until 27th November, 2013.

27th November 2013 – The Developer made its response to this request for further information. As significant further information was submitted, a further planning notice was placed in the Tipperary Star. This notice stated that any further additional observations should be made within five weeks.

7th January 2014 – Edward Buckley, the first named Applicant, notified the Planning Authority of the withdrawal of his consent. This was received by the Planning Authority on 8th January, 2014.

9th January 2014 – The Planning Authority acknowledged receipt of Mr Buckley's submission.

27th January 2014 – The Planning Authority decided to grant planning permission. Mr Buckley's withdrawal of consent was also noted.

19th February 2014 – Edward and Carmel Buckley submit an appeal to An Bord Pleanála.

26th March 2014 – The Developer, Ecopower Developments Ltd, responds to submissions made by third parties on appeal.

22nd April 2014 – Site inspection by An Bord Pleanála (ABP) Inspector.

20th May 2014 – Further site inspection by ABP inspector.

21st May 2014 – Developer submits a map including "revised lands under control of Applicant outlined in blue".

4th June 2014 – DAHG respond to appeal.

16th June 2014 – An Bord Pleanála Inspector's Report.

13th July 2014 – The Board gave further consideration to the submissions, and the Inspector's Report, and decided to grant permission.

12th August 2014 – An Bord Pleanála granted permission.

The issues in these proceedings

4. There are three main legal issues which the Applicants have raised in these proceedings. These are as follows:

1. **The "withdrawal of consent" issue**

The first issue is that the Applicants submit that the Respondent has acted ultra vires and contrary to s.34 of the Planning and Development Act 2000 (PDA 2000) and Article 22 (2) (g) of the Planning and Development Regulations 2001 – 2004 in granting consent to the first named Notice Party for the proposed development, in circumstances where the written consent of the first named Applicant was withdrawn prior to the decision by the Respondent. (In the alternative, the Applicants are seeking a declaration that the decision of the Respondent is void, to the extent that it grants permission to the first named Notice Party for development on lands owned by the first named Applicant in County Tipperary).

2. **The failure to carry out an Environmental Impact Assessment**

The second issue is that the Applicants submit that An Bord Pleanála ("The Board") has failed to carry out a proper Environmental Impact Assessment ("EIA") because, in its decision, it only "noted" the Inspector's Report but did not "adopt" it.

3. **The failure to carry out an adequate assessment**

The third argument is that the Respondent erred in law and breached Article 6 of Council Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") by failing to carry out an appropriate or adequate assessment in accordance with Article 6 of the Habitats Directive and s.177V in part XAB of the PDA 2000. In particular it is claimed that the Respondent failed to include an examination, analysis and evaluation of the potential impact of the proposed development on the conservation objectives of the relevant European sites.

The withdrawal of consent issue

5. The first issue which the Applicants raise is in relation to the withdrawal of consent by Mr Buckley before the original planning application was determined by North Tipperary County Council. The Applicants submit that the Respondent did not have jurisdiction to determine the planning application on appeal, in circumstances where the necessary land-owner consent was withdrawn before (a) the original decision by the planning authority was made or (b) before the matter was determined by the Board.

Relevant legal provisions

6. Section 34 of the Planning and Development Act 2000 (as amended) provides as follows:

"34.—(1) Where—

(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and

(b) all requirements of the regulations are complied with,

the authority may decide to grant the permission subject to or without conditions, or to refuse it."

7. Section 34 (3) provides that:

"A planning authority shall, when considering an application for permission under this section, have regard to—

(a) in addition to the application itself, any information relating to the application furnished to it by the Applicant in accordance with the permission regulations,

(b) any written submissions or observations concerning the proposed development made to it in accordance with the permission regulations by persons or bodies other than the applicant."

8. Section 34 (4) of the PDA provides as follows:

"Conditions under subsection (1) may, without prejudice to the generality of that subsection, include all or any of the following—

(a) conditions for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant, if the imposition of such conditions appears to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission…"

9. The Planning and Development Regulations 2001-2004 are made pursuant to s. 33 of the Planning and Development Act 2000. Article 22 provides that:

"A planning application under section 34 of the Act shall be in the form set out at Form No. 2 of Schedule 3, or a form substantially to the like effect."

10. Article 22 (2) (g) provides that

"A planning application shall be accompanied by:

(g) Where the applicant is not the legal owner of the land or structure concerned, the written consent of the owner to make the application."

Affidavit evidence in relation to the withdrawal of consent issue

Affidavit of Edward Buckley sworn on 1st October 2014

11. Mr Buckley swore an affidavit on 1st October, 2014. At para. 13 of his affidavit, he states, that when Ecopower proposed the application for the development, he gave his consent to Ecopower, as the Applicant, for planning permission for the use of his lands in County Tipperary. This consent was given by way of a formal written letter of consent dated 16th December, 2012.

12. This letter of consent stated as follows:

"Upperchurch Wind Farm

Planning application consent letter

I, Edward Buckley of Gortnada, Upperchurch, Thurles, County Tipperary agree to a planning application being made by Ecopower Developments Ltd of Sion Road Kilkenny for a wind farm development on and/or adjacent to my lands contained in Folio TY35793 at Knocknameena Upper Church County Tipperary.

Dated the 16th December 2012

Signed Ned Buckley."

13. This letter was date stamped "Received, North Tipperary Council 7th January 2013" .

14. Mr Buckley then states at para. 14 of his affidavit

"14. I say and believe that [before] the matter was determined by [North Tipperary County Council] I withdrew my consent once the full scale and scope of what was being proposed by the first named Notice Party became apparent to me. In particular, I objected to the fact that the first named Notice Party proposed to lay an access road across my lands to facilitate construction access from the R503 route from Thurles to Graniera as well as access to the cluster of turbines which includes turbine number 16.

15. Accordingly I submitted a further letter to North Tipperary County Council which was the relevant planning authority on [7th January 2014] indicating that I was no longer consenting to the use of my lands by the first named Notice Party for the proposed access road to facilitate the development. I say and believe that at all material times, the Respondent had the relevant correspondence on the planning file and was aware, or should have been aware, that the first named Notice Party did not have the consent of the relevant land owners which it required to facilitate the proposed development and, in particular, that the application for the development proposed by the first named Notice Party did not have the benefit of the necessary letters of consent including that of your deponents. In addition, a letter was submitted by my wife Carmel Buckley, on 7th January 2014 objecting to the proposed development which was acknowledged by North Tipperary County Council. Furthermore submission was made to the Respondent on 19th February by or on behalf of your deponent confirming that consent had been withdrawn. I beg to refer to copies of the letters and correspondence exhibited at Tab 6 of the booklet of exhibits."

15. The letter of withdrawal from Mr Buckley to which he refers is dated 7th January, 2014 and it states as follows

"Dear Sir/Madam

I, Edward Buckley, wish to withdraw permission granted to Ecopower Developments Ltd for wind farm development on my lands at Knocknameena Upperchurch Thurles County Tipperary.

As it has come to my attention that a roadway and drainage developments are planned without consultation or permission from me.

Thanking you

Ned Buckley".

16. This letter is date stamped as having been received by North Tipperary County Council on 8th January, 2014.

17. Mr Buckley says that despite the fact that Ecopower was aware, or should have been aware, that Mr Buckley was no longer granting consent for the use of his lands to facilitate the proposed development, and that the letter withdrawing consent had been lodged with North Tipperary County Council and was available on the planning file, North Tipperary County Council nevertheless proceeded to grant planning permission for the proposed development.

18. Mr Buckley also complains that, despite the fact that he had withdrawn consent, and that this consent had been lodged and was available on the planning file, An Bord Pleanála also proceeded to grant permission for the proposed development.

19. In those circumstances, he says that the Board acted ultra vires and contrary to s. 34 of the PDA and Article 22 (2) (g) of the PD Regulations 2001-2014. He also states, that if the access road cannot proceed, and is required to facilitate the proposed development, then the Appropriate Assessment and Environmental Impact Assessment which the Respondent purported to have carried out are fundamentally flawed as the application and its subsequent assessment were predicated on an erroneous application and supporting documents.

20. Mr Buckley swore a supplemental affidavit on 11th November, 2014 to correct one of the paragraphs of his original affidavit. The essential point he makes in this supplemental affidavit is that, having regard to the planning application and the maps submitted with the application, the proposed development and the decision of the Board are fundamentally compromised "given the spatial relationship between the access road proposed by the first named Notice Party which I say cannot proceed and turbine number 15". The essential point made by Mr Buckley is this: according to the maps submitted by the developer to the County Council, and also to the Board, there is an access road and three drains which are to be constructed between turbine number 15 and turbine number 16; This access road and the three drains pass through a part of Mr Buckley's lands; Mr Buckley says he was not aware of the proposal that a road would be built through his lands at the time he gave his consent; He says he is now withdrawing his consent; therefore he says there is no consent to the access road being shown in the maps. Therefore the planning application as submitted, and as considered by Tipperary County Council and by the Board is different to the one which he gave his consent to. He says therefore, that as a matter of fact, he is not giving his consent to any application which would allow any road, or drains, to be constructed on his land. This, he says, has the implication that there can be no access road connecting turbine 15 and turbine 16 and moreover there can not be any drains which pass over this part of his lands or any part of his lands. Thus he says that the application and the subsequent EIA and Appropriate Assessment which the Respondent carried out are fundamentally flawed.

Replying affidavit of Chris Clarke for the Board

21. Mr Chris Clarke, secretary of An Bord Pleanála, swore a replying affidavit on 19th December 2014. Mr Clarke's response to the letter of withdrawal is set out at paras. 13 and 14 of his affidavit. His response is to the effect that, the fact that Mr Buckley was no longer giving his consent for the construction of part of an access road does not, and did not, affect the validity of the application for planning permission that had been made one year earlier on 7th January, 2013 and does not affect the validity of the planning permission granted by the Board on 12th August, 2014. He says that the consent of a landowner to the making of a planning application does not of itself commit the landowner to consenting to, or facilitating, the proposed development, nor does it entitle the developer to use the landowner's land for the purpose of the proposed development. He says that where, after the permission has been granted, and the parties know the final details of the permitted development, a developer cannot reach agreement as regards the use of lands with a landowner who consented to the making of a planning application, that developer has the option of seeking to modify the permission, or to abandon some or all of the development. However the permission remains valid for its normal duration even if, for practical or legal reasons, the developer cannot immediately build on foot of it.

22. He also states at paras. 24 and 25 of his affidavit that, in his view, when the planning application was made, it complied with the legal requirements of Article 22 (2) (g) and was therefore a valid application. He says that the subsequent withdrawal of consent at a later stage does not render it invalid or mean that the planning authority, or the Board, on appeal, cannot proceed to determine the application. However, he says that a change of mind by an affected landowner at any stage, including after the grant of permission, can of course have an impact on the extent to which the permission can be implemented. He states "however the validity of a permission and the extent to which it can be legally implemented are two separate issues".

Affidavits filed on behalf of Ecopower

23. A number of affidavits were also sworn on behalf of Ecopower, the developer and first Notice Party. One such affidavit was an affidavit of Jack O'Leary sworn on 19th December, 2014. Mr O'Leary is a chartered engineer and a director of Malachy Walsh and Partners Engineers who were engaged by Ecopower Developments Ltd to assist in the preparation of the planning application for the wind farm development. He states at para. 33 of his affidavit

> *"Mr Buckley's assertions that the proposed development cannot be constructed if his lands are not available to Ecopower are simply incorrect. The planning application provided for a road linking turbine T15 and T16 of which approximately 75 metres was to be constructed on Mr Buckley's lands along with associated clean water drain and dirty water drain on either side of the road and a clean water cross - drain beneath the road. No turbines were proposed on Mr Buckley's lands and, contrary to what Mr Buckley avers to at para. 19 of his affidavit as amended by his supplemental affidavit, no settlement pond was proposed on his lands."*

24. He also states at para. 4 of his affidavit, that he believes that the proposed development can be built without entering onto Mr Buckley's land and that it is not necessary to construct the road linking turbine T15 and T16. He also says that he was responsible for supervising the design of the drainage system proposed as part of the planning application and that it is his opinion that "the drainage system will not be affected by the fact that the road and associated drains will not be built linking turbine T16 and T15." He said that the drainage system designed as part of the proposed development provided that run - off from the work areas would be isolated from the clean catchment run - off by means of a series of open drains that will be constructed on the downhill side of the works, and that these drains will be directed to settlement ponds that will be constructed throughout the site, downhill from the work areas. The ponds have been designed to a modular size which is not dependant on being interlinked by the road drainage. Where roads do not exist, there is no requirement for drainage.

25. He also says, at para. 6 of his affidavit, that the separate settlement ponds which will serve T15 and T16 are located outside Mr Buckley's lands and can be built in accordance with the grant of planning permission irrespective of whether Mr Buckley ultimately consents to developments on his lands. He also states:

> *"Furthermore if the road linking T16 and T15 is not constructed, there is no requirement to construct the associated clean water drain, dirty water drain and clean water cross drain which run along and under this road. These drains were only provided to cater for the runoff associated with the construction of the road. The drainage system will not in any way be compromised by the exclusion of Mr Buckley's lands from the scheme".*

26. Pat Brett, the managing director of Ecopower, also swore an affidavit on 19th December, 2014. At para. 6 he accepts that Ecopower are not the owners of the land to which the planning application relates and says that this fact is clearly stated in the planning application form. The site area is approximately 52 hectares and the land is in fact owned by 40 different landowners from whom Ecopower had obtained the necessary consents to make the planning application in respect of their lands. He says at para. 7 of his affidavit:

> *"One such landowner is the first named Applicant Mr Edward Buckley. Prior to the lodging of the planning application, Mr Buckley had given his consent for his lands to be included in the planning application and a copy of this consent is exhibited at Tab 5 to the affidavit of Mr Buckley. I say and believe that all the necessary consents had been obtained from all of the relevant landowners prior to the lodging of the planning application.Accordingly I say and am advised that the planning application was a valid application and complied with the requirements of Article 22 of the Planning and Development Regulations 2001 (as Amended)."*

27. At para. 11 of his affidavit he says:

> *"I beg to refer to paras. 14 to 19 of the affidavit of Mr Buckley sworn on 1st October 2014 and to Mr Buckley's supplemental affidavit in which he deals with the withdrawal of his permission for wind farm development on his lands. I say and believe that the account which Mr Buckley presents is not in fact accurate. As stated previously, Mr Buckley had given his consent for his lands to be included in the planning application. The planning application provided for a road of approximately 75 metres in length to be constructed on his lands along with associated clean water drain and dirty water drain on either side of the road and a clean water cross drain beneath the road. No turbines were proposed on Mr Buckley's land and contrary to what Mr Buckley avers at para. 19 of his affidavit as amended by his supplemental affidavit, no settlement pond was proposed on his land."*

28. He also states at para. 12 that, at no time did Mr Buckley advise Ecopower that he had withdrawn his agreement for development on his lands, and that Mr Brett first became aware of it when he read the files on Tipperary County Council website in late January/early February 2014. He said that the appearance of the letter was unexpected as he had not heard anything directly from Mr Buckley in relation to this. He also said that he decided he would wait for Mr Buckley, until he heard from him, before he made any changes to the proposed development. He says *"I was aware that even if planning permission was granted Ecopower would still have to enter into a legal agreement with Mr Buckley in order to build a road on his land. In fact Mr Buckley never contacted me to raise any issue in relation to his earlier permission to have his lands included in the planning application."*

29. He also states in para. 13 of his affidavit that Ecopower was aware, from the appeal lodged by Mr Buckley with An Bord Pleanála, that there was an issue with Mr Buckley's consent but it was unclear as to whether Mr Buckley had in fact withdrawn his consent, "not having heard from him". He repeats in para. 14 that he is advised that the planning application lodged by Ecopower was valid and complied with Article 22 of the Planning and Development Regulations 2001. He also says that the County Council is only required to validate the planning application when it is made to them initially and that the planning authority is not required to revisit the validity of the planning application during its consideration of the application. Thus, he says that he believes and is advised, that Mr Buckley's purported withdrawal of consent after the planning application was lodged does not render the planning application invalid, but he says it will have consequences for the implementation of the planning permission in respect of Mr Buckley's lands.

30. He also states that he believes the proposed development can be built without entering onto Mr Buckley's lands at all and that it is not necessary to build the road linking turbine T15 and T16 (approximately 75 metres) which was proposed to be constructed on Mr Buckley's lands. He says that T16 can be accessed from the proposed road which will also serve turbine 14. Likewise turbine 15 can be accessed from the road proposed to be constructed between T13 and T15 and neither of these access roads traverse Mr Buckley's lands. He also says that if the road linking turbine T15 and T16 is not constructed then there is no requirement to construct the associated clean water drain, dirty water drain and clean water cross drain which run along and under this road and he refers to the affidavit of Jack O'Leary. Thus he says:

> *"Accordingly the proposed development can be constructed without recourse to Mr Buckley's lands and without his consent. If the courts were to hold that the first named Applicant's withdrawal of permission to development being carried out on his lands after the application had been validated has any legal effect, I say and believe and am advised that the appropriate order to make is in terms as sought by the Applicant at para. 3 of the statement of grounds namely a declaration that the decision of the Board is void insofar as and to the extent that it grants permission to Ecopower for development on lands owned by Mr Buckley."*

Replying affidavit of Edward Buckley

31. Mr Buckley swore a replying affidavit on 26th January, 2015. At paragraph 9 of his affidavit he says that the validity of the planning application must be determined when the decision to grant or refuse planning permission was ultimately made or in the alternative, when the validity of the planning application was considered by the Respondent.

32. He says that it cannot be the case that the application is deemed to be valid when the application was first received but that this administrative process cannot be revisited when the decision is made by the planning authority, or on appeal, by An Bord Pleanála. He submitted that, as is clearly seen from the chronology, his consent was withdrawn before the Planning Authority even made its determination.

33. At para.10 of his affidavit he says that, in any event, An Bord Pleanála was required to determine the matter de novo on the basis of the entire planning file and the Inspector's Reports. This would mean, given that his letter withdrawing consent was on the planning file, that An Bord Pleanála had actual knowledge of it and should have taken it into account. He also says that this leads to an absurd situation where a decision maker on a planning application closes his mind to the reality that the planning application was no longer valid at the time the decision was made.

34. Mr Buckley also states at para. 12 of his affidavit as follows:

> *"The circumstances of the withdrawal of the consent are that initially when Mr Brett who is the managing director of the first named Notice Party and the Applicant for permission for the proposed development, initially approached me in or about April or May 2012 I gave my consent on the basis that the first named Notice Party simply required permission to use the airspace above my lands for the proposed development and that this agreement was for 'over sail' on your deponent's land. I subsequently was informed on or about 16th December 2012 at a public meeting in Upperchurch that the proposed development involved the construction of an access road through my lands to which I objected in person*

to Pat Brett. I understood that any consent that was given was only in relation to the airspace and not for any other ancillary works which directly effected or impinged upon my lands. Pat Brett was aware of my objections following that meeting.

13. I signed the original letter of consent on 16th September 2012 on the basis that this only related to the over - sail required by the first named Notice Party and this was the letter of consent which was submitted by or on behalf of the first named Notice Party with its application on 7th January 2013. I accept that I was aware that there was an alternative map in existence when I signed the letter of consent and that this differed from the original map which I had been shown by Mr Brett but I understood that my concerns would be given due regard by the first named Notice Party. However ultimately I withdrew my consent when it became apparent that the first named Notice Party proposed to construct the access road to which I had not consented." (Emphasis added).

35. He also says at para. 14:

"I say that the elements of the planning application which are proposed to be constructed on your deponent's lands cannot be severed from the entire planning application. The planning application is submitted on the basis that the proposed development will be constructed in accordance with the grant of planning permission and conditions attached thereto. If a fundamental aspect of that grant of planning permission is found to be void then I say that the application cannot proceed on the basis of the granting of planning permission which must be declared to be invalid and quashed."

36. At para. 16 he says as follows:

"I say and believe that by withdrawing my consent turbine number 15 will not be able to proceed. Furthermore the access road linking turbine 15 and 16 which traverses my land cannot proceed in the absence of my consent…..I acknowledge that it is proposed that the access road will have a drainage channel on other side of its perimeter and that a settling pond would be located outside my lands but into which runoff would flow from my lands."

37. He says at para. 17:

"I say that by withdrawing my consent turbine number 15 cannot proceed and turbine number 16 is seriously compromised as it is currently proposed. Any consent which was originally granted to the Notice Party was in respect of the airspace over my lands as well as the access road across my lands. Having withdrawn my consent prior to the determination by the planning authority I say that this fundamentally affects turbine number 15 which will require my consent for the over sail over my lands.

In relation to paragraph 4 of the affidavit of Jack O'Leary, if the access road between turbine 15 and turbine 16 is to be removed then it is incumbent on the first named Notice Party to propose and identify alternative access routes." (Emphasis added).

Replying affidavit of Pat Brett

38. In turn, Mr Brett for Ecopower, swore a replying affidavit in which he stated that "the over sail area covered by wind turbines is the land area above which the blades pass when they are rotating. This means that the over sail area is a circle around the turbine tower with a diameter equal to the rotor diameter. In my discussions with Mr Buckley I don't believe that I ever mentioned over sailing of his lands and I believe that Mr Buckley is not correct in stating that the consent he gave was in respect of over sail. Mr Buckley gave consent to allow his lands to be included in the planning application site."

39. However Mr Brett also states the following "I did indicate to Mr Buckley that it was necessary for the development to comply with the requirements of the North Tipperary County Development Plan and paragraph 10.13.2 therein which provides that the planning authority will require new wind farm developments to comply with stated exclusion and separation zones……the policy requires that the setback distances between the turbines and the boundary, which is the boundary of the land under the control of the developer is to be 1.5 times the turbine height. In practice this means that the developer of a wind farm must enter into agreement with the landowners within an area consisting of 1.5 times the turbine height. This was the case with Mr Buckley. Turbine T15 is located approximately 52 metres from the boundary with Mr Buckley's lands and accordingly in order to illustrate compliance with requirements at para. 10.13.2 Mr Buckley's consent was required".

40. At para. 5 of his affidavit Mr Brett states *"If Mr Buckley's objection to development on his lands had been made clear to me I would have omitted this section of roadway from the planning application particularly as* (as I have outlined previously) *the development can be carried out without any alteration even when omitting this section of roadway."* (Emphasis added).

41. He says at para. 6:

"I did meet with Mr Buckley in his house on or about 16th December 2012. At this meeting it was agreed between the parties that Ecopower would make an annual payment to Mr Buckley in return for him allowing his land to be included in the planning application."

42. He also says at para. 7:

"Therefore I understood that when Mr Buckley signed the planning consent form for his lands that he was also agreeable to some form of access road from Ms McLoughlin's lands to his lands. I considered the meeting I had with Mr Buckley to be very constructive and it was surprising that Mrs Buckley subsequently lodged an objection with the planning authority to the project albeit without any mention of the proposed roadway on the lands."

43. He also states at para. 8:

"I reiterate that the proposed development can be built without entering onto Mr Buckley's land. The 75 metres of roadway that was proposed on Mr Buckley's land is not a fundamental aspect of the project. There is no requirement to modify the proposed development or to facilitate an alternative construction and access road as alleged by Mr Buckley… It is evident from this drawing that turbine T16 can be accessed from the proposed road which would also serve turbine T14. Turbine T15 can be accessed from the road proposed to be constructed between turbine T13 and T15. Both of

these roads were proposed and assessed as part of the planning process and no in view infrastructure over and above that for which planning has been granted will be required. All of the proposed roads were designed to carry construction traffic for multiple turbines and no modification would be required to any of the proposed roadways as a result of the omission of the 75 metres stretch from Mr Buckley's lands. As there is no requirement to facilitate an alternative construction of access route, other than that which has already been assessed by the board as part of the within planning application, the conclusions of the AA and the EIA remain valid."(Emphasis added).

44. At para. 9 he says:

"It would appear from para. 16 and 17 of Mr Buckley's replying affidavit that he maintains that turbine number 15 will not be able to proceed as the turbine will over sail his lands and he has withdrawn his consent for this. He further alleges at para. 19 that the development will affect his lands. This is simply not correct. No turbines or settlement ponds are proposed for his lands. Turbine T15 is not located on Mr Buckley's land nor does it physically over sail Mr Buckley's land and no legal agreement is required with Mr Buckley to install T15."(Emphasis added).

45. One issue which arose during the course of the hearing is that in the replying affidavit of Mr. Buckley, he stated at para. 17:

"I say that by withdrawing my consent, turbine number 15 cannot proceed and turbine number 16 is seriously compromised as it is currently proposed. Any consent which was originally granted to the Notice Party was in respect of the airspace over my lands as well as the access road across my lands. Having withdrawn my consent prior to the termination by the planning authority, I say that this fundamentally affects turbine number 15 which will require my consent for the over sail over my lands."

46. During the course of the hearing an issue arose as to whether this averment in the affidavit was correct. Mr. Devlin S.C. for Mr. Buckley submitted to the court in his reply that this averment was unfortunately not correct because the phrase "as well as the access road across my lands" should not have been included in the affidavit and was included in error. I accept this clarification by Mr. Devlin S.C. on behalf of Mr. Buckley and I am dealing with the case on the basis that, as Mr. Devlin S.C. submitted, that phrase should not have been included in the affidavit and that therefore any consent which was originally granted by Mr. Buckley to the Notice Party was only in respect of the airspace over his lands. However Mr. Buckley still accepts that he signed the letter of consent to the making of the planning application.

Withdrawal of consent – legal analysis

47. The issue therefore which I have to decide on this aspect of the case is a net one. The issue is this: If an owner of land gives written consent to an applicant for planning permission and the applicant subsequently makes the application, if the landowner subsequently withdraws that consent, does that invalidate the planning application ab initio. If it does, then the planning authority had no jurisdiction to grant planning permission and the Board had no jurisdiction to grant planning permission either. If it does not, then the planning application remains valid and the subsequent withdrawal of consent has no legal effect on the planning application.

48. Mr. Devlin S.C. for the Applicants argues that it is clear from the statutory regulations and the case law that, in order for a planning application to be valid, there must be a consent from the landowner and that this consent must be valid and subsisting up until the date of the final decision taken by the Board.

49. Ms Butler S.C. and Mr. Mulcahy S.C. - for the Board and the developer respectively - submit that this is simply wrong as a matter of law, that it is completely to misunderstand s.22 (2) (g), that, if the Applicants were correct, this would create a "trap" for all developers and the Board (in that they would have to constantly ensure that all consents were still valid and subsisting up until the date of the grant of the planning permission,) that it would create a huge administrative burden for the Board and that this was not what the Legislature or the legislative scheme intended.

Statutory Interpretation

50. All parties however agree that it is a question of construction of Article 22 (2) (g). I turn therefore to consider this regulation.

51. Article 22 (2) provides as follows:

"A planning application referred to in sub-article (1) shall be accompanied by

(g) where the Applicant is not the legal owner of the land or structure concerned, the written consent of the owner to make the application" (Emphasis added).

52. Much of the submissions by all parties concentrated on the case law. However before I turn to a review of the case law I propose to deal with the basic question of statutory interpretation and the interpretation of Regulation 22 (2) (g).

53. It is, in my view, clear from the wording of Regulation 22 (2) (g) that what the owner is consenting to, is a consent to the Applicant "to make the application". The Regulation is clear on its face. There is no ambiguity as a matter of statutory interpretation. What is required is a consent "to make the application". It is not a consent to the actual grant of planning permission (and therefore a landowner could grant consent to an applicant to make an application for planning permission but then subsequently decide to oppose that planning application). Moreover it is not a consent to the developer to subsequently use the owner's land to carry out any development which might be granted by the planning permission.

54. Ms Butler S.C. for the Board submitted that it was necessary to distinguish between three different consents. These were

(1) a consent to the planning application simpliciter

(2) a consent to the substantive planning permission

(3) a consent to the implementation of that planning permission or the carrying out of that planning permission on one's lands.

55. Ms Butler S.C. submitted that, when it is seen that there are possible consents to three different issues, what Regulation 22 (2) (g) requires is written consent of the landowner to the Applicant "to make the application". The regulations do not require the written consent of the owner to the substantive planning decision sought or indeed to the subsequent development or implantation of the planning permission on the landowner's lands. Those are matters for another day. Thus, if Mr. Buckley did not consent or would not

consent, to a turbine on his lands (or any roads going through his lands) then he could not be forced to have this development on his lands just because planning permission was granted. It would then be a matter for the developer to agree, if possible, an arrangement with Mr. Buckley whereby the planning permission could be implemented - or in the alternative, to modify the scheme to remove any access roads or drains which might pass through Mr. Buckley's lands.

56. This analysis is helpful because it illustrates how limited the landowners consent needs to be to satisfy Regulation 22 (2) (g). It need only be a consent to the application – as is the case here.

57. Ms Butler S.C. also submitted that when one considered the consequences of the Applicant's argument, it was untenable. She submitted that in this case the development required the consent of 40 landowners. The planning application took 20 months. It was, therefore, entirely conceivable during this lengthy planning process that one or more of the landowners might sell their lands, or die during the process, or, if the land was held by a company, the company could be struck off. She submitted that it could not be the case that if any of these eventualities occurred, it might invalidate the entire planning application. In her view, that would be to misread the clear legislative intent of Regulation 22 (2) (g).

58. Ms Butler S.C. also submitted that there was nothing in the wording of the regulations which provided that if the consent was subsequently withdrawn, that the planning application was therefore invalid and that the whole process would start again. In her view, it was not appropriate for the court to add such words to the regulations, nor should it do so. That was a matter for the Executive or the Legislature. In my view, this submission is well- founded.

59. Ms Butler S.C. also submitted that, if the Applicants were correct, then the statutory scheme would place an extra and enormous administrative burden on the planning authorities, and the Board, to ensure that before they granted planning permission they would have to ensure that all of the consents of the landowners remained valid and subsisting. In her view, there was nothing in the regulations which warranted such an interpretation. That submission is also well- founded.

60. Ms Butler S.C. also submitted that Regulation 26 (3) and (4) provide specific instances of where a planning authority could regard a planning application as invalid - for example if any of the requirements of the relevant regulations have not been complied with. She submitted that the subsequent withdrawal of consent is not one such example and therefore the courts would, in effect, be adding a new requirement to the legislation. In my view, this submission is also well-founded.

61. Mr. Mulcahy S.C. for the Notice Party submitted that once a written consent had been given and once the application had been made, the hurdle had been jumped. It could not be unjumped. As he put it: "the bell had been rung, it could not be unrung".

62. In this case the consent was given on 16th December, 2012; the application for planning permission was submitted on 7th January, 2013 and the withdrawal of consent was dated 7th January, 2014 (i.e. a period of almost twelve months after the application was submitted). Counsel for the Board accepted that if the consent was given to the Applicant before the planning application was made but then withdrawn before the planning application was made, then there would be no valid consent to make the application. This, in my view, is correct as a matter of logic and as a matter of law. Conversely, Ms Butler S.C. argued that if a consent was given before an application was made, and then the application was made, the application was then valid (assuming it passed the validation required by the planning authority), and once it was deemed to be a "valid" application it could not then be rendered "invalid" by a withdrawal of consent, subsequent to the application having been made. In my view, this submission is correct as a matter of law.

63. Ms Butler S.C. submitted that Mr. Buckley's withdrawal of consent was, in fact, a withdrawal of any consent he might, or might not, give to the developer to implement any part of a planning permission over his lands. However that was a matter for the developer and Mr. Buckley. It was a matter for the developer to consider the withdrawal of consent to the implementation of the planning permission but that did not affect the validity of the planning application and therefore did not affect the jurisdiction of the Board to consider the matter.

64. Mr. Mulcahy S.C. submitted that the Applicants' proposition was entirely novel and there was no authority for it. Mr. Mulcahy S.C. also submitted that the Applicants' argument - when tested to the limits - would mean that the entire planning process could continue and a landowner could withdraw his or her consent right up until the very last day before the Board made a decision. In his view, that would be an absurd situation and one which was clearly not permitted by the regulations and could not be read into them.

65. In his submission, the precise consent which was required by s. 22 (2) (g) was fulfilled in this case.

66. Mr. Mulcahy S.C. also submitted that, in fact, when one looked closely at the withdrawal of consent letter of 7th January, 2014 by Mr. Buckley, it stated that Mr. Buckley wished to withdraw permission granted to Ecopower "for wind farm development on my lands". This, he submitted, was therefore not a withdrawal of consent to the "application" but rather a withdrawal of consent "for wind farm development on my lands". Whilst I understand the submission by Mr. Mulcahy, I do not believe that such letters should be interpreted as if they were contractual agreements or statutory instruments. I would therefore propose to interpret it in the manner most favourable to the Applicants. But, even if it is construed as a withdrawal of consent to the application, in my view it has come too late to invalidate the application.

67. Mr. Mulcahy S.C. also submitted that, if Mr. Buckley maintained the refusal of his consent, then the developer would have to deal with it. The developer however, had a number of options. In one view of the situation, the developer could regard it as an "Immaterial Deviation" as it was a minor part of the overall scheme. The scheme could proceed without a 75 metre road being constructed on Mr. Buckley's lands. In the alternative, even if it was not regarded as an "Immaterial Deviation" the developer could apply for a modification to the planning permission as is normal in such matters.

68. One of the arguments made by the Applicant was that, although he gave his consent to the planning application, he subsequently withdrew this consent once it became clear to him that the developer proposed to lay an access road across his lands which he said he had not been informed about before. Therefore he says that although he gave his written consent as a landowner to the Applicant "to make the application", it was to an application which did not include an access road across his lands.

69. This raises the issue of what happens if an Applicant such as Mr. Buckley is not fully aware of what the application is.

70. Ms Butler S.C. for the Board however, said that on the facts of this case that did not arise because in Mr. Buckley's second affidavit at para. 17, he stated categorically that "any consent which was originally granted to the Notice Party was in respect of the air space over my lands as well as the access road across my lands". However as stated above, Mr. Devlin S.C. in reply, said that that phrase "as well as the access road across my lands" was included in the affidavit in error. I accept this submission on the part of

the Applicant. However that still leaves the fact that the Applicant did give consent to the planning application and to an application in respect of the air space over his lands. Thus, what he is withdrawing his consent to, is the access road across his lands. Moreover, it appears from the affidavit evidence that there may well have been a misunderstanding between the Applicant and the developer in this regard. However the developer says, if that is the case, it is an "immaterial deviation" from the planning permission or, in the alternative, a modification to the planning permission can be obtained at a later stage, as is normal in such applications.

71. In my view, even if Mr. Buckley was subsequently withdrawing his consent, he did provide consent to the application and to the use of the airspace above his lands. What he is withdrawing his consent to now, is to the construction of an access road over his lands. However, given that this is so, and given that the developer cannot build on his lands even if he has planning permission, without Mr. Buckley's consent, the developer will have to reconfigure the road to avoid Mr. Buckley's land. Whether this amounts to an immaterial deviation or not, is not a matter for me to decide. That is a matter for another day. However, I am satisfied that the Applicant did give a valid and informed consent to the developer to make the application.

72. Having considered the submissions of the Applicants, the Respondent and the Notice Party, I am of the view that the Applicants' arguments on this issue are not correct as a matter of law.

Review of case law
73. A considerable amount of time in this hearing was taken up with submissions on various cases. In particular, the Applicants sought to rely on *Frescati Estates Ltd v. Walker* [1975] 1 I.R. 177. In that case, the Defendant applied for planning permission over the Plaintiff's land. The Defendant had no estate or interest in the Plaintiff's land. The planning authority granted the Defendant's application for outline planning permission. The Plaintiff appealed against that decision. The Plaintiff also issued proceedings in the High Court in respect of this matter.

74. Kenny J. in the High Court held that it was not necessary for an Applicant to have an interest in the land before making an application for planning permission. The Supreme Court held that although the Local Government (Planning and Development) Act 1963 did not require a person to have an estate or interest in the property before applying for planning permission, the general scheme and operation of the Act did require that such a person's application should have been approved by the owner of an estate in the property sufficient to enable him to carry out the planning permission.

75. As Henchy J. stated in the Supreme Court decision:

> *"To sum up, while the intention of the Act is that persons with no legal interest (such as would-be purchasers) may apply for development permission, the operation of the Act within the scope of its objects and the limits of constitutional requirements would be exceeded if the word "applicant" in the relevant sections is not given a restricted connotation. The extent of that restriction must be determined by the need to avoid unnecessary or vexatious applications, with consequent intrusions into property rights and demands on the statutory functions of planning authorities beyond what could reasonably be said to be required, in the interests of the common good, for proper planning and development.*
>
> *Applying that criterion, I consider that an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question. There will thus be sufficient privity between the applicant (if he is not a person entitled) and the person entitled to enable the applicant to be treated, for practical purposes, as a person entitled."*

76. Counsel for the Applicants sought to argue, that in the present case, because Mr. Buckley had withdrawn his consent, the entire planning application was "unnecessary". However, in my view, that submission is unfounded. The planning application was made and granted. The only issue about which Mr. Buckley has withdrawn his consent, is in respect of the construction of an access road through his lands. As stated above, this only relates to 75 metres of roadway (and associated drains) in a development which has over eight kilometres of roadway. The developer has clearly stated that the roads can be diverted to avoid Mr. Buckley's lands. Moreover, if that is done, there is no necessity to install any drains on Mr. Buckley's lands. In my view therefore, the development is not "unnecessary" and the application for planning in respect of it is not "an unnecessary application".

77. Counsel for the Applicants submitted that Mr. Justice Henchy's remarks established that a consent must be such as to "enable [the Applicant] to carry out the proposed development or so much of the proposed development as relates to the property in question". He submitted that the Developer here will not be able to carry out the proposed development as it relates to Mr. Buckley's property in question and therefore that Regulation 22 (2) (g) is not fulfilled. However, Mr. Mulcahy S.C. for the developer submitted that that is entirely to ignore the context of Henchy J's remarks where he commences the paragraph by saying "An application for development permission to be valid must be made…..". Thus, Henchy J. is at all times dealing with the issue of "an application for development permission". He is not dealing with the actual development at a later stage. In my view, the Notice Party's submissions on this point are correct.

78. I have also been referred to and considered the dicta of Keane J. (as he then was) in *Keane v. An Bord Pleanála* [1998] 2 ILRM 241 at pp. 248-249 and the dicta of Clarke J. in *Arklow Holidays Ltd v. An Bord Pleanála and Ors* [2006] IEHC 15.

79. I have also considered the decision of Herbert J. in *McCallig v. An Bord Pleanála and Ors* [2013] IEHC 60. However the facts in *McCallig* are quite different to the facts in this case. In *McCallig* the High Court found as a fact that Ms McCallig had not in fact ever granted her consent to the Applicant to make the planning application. In this case, Mr. Buckley clearly granted a consent to the developer to make the planning application. Therefore *McCallig* must be distinguished on its facts.

80. I would therefore conclude that, as a matter of principle, as a matter of statutory interpretation and having considered the authorities, that the Applicants' submissions on this issue are unfounded and must be rejected.

81. The Respondent's and Notice Parties' fall-back position was, that if there was an issue about the validity of the planning permission, it was open to the court to make an order that the planning permission was only invalid with respect to the Applicants' lands. If I had not upheld the Respondent's and Notice Parties' submissions on the legal issue of withdrawal of consent, I would have been disposed to make such an order.

The second issue - that An Bord Pleanála failed to carry out an Environmental Impact Assessment in respect of the proposed development
82. The Applicants' second argument, in essence, is that under s.172 (1) of the Planning and Development Act 2000, an Environmental Impact Assessment shall be carried out by the Planning Authority or the Board as the case may be, in respect of an

application for consent for a proposed development. Section 172 (1H) provides that in carrying out this Environmental Impact Assessment the Board may have regard to, and adopt, any report prepared by its officials. However, the Applicant submits that the Board did not carry out an Environmental Impact Assessment, and that it simply "noted" the Inspector's Report in relation to the Environmental Impact Assessment. The Applicant submits, because the Board only "noted" the Inspector's Report but did not "adopt" it, that therefore the Board did not carry out a proper Environmental Impact Assessment and therefore that it was in breach of its statutory obligations.

Legal Assessment

83. Article 1 of Directive 2011/92/EU provides:

> *"This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment".*

84. Article 2 provides:

> *"Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4."*

85. Article 2 (2) provides:

> *"The Environmental Impact Assessment may be integrated into the existing procedures for development consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive."*

86. Article 3 provides as follows:

> *"The Environmental Impact Assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12 the direct and indirect effects of a project of the following factors*
>
> *(a) human beings, fauna and flora;*
>
> *(b) soil, water, air, climate and the landscape;*
>
> *(c) material assets and the cultural heritage;*
>
> *(d) the interaction between the factors referred to in points (a), (b) and (c).*

87. The Applicants submitted that in *Commission v. Ireland* (Case C-50/09) 2011 I-00873 the CJEU considered the failure of Ireland to fulfil its obligations under Directive 85/337 (the precursor to Directive 2011/92). The point at issue in that case was whether Ireland had properly implemented Article 3 of the Directives. At paragraph 37 of the court's decision, the court stated that:

> *"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."*

88. The CJEU held that the national provisions relied on by Ireland had not properly implemented Article 3 of Directive 85/337.

89. Ireland subsequently implemented Article 3 of this Directive by means of Part 10 of the Planning and Development Act 2000.

90. Article 177A in Part 10 of the PDA 2000 defines an Environmental Impact Assessment.

91. Section 172 provides that:

> *"An Environmental Impact Assessment shall be carried out by the planning authority or the Board, as the case may be, in respect of an application for consent for proposed development."*

This provision implemented the findings of the court in Commission v. Ireland.

92. Section 172 (1H) provides that:

> *"In carrying out an Environmental Impact Assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.*

93. Section 172 (1G) of the PDA 2000 provides 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;*
>
> *(b) any further information furnished to the planning authority or the Board pursuant to subsections (1D) or (1E);*
>
> *(c) any submissions or observations validly made in relation to the environmental effects of the proposed development;*
>
> *(d) the views, if any, provided by any other Member State under section 174 or Regulations made under that section.*

94. However the key argument of the Applicant is based on s.172 (1H) –which provides that in carrying out an Environmental Impact Assessment the Board "may have regard to and adopt" any reports prepared by its officials.

95. It is necessary therefore to look at the substance and the form of what the Board did in this case and to consider whether it "did have regard to and adopt" any reports prepared by its officials and any of their Environmental Impact Assessment reports.

96. The Applicants contend, when one considers the legal test, and considers what the Board did in this case, that what the Board did fell short of the legal test. In support of this assertion, they point to the decision of the Board in this case. The decision of the Board (at page one - Reasons and Considerations) states as follows:

> *"The Board completed an Environmental Impact Assessment of the proposed scheme, which considered, inter alia the environmental impact statements submitted with this application, submissions made in the course of the planning application and the appeal including the further information submitted to the planning authority on 27th November 2013 and the report assessment and conclusions of the inspector in relation to the environmental impact of the scheme which are noted. The Board considered that subject to compliance with the mitigation measures set out in the environmental impact statement the proposed development would not have a significant effect on the environment." (Emphasis added).*

97. The use of the phrase "and the report, assessment and conclusions of the inspector in relation to the environmental impact of the scheme which are noted" is at the heart of the Applicants' complaint in this regard. They submit that because the Board only stated that the Environmental Impact Assessment of the inspector was "noted" rather than "adopted", it means that the Board did not in fact carry out a proper Environmental Impact Assessment as it is required to do under the statute. They submit therefore there was no Environmental Impact Assessment done by the Board.

Assessment

98. Having considered the arguments of the Applicants and the arguments of the Respondent and the Notice Party, I do not accept the Applicants' arguments for the reasons set out below.

99. Firstly, the Applicants accepted that if the Inspector's Report had been adopted by the Board, then it would have been a sufficient Environmental Impact Assessment Report. That is an important and, in my view, a correct concession.

100. Therefore it follows that the only basis for the Applicants' argument, is that the Board did not "adopt" the Inspector's Environmental Impact Assessment Report.

101. In order to assess whether the Board did in fact adopt the Inspector's Report, it is necessary to examine the substance of the Board's decision and to compare it with the substance of the Inspector's Report.

102. In the Board decision, it is stated at the outset that:

> *"The submissions on this file and the Inspector's Report were further considered at a Board meeting held on 30th July 2014.*
>
> *The Board decided to grant permission generally in accordance with the inspector's recommendation for the following reasons and considerations and subject to the following conditions."*
>
> *REASONS AND CONSIDERATIONS*
>
> *In coming to its decision the Board had regard to the following:*
>
> • *The report of the inspector.*
>
> *The Board completed an Environmental Impact Assessment of the proposed scheme which considered inter alia the Environmental Impact Assessment statement submitted with this application, submissions made in the course of the planning application and the appeal including the further information submitted to the planning authority on 27th November 2013 and the report assessment and conclusions of the inspector in relation to the environmental impact of the scheme which are noted. The Board considered that subject to compliance with the mitigation measures set out in the environmental impact statement, the proposed development would not have a significant effect on the environment."*

103. It is important to note that the report of the Inspector sets out 25 conditions to be attached to the development. The Board's decision attached exactly the same 25 conditions to its decision, (apart from a minor amendment at condition 5a). Ms. Butler S.C. for the Board submitted that there could be no doubt from this fact alone, that the Board adopted the Inspector's Report both in substance and in form. Ms. Butler S.C. submitted that the Board followed the Inspector's Report almost to the letter and therefore the evidence before the court was that the Board had adopted the Inspector's Report. It was submitted that the inescapable conclusion was that the Board had "regard to and adopted" the Inspector's Report in compliance with s. 172 (1H) of the PDA 2000.

104. I agree with this submission. In my view, the fact that the Board adopted all 25 conditions of the planning permission set out in the Inspector's Report in its decision leads to the inescapable inference that the Board "adopted" the Inspector's Report and the inspector's Environmental Impact Assessment.

105. Thus the Applicants' case then becomes one based on the narrow, linguistic proposition that, because the Board decision used the word "noted" - rather than the word "adopted" - the Board did not adopt an Environmental Impact Assessment and therefore it is in breach of its statutory obligations. I do not agree with that submission. The legal requirement on the Board to adopt an Environmental Impact Assessment is one of substance. I am satisfied that, in substance, the Board did carry out an Environmental Impact Assessment through its inspector and that it adopted his report.

106. Ms. Butler S.C. for the Board also submitted that the substantive obligation set out in s. 172 (1H) of the PDA 2000 (which provides that in carrying out such an Environmental Impact Assessment the Board may have regard to and adopt any reports prepared by its officials) did not set out a specific form of statutory wording which had to be used by the Board in its decision. Ms. Butler S.C. submitted that substantive compliance with the legislation is the key issue and the formula of words used is of secondary importance. I agree with that submission on the facts of this case, as they relate to this issue. It is unfortunate that the Board used the word "noted" rather than the word "adopted" (as is set out in the legislation) because if it had used the word "adopted" this argument could never have been made by the Applicants.

Review of case law
107. Counsel for the Board also submitted that there is a long line of authority which state, that if the Board accepted the Inspector's Report, and did not demur, then the Board is taken as in effect, adopting the Inspector's Report.

108. In *Ní Eili v. The EPA and Roche Ireland Ltd* Unreported Supreme Court, 30th July, 1999 Murphy J., delivering the unanimous decision of the Supreme Court, stated at page 28 of his decision as follows:

> *"The foregoing is the decision of the agency to grant the licence and, clearly, the reasons for doing so are because the Board accepted the recommendations of the hearing officer appointed by them. Perhaps it might have been more appropriate for the Agency to say (and for the secretary to record) that the Board accepted not merely the recommendations but also the findings and the conclusions of their Hearing Officer. On the other hand it seems that the acceptance of the recommendations necessarily implied the acceptance of the conclusions on which they were based. In my view, the Agency in its decision indicated that it was granting the licences sought by Roche because it was satisfied to accept, adopt and apply the conclusions reached by the Hearing Officer and his proposed rejections and arguments raised by the objectors. The reasons for the rejection of the objections are to be found therefore in the report of the Hearing Officer and these are as ample as any party could require. They were incorporated by reference in the decision and in my view it was not essential in the circumstances of the present case to repeat those reasons in the minutes of the Board meeting."*

109. In *Maxol v. An Bord Pleanála and Ors* 2011 IEHC 537 Clarke J. stated at para. 5.1 of his decision:

> *"No evidence was put before the court to suggest that the view adopted by An Bord Pleanála itself differed from the view contained in the Inspector's Report. In those circumstances it seems to me that the appropriate inference to draw is that the reasoning of An Bord Pleanála was the same as the reasoning of the inspector. In cases where An Bord Pleanála has different reasons for its conclusions to those contained in the relevant Inspector's Report, then it seems to me that it is incumbent on An Bord Pleanála to place those different reasons before the court in an appropriate form whether by arranging for the swearing of an appropriate affidavit or exhibiting relevant documentation in evidence. In the absence of An Bord Pleanála taking any such course of action, it seems to me that the court is entitled to assume that Bord Pleanála's reasoning is the same as its inspector's."*

110. In *Fairyhouse Club Ltd v An Bord Pleanála & Ors*, Unreported High Court, 18th July, 2001, Finnegan J. stated as follows at para. 3 of his decision:

> *"Ideally perhaps the decision [of the Board] should have expressly adopted the inspectors report as the basis of its decision and that it did not do. However, in the circumstances of this case, I am not satisfied that this omission alone would have justified me in holding that this ground is substantial as I am satisfied that the inspectors report is the basis of the Board's decision and the reasons for that decision clearly appear from the report which is to be read in conjunction with the decision."*

111. In *Cork City Council v An Bord Pleanála & Ors* [2007] 1 IR 761, Kelly J. stated at para. 61 of his decision:

> *"In view of the fact that the Respondent did not differ from the recommendation made by the inspector and in the absence of any dissent from her line of thought, it is reasonable to conclude that it adopted her reasoning in arriving at its decision and in furnishing its own reasons and considerations for so doing".*

112. In *Ogalas v An Bord Pleanála & Ors* [2015] IEHC 205, Baker J. also referred to the judgment of Clarke J. in Maxol where she stated as follows:

> *"15. I do not accept that there is uncertainty in the law. The judgment of Clarke J. in Maxol Ltd v. An Bord Pleanála is perfectly clear, and requires some evidence to be identifiable if an inference is to be drawn that the Board did not wholly adopt the reason of its inspector. Hedigan J's statement of law and his identification of the differing roles of the inspector and the Board also admits of no uncertainty, nor can I find any conflict or difference between that legal test as identified by Hedigan J. and those identified and applied by O'Neill J. in M and F Quirke and Sons and Anor v. An Bord Pleanála and Ors and by Clarke J. in Maxol Ltd v. An Bord Pleanála.*
>
> *16. There is no legal uncertainty as to the respective roles of the inspector and the Board, and I cannot put the test any clearer than it was put by Hedigan J. namely that the Board decides and the inspector recommends. The inspector's recommendation is part of the evidence or part of the mix of evidence or part of factors that are taken into account by the Board but the decision must always be the decision of the Board.*
>
> *19. The statutory function of the Board is adjudication and the point sought to be certified as appropriate to an appeal is how that adjudication should engage with the inspector's report, and in that regard one can envisage a spectrum of decisions where the Board agrees with a report of an inspector and adapt his or her recommendations, and cases where the Board departs from them in whole or in part. In all of these cases the Board engages with the evidence and recommendations by way of a process of adjudication. I do not accept that there is any uncertainty in current law as to the means by which a deciding body has to show its reasoning process. The decision maker has to reach a reasoned decision based on the evidence and it may for that purpose, and depending on the complexity of the matter, require to set out in detail the weight it gives to certain facts and recommendations. The Board must do so in the same way as any other body charged with an adjudicative function, and there is nothing unique in the function vested in the Board that requires clarification by an appellate court of how the adjudicative process ought to be engaged."*

113. Counsel for the Board also relied on In re XJS Investments Ltd [1986] IR 750 where McCarthy J. stated that:

> *"Certain principles may be stated in respect of the true construction of planning documents:-*
>
> *(a) To state the obvious they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material*
>
> *(b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents unless such documents read as a whole necessarily indicate some other meaning".*

114. This decision was followed by Barr J. in *Tennyson and Ors v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527.

115. Counsel for the Notice Party also relied on *Ratheniska Timahoe and Spink Substation Action Group and Anor v. An Bord Pleanála and Eirgrid Plc* [2015] IEHC 18 where Haughton J. noted at para. 83 of his decision that "the Applicants asserted the Board failed to 'record' the EIA. The Applicants also averred that the Board failed to 'engage' with the inspector's assessment and disregarded his concerns which were based on broader factors".

116. Having considered the issue however Haughton J. stated at para. 85:

> *"The court is satisfied firstly that the Board did undertake a comprehensive EIA in relation to this aspect of the Development and that this is recorded in the body of the decision where the Board stated that it was satisfied that the information available on file was adequate to allow an EIA to be completed. It is also apparent from a reading of the decision as a whole that the Board considered and assessed the EIS, the Inspector's Report (where an assessment of the EIS and this issue was carried out by the Board's nominated officer) and other relevant documentation. The Board also expressly confirms that in forming its view it had regard to listed and publicly available documents of a scientific or guidance nature relevant to this issue."*

117. On the facts of the present case, it is clear that the inspector carried out an Environmental Impact Assessment. Indeed the Applicant accepts that were this "adopted" by the Board then its argument would fall away. In circumstances however, where the Board in its decision, at the very outset, stated that it decided to grant permission "generally in accordance with the inspector's recommendations for the following reasons and considerations and subject to the following conditions" and that it had regard to "the report of the inspector" and that it adopted all 25 conditions in the Inspector's Report, I am of the view that it is clear that the Board did "adopt" the Inspector's Report and carry out an appropriate EIA in accordance with its statutory obligations.

118. I would therefore conclude that the Applicants' submission in this regard is not well founded.

The third issue – that the Board failed to carry out "an appropriate assessment" under the Habitats Directive
119. This argument is a variation on the second issue.

120. Article 6 (1) Directive 92/43 (on the conservation of natural habitats and of wild fauna and flora) (the "Habitats Directive") provides that for special areas of conservation Member States shall establish the necessary conservation measures.

121. Article 6 (2) provides that Member States shall take appropriate steps to avoid in the special areas of conservation, the deterioration of natural habitats.

122. Article 6 (3) of the Directive provides that 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 para. 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".

123. The Applicant submits that, in the light of these statutory requirements, An Bord Pleanála must carry out "an Appropriate Assessment" of the relevant site and that An Bord Pleanála shall "agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site".

124. The Habitats Directive was implemented into Irish law by Article XAB of the Planning and Development Act 2000 which is headed "Appropriate Assessment".

125. Section 177R (1) defines "Appropriate Assessment" and provides that it shall be "construed in accordance with s. 177V".

126. Section 177S provides that a competent authority in performing the functions conferred on it under this part shall take appropriate steps to avoid in any European site, the deterioration of natural habitats.

127. Section 177V provides that:

> *"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 Land use plan or proposed development would adversely affect the integrity of a European site and an appropriate assessment shall be carried out by the competent authority, before -*
>
> *(a)…… or*
>
> *(b) consent is given for the proposed development.".*

128. Section 177D (2) sets out the various matters which the competent authority shall take into account in carrying out an appropriate assessment.

129. Again, the argument of the Applicants under this heading is that the legislation requires that the Board should have made a "determination" as to whether a proposed development would adversely affect the integrity of a site. The Applicant submits that, in this case, the Board only "noted" the Inspector's Report and therefore did not make the relevant "determination" and therefore did not carry out "an appropriate assessment".

130. The Applicant also relied on s. 177V(3) which provides that:-

> *"…a competent authority shall make a land use plan or give consent for proposed development only after having determined that the land use plan or proposed development shall not adversely affect the integrity of a European site".*

131. The Applicant also relied on the decision of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála & Ors* [2014] IEHC 400.

132. The Applicant conceded however, that it was not saying that the Inspector's Report was not capable of being accepted or

adopted by An Bord Pleanála but just that no "determination" was made by the Board as is required under the Act. In effect, the Applicant accepted that the report of the inspector would have been an appropriate assessment if formally adopted by the Board.

133. The Applicants' case is also based on the fact that in the Board's decision at p. 2 it is stated as follows:

> *"The Board completed an Appropriate Assessment in relation to potential impact of the proposed development on Natura 2000 sites and having regard to the Natura impact statement, the further submissions and responses to same submitted during the course of the application and appeal including in particular the further information submitted to the Planning Authority on 27th November 2013, and the Inspector's Report and submissions on file which are noted, the Board concluded that on the basis of the information available, the proposed development either individually or in combination with other planned projects would not adversely affect the integrity of any European site in view of the site's conservation objectives." (Emphasis added).*

134. Thus again the Applicants' case is that in this paragraph the Board simply "noted" the Inspector's Report.

135. It should be noted that this paragraph in the Board's decision on "Appropriate Assessment" follows on from the paragraph in the Board's decision "Environmental Impact Assessment". In each paragraph, the wording of the Board in relation to the Inspector's Report is similar i.e. that the Inspector's Report is "noted".

136. In addition, the Applicant submitted that there was a letter from the Department of Arts, Heritage, Culture and the Gaeltacht (dated 4th June, 2014) addressed to the Secretary of An Bord Pleanála in respect of this development. This letter states (on p. 2) under the heading "Further information for Appropriate Assessment" as follows:

> *"The NIS (p. 71) refers to water quality mitigation measures, but does not specifically assess the potential, in combination effects of increased drainage rate from the site on stream and river bed and bank erosion due to greater hydrographic peaks in the sea stream and river flows on the conservation objectives of down stream seas. This issue is addressed in the sediment and erosion control plan for a 10 year storm event. However it is recommended that an assessment be undertaken in the NIS, or in the appropriate assessment by An Bord Pleanála, of the effects of exceptional rain fall magnitude events, which are particularly to increase in future, such as 1 in 50 or 1 in 100 year events. This is also relevant if it is proposed to leave the road drainage network in place after decommissioning, and if post decommissioning drainage maintenance is likely."*

137. The matters raised in this letter from the Department of Arts, Heritage, Culture and the Gaeltacht are specifically assessed by the Inspector in the Inspector's Report at 9.5.3. The Inspector's view was set out in the penultimate paragraph of that section where he states as follows:

> *"I therefore consider that the measures outlined in the NIS and also in the Sediment and Erosion Plan have adequately considered and assessed the matters of exceptional rainfall events raised in the DAHG submission."*

138. The Applicants submitted that there was a difference of view between the Department and the Inspector and that it was a matter for the Board to resolve this issue. The Applicants submitted that the Board simply "noted" the Inspector's Report and therefore there was no determination of this issue. The Applicants submitted that because there was a conflict between the Department and the Inspector it was a matter which needed to be "determined" by the Board and as the matter was not determined by the Board it followed that the Board had not carried out an "appropriate assessment" as required by law.

139. Ms. Butler S.C. for the Board noted that the Applicant accepted that the Inspector's Report would have been an Appropriate Assessment if it had been "adopted" by the Board.

140. In parallel with her earlier submission under the Environmental Impact Assessment, Ms. Butler S.C. submitted that it is clear from p. 2 of the Board's decision that the Board did indeed complete an Appropriate Assessment in relation to the potential impact of the proposed development on the site and that, having regard to the Natura Impact Statement, the further submissions and responses received, and the Inspector's Report, the Board concluded that the proposed development would not adversely affect the integrity of the site, in view of the site's conservation objectives. Ms. Butler S.C. submitted that it is clear from this paragraph that the Board stated that it "concluded" on the basis of the information available that the development would not adversely effect the site. She submitted therefore, that it is clear that there was a "determination" by the Board of an appropriate assessment.

141. Again Ms. Butler S.C. submitted that, having regard to the Inspector's Report, and the analysis, and Appropriate Assessment carried out by the Inspector, in his report, having regard to the Board's decision as a whole, and having regard to the conditions suggested by the Inspector, all of which were followed in their entirety in the Board's decision, that the only conclusion which could be drawn is that, as a matter of fact, the Board did indeed adopt the Inspector's Report and therefore made a determination on Appropriate Assessment.

142. In relation to the Applicants' submission that there was a dispute between the Department of Arts, Heritage, Culture and the Gaeltacht and the Inspector's Report and that the Board should resolve such disagreements, Ms. Butler S.C. submitted that these views of the Department were considered by the Inspector and that he concluded that the measures outlined in the NIS and also in the Sediment and Erosion Plan "have adequately considered and assessed the matters of exceptional rainfall events raised in the DAHG submission". The Inspector considered the submissions from the Department and the submissions from the developer and came to a conclusion which was then "adopted" by the Board. I am of the view that this submission is well-founded.

143. Having considered the submissions of the Applicants, the Respondent and the Notice Party, I am of the view that the decision of the Board - as a matter of substance - adopted the report of the Inspector in relation to the determination of an Appropriate Assessment. This is clear from the Board's decision when it states that:

> *"The Board decided to grant permission generally in accordance with the Inspector's recommendation for the following reasons and considerations and subject to the following conditions."*
>
> *Reasons and considerations*
>
> *In coming to its decision, the Board had regard to the following:*
>
> • *The Report of the Inspector*

144. It is also clear that the 25 conditions suggested by the Inspector were followed in their entirety, (with one minor exception) by the Board. It therefore follows, in my view, that the inescapable inference is that the Board not only noted the Inspector's Report but "adopted" the Inspector's Report. Moreover, having regard to the line of authorities set out earlier in my judgment, it is clear that the court looks to the substance, rather than the form, of the Board's decision. It is true that the Board used the word "noted" in relation to the Inspector's Report but having considered the decision in its entirety I am satisfied that the Board did indeed adopt the Inspector's Report, and in so doing, it made a "determination" as required by s. 177V of the PDA 2000 and as such carried out an appropriate assessment under the legislation.

145. Mr. Mulcahy S.C. for the Notice Party also submitted that s. 34(10) of the PDA 2000 provided in (b) that where a decision by the Board which granted or refused permission is different from the recommendation in the report of a person assigned to report on an appeal on behalf of the Board, then the Board "shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission". In the present case, Mr. Mulcahy S.C. submitted there is no suggestion that the Board had any reason to disagree with the Inspector's Report. Therefore he submitted it is another reason why there is an inescapable inference that the Board agreed with the Inspector and in effect adopted his report. In my view this submission is well-founded.

146. Mr Mulcahy S.C also referred to the remarks of Clarke J. in *Maxol v. An Bord Pleanála & Ors*, that in cases where An Bord Pleanála has different reasons for its conclusions, to those contained in the Inspector's Report, then it is incumbent on An Bord Pleanála to place those different reasons before the court and in the absence of any such course of action "the court is entitled to assume that An Bord Pleanála's reasoning is the same as the Inspector's".

147. Mr. Mulcahy S.C. submitted that the clear principle to be derived from the case law is that, in the absence of an express disagreement, the inference is that the Board agrees with its Inspector's Report and therefore can be taken to have adopted it.

148. Mr. Devlin S.C. in reply sought to argue that the case law relied upon by the Respondent and Notice Party were all cases where the courts held that the statutory requirement to give reasons could be done, according to the case law, by reference to the Inspector's Report. He submitted that these cases all related to arguments which were made in numerous cases, that the Board had not given reasons for its decision, and when the Board's response had been that its reasons were those set out in the Inspector's Report. However, he stated that there was no case where the case-law on the requirement to give reasons had been applied to the requirement to "adopt" the Inspector's Report.

149. However, in my view, the rationale set out in those decisions also applies to the argument that the Board must "adopt" its Inspector's Report. If the Board, from a proper reading of its decision, has followed the Inspector's Report and has, for example, as here, set out 25 planning conditions which mirror exactly those set out in the Inspector's Report, it is, (absent any other evidence) an inescapable inference that the Board has not only had regard to, but also "adopted", the Inspector's Report.

150. As was stated in argument by the Applicant, (in relation to the fact that the Board had "noted" the Inspector's Report), one person might say to another "I note what you say". This might mean "I agree with what you say" or "I disagree entirely with what you say but I am not going to argue the point with you directly". The phrase is therefore ambiguous. Any ambiguity must therefore be resolved by looking at the substance of the Board's decision. When one looks at the substance of the Board's decision, it is clear that the Board in this case has agreed with the Inspector's Report. Indeed, in the opening paragraphs of its decision, the Board stated that it "decided to grant permission generally in accordance with the Inspector's recommendation". Even more substantively, the decision of the Board sets out 25 conditions which are identical to the 25 conditions set out in the Inspector's Report. In those circumstances, it cannot be stated that where the Board "notes" the Inspector's Report, that it disagrees with the Inspector's Report. Indeed there is nothing in the Board's decision to suggest that it disagrees with the Inspector's Report in any respect. Again therefore one is drawn to the inescapable conclusion that the Board agreed with the Inspector's Report in its entirety and therefore, in effect, that it adopted the Inspector's Report.

151. I would therefore hold that on the facts of this case, the Board did indeed adopt the Inspector's Report. It therefore did indeed make a determination on an Appropriate Assessment as it was required to do under the legislation.

Conclusion

152. I would therefore conclude, that on all three points, the Applicants' submissions are unfounded and I would dismiss the challenge to the decision.