



THE COURT OF APPEAL

Appeal No. 2015/385

**Ryan P.
Hogan J.
Edwards J.**

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

BETWEEN/

PEOPLE OVER WIND, ENVIRONMENTAL ACTION ALLIANCE IRELAND

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

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

NOTICE PARTIES

JUDGMENT of the Court delivered by Mr. Justice Gerard Hogan on 20th day of November 2015

1. The applicant is an environmental non-governmental organisation which in these judicial review proceedings has challenged the validity of a decision of An Bord Pleanála ("the Board") dated 14th June 2014. By that decision the Board granted the notice party, Coillte Teo., planning permission to construct and develop a wind farm at Cullenagh, Co. Laois, permission having been originally refused by the planning authority. The planning permission thus granted extends to the erection of 18 wind turbines (each of which will have a rotor diameter of up to 93m and an overall tip height of up to 131m.). The decision also gave permission for the construction of new internal forestry roads, the strengthening of existing roads and the construction of a sub-station along with car parking spaces.

2. In the High Court the applicant pursued a wide ranging challenge to the validity of the permission, but these objections were dismissed by Haughton J. in a careful judgment of exceptional thoroughness and lucidity delivered on 1st May 2015: see *People over Wind, Environmental Action Alliance Ireland v. An Bord Pleanála* [2015] IEHC 271. Haughton J. subsequently delivered a further reserved judgment on 19th June 2015 certifying pursuant to s. 50A(7) of the Planning and Development Act, 2000 (as amended) three points of law of exceptional public importance: see [2015] IEHC 393. The three points of law which were certified by Haughton J. all relate to the application of the Habitats Directive 1992 (92/43/EEC).

3. The obligations imposed by Article 6 of the Habitats Directive were transposed into domestic law by Part XAB of the Planning and Development Act 2000 (as amended) ("the 2000 Act"). Article 6 so far as material provides:

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

4. While, as might be expected, the domestic transposing legislation is more detailed and specific than the Directive, the essence and the object of the 2000 Act is the same. Part XAB of the 2000 Act applies to any European site, which term includes for this purpose

Special Areas of Conservation ("SAC"). Section 177S of the 2000 Act imposes a positive obligation on all "competent authorities" to 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 objects of the Habitats Directive."

5. The term "competent authorities" refers in this context to the planning authority (in this instance, Laois County Council) and, on appeal, the Board. It is not disputed for present purposes that s. 177S of the 2000 Act imposes a jurisdictional obligation on the Board. It follows, therefore, that the Board cannot legally grant permission for a development which, viewed objectively, would contravene the requirements of this section: see, e.g., the judgment of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400.

6. While the lands which were the subject of the planning application are currently in forestry use, they are situated some 12km to 17km distant from the River Nore SAC. There was, however, concern that the construction of the windfarm might affect one of the protected fauna found in the River Nore SAC, namely, the Nore freshwater pearl mussel ("*Margaritifera durrovensis*").

7. It is not disputed that the Nore freshwater pearl mussel is a critically endangered species. The extant adult population of the Nore freshwater pearl mussel is estimated to be as low as 300, having been as high as 20,000 individual mussels in 1991. The life span of each mussel is somewhere between 70 to 100 years, but the Nore freshwater pearl mussel is not known to have reproduced itself in the River Nore since 1970. Indeed, there is general agreement that the habitat of the species is currently unsuitable by reason of the high sedimentation of the river stratum to which the creature is distinctly vulnerable. All recent mussel monitoring surveys have confirmed the high level of sedimentation at this part of the River Nore, often at levels that would inhibit the successful re-stocking of the river by juveniles.

8. The River Nore SAC lies downriver of the proposed site. It is also agreed that some 68% of the development site drains to the Nore freshwater pearl mussel population. The real concern, therefore, facing both the parties to the appeal before the Board and the Board itself was that run-off from the construction activities would contain high levels of sediment which would ultimately seep into the Nore, thereby placing further pressure on any already endangered species located with the SAC. It is only fair to record that both Coillte and the Board recognised this risk and took extensive steps to eliminate it. The fundamental question confronting this Court – reflected in the three separate certified questions – is whether these steps were adequate for this purpose.

9. It is against this general background that the three certified questions can now be considered.

Question 1: The Restoration Obligation

10. There is no doubt but that restoration is a key objective of the River Nore SAC. As Haughton J. observed in his judgment, this is unambiguously stated by the National Parks and Wildlife Service ("NPWS") in its published Guidelines to be one of the objectives of the SAC. As has been stated already, the Nore freshwater pearl mussel is a qualifying species for the purposes of this SAC.

11. The first question certified by Haughton J. was in the following terms:

"1. RESTORATION

Do Part XAB of the Planning and Development Act, 2000 (as amended) and/or Article 6(3) of the Habitats Directive impose an obligation on An Bord Pleanála in conducting an appropriate assessment to ensure that the proposed development would not adversely affect a National Parks and Wildlife Service objective of *restoration*, from unfavourable to favourable conservation status, of a protected habitat and species in a candidate Special Area of Consideration situated outside the proposed development site?

12. There is no doubt but that a development which compromised the objective of restoration might well affect the integrity of the SAC site within the meaning of Article 6(3) of the Directive. A development which, for example, made the objective of restoration appreciably more difficult might well be thought to be likely to have significant effects in respect of the site. In some circumstances such a development could well compromise the integrity of the site. This very point was acknowledged by the Court of Justice in Case C-127/02 *Waddenzee* [2004] E.C.R. I-7448 when it stated (at para. 48) that:

"where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site."

13. The argument concerning the first question did not, however, quite proceed along these lines. There is no suggestion at all that the proposed development would, in fact, compromise the restoration objective for the site. Rather, having regard to the manner in which the argument was presented to this Court, we have been essentially asked to consider whether it is sufficient for the purposes of Article 6(3) of the Habitats Directive that a proposed development would not adversely affect the integrity of the proposed site or whether it must also be shown that the proposed development will contribute positively in some way to the restoration objective. We propose, therefore, to proceed as if this was in fact the nature of the question posed.

14. In the course of argument counsel for the appellant, Mr. Devlin S.C., urged that the restoration objective required the Board to ensure either that the development was more likely to have restorative effects or, at least, not to proceed on the basis that the maintenance of the *status quo ante* was necessarily sufficient. In our view, this submission is not well founded.

15. It is true that Article 2(2) of the Habitats Directive provides that:

"Measures taken pursuant to the Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest."

16. The first thing to note is that these obligations are addressed to Member States and not to private operators such as developers. Second, it is clear that, as Advocate General Sharpston pointed out in her opinion in EU:C:2013:220 *Sweetman v. An Bord Pleanála* paragraphs (2),(3) and (4) of Article 6 serve a "different purpose" As the Advocate General stated (at paragraphs 43-45):

"43. Paragraphs 2, 3 and 4 of Article 6 serve a different purpose. Paragraph 2 imposes an overarching obligation to avoid deterioration or disturbance. Paragraphs 3 and 4 then set out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the site (and which is thus not covered

by paragraph 1) but which is likely to have a significant effect thereon. Collectively, therefore, these three paragraphs seek to pre-empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole.

44. Article 6(2) imposes a general requirement on the Member States to maintain the status quo. The Court has described it as 'a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives'. The obligation Article 6(2) lays down is not an absolute one, in the sense that it imposes a duty to ensure that no alterations of any kind are made, at any time, to the site in question. Rather, it is to be measured having regard to the conservation objectives of the site, since that is why the site is designated. The requirement is thus to take all appropriate steps to avoid those objectives being prejudiced. The authenticity of the site as a natural habitat, with all that that implies for the biodiversity of the environment, is thus preserved. Benign neglect is not an option.

45. Article 6(3), by contrast, is not concerned with the day-to-day operation of the site. It applies only where there is a plan or project not directly connected with or necessary to site management. It lays down a two-stage test. At the first stage, it is necessary to determine whether the plan or project in question is 'likely to have a significant effect [on the site].'

17. The European Court had previously said as much in its judgment in *Waddenzee* where it had stressed (at paragraphs 36 to 38) that the a key objective of Article 6(2) and Article 6(3) was to ensure that there was no environmental damage as a result of the grant of planning permission:

"36. Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2).

37. Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive.

38 The answer to the second question must therefore be that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3)."

18. Indeed, it is clear from both *Waddenzee* and *Sweetman* that a permission may be granted by the competent authority of each Member State for the purposes of Article 6(3) provided that it will not adversely affect the integrity of the site. There is, however, nothing in these judgments which suggest that the specific Article 6 obligations imposed on Member States to avoid deterioration and disturbances which could have significant effects on SAC sites extend further so as to impose positive obligations to restore the site.

19. In any event, it is hard to see how such an obligation would be practical or even feasible. It is true that the developer in the present case is a well resourced private company owned by the Minister for Finance and the Minister for Agriculture. Yet from the standpoint of principle this is essentially irrelevant, since the developer might equally have been a small privately owned company or even a private individual.

20. The restoration of the Nore freshwater pearl mussel is no doubt a desirable objective. Yet the evidence in this case suggests that the realisation of this goal is the preserve of specialists. This is clearly borne out by the report of the NWPS of 19 July 2011 which recites the objective of restoring the "favourable conservation condition" of the Nore freshwater pearl mussel in the River Nore and River Nore SAC. The report then makes detailed recommendations in respect of matters of water quality, the quality of the river substratum, the flow variability of the river and the stock of host fish. The report acknowledged, for example, that the existing river substratum was too heavily sedimented and stated that one of the targets would be the restoration of the substratum "with stable cobble and gravel substrate with very little fine material."

21. It would be quite unrealistic to think that purely private individuals or companies could be expected to have the expertise or resources or even the legal entitlement to assist in the achievement of this objective. If the grant of planning permission could be made subject to the imposition of a condition that the grantee positively contributed to the restoration of an endangered species in an SAC, we feel certain that Article 6 of the Habitats Directive would have made provision for this in express terms. There is nothing at all in cases such as *Waddenzee* or *Sweetman* which would support such a construction of Article 6.

22. It is sufficient, therefore, that the applicant for permission demonstrates that the proposed development will pose no threat of the integrity of the SAC. It is not unfair that an applicant demonstrate that the proposed development will not impact adversely on a qualifying species protected by an SAC: it would be quite another matter if the applicant was to be required to contribute positively to the restoration of the protected species.

The second question: Best scientific evidence

23. The second question certified by Haughton J. was in the following terms:

"BEST SCIENTIFIC EVIDENCE

(a) What obligation (if any) is on An Bord Pleanála, to seek or procure the best scientific evidence in carrying out an appropriate assessment?

(b) In light of the scientific evidence that was before An Bord Pleanála with regard to the Nore Freshwater Pearl Mussel, in carrying out its appropriate assessment was An Bord Pleanála entitled to regard this as the best scientific

evidence for the purposes of deciding the appeal?

(c) In reviewing the decision of An Bord Pleanála in respect of appropriate assessment was the Court constrained only to consider matters that were before An Bord Pleanála or was it entitled or obliged to have regard to the new or additional evidence in the affidavit of Dr. Evelyn Moorkens sworn on 23rd January, 2015 with regard to the Nore Freshwater Pearl Mussel?

(d) If so, does this evidence demonstrate a lacuna in the best scientific evidence put before An Bord Pleanála such that its decision should be quashed or emitted for further consideration?"

24. It must first be noted that the term "best scientific evidence" is not used in the Directive nor, indeed, in the jurisprudence of the Court of Justice concerning the Habitats Directive. The phrase which has been instead used by the Court of Justice is that of "best scientific knowledge." The Court of Justice takes the view that the "appropriate assessment" of the risks presented by a proposed development required by Article 6(3) necessarily implies that such an assessment "must be identified in the light of the best scientific knowledge in the field": see *Waddenzee* at para. 54.

25. While perhaps too much should not be read into a phrase in a judgment – and this is perhaps especially so in the case of an international Court employing a variety of languages – there is, it seems to us, a difference between the concepts of "scientific knowledge" on the one hand and "scientific evidence" on the other. The entire objective of the *Waddenzee* formula ("scientific knowledge") is to ensure that the appropriate assessment is conducted by reference to the best scientific methods and understanding. Specifically, the objective is to ensure that the integrity of an SAC site is not compromised by the grant of permission which is in turn premised on a scientific analysis which is out-dated, flawed or which does not measure up to state of the art scientific understanding.

26. There is no suggestion at all that such was the case here. Rather a hugely detailed environmental impact assessment concerning every relevant scientific and environmental aspect of the Cullenagh wind farm was prepared by the specialist environmental consultancy group, RPS, in August 2013. A Natura Impact Statement ("NIS") was also appended at Appendix E to the EIA. The EIA contained an elaborate assessment of the potential impacts on hydrology due to tree felling and construction if no appropriate mitigation measures were taken. Thus, for example, paragraph 13.4.1.6 acknowledged:

"Any blockage to normal flow rates in the adjacent stream channels during the implementation of the works could reduce the flow rates in the downstream water courses which could have an impact on the aquatic ecology. This could be caused as the result of the temporary storage of excavated materials along the existing natural flow paths or from collapsing of unstable soil stock piles. In addition, due to the removal of vegetated surface during construction, infiltration of surface runoff could increase, which could result in the reduction of flow rate in the adjacent natural water courses."

27. The report then went on to detail (at paragraph 13.6.1) some 21 mitigation measures, all of which were designed to mitigate the risk that watercourses in the SAC catchment area might be contaminated by sediment release during the construction phase. A variety of other engineering solutions were also envisaged, including proposals for surface water management during site clearance and the discharge of roadside drains into stilling ponds.

28. It is true that the Department of Arts, Heritage and the Gaeltacht were not entirely happy with the NIS because in a letter dated 1st October 2013 to Laois County Council Ms. Patricia O'Leary of the Development Applications Unit stated:

"Nore Freshwater Pearl Mussel and Natura Impact Statement (NIS)"

The impacts of the proposed development on the downstream population of the critical endangered Nore Freshwater Pearl Mussel population, one of the qualifying interests for the river Barrow and river Nore SAC 2162, has not been adequately assessed in the NIS.

The impacts of additional clear-felling of trees (44.6 ha) with associated timber stacking and haulage/replanting proposals required for this development in combination with a root routine felling in this area, on the Nore Freshwater Pearl Mussel has not been assessed.

Impacts of bridgeworks and the downstream population of the Nore Freshwater Pearl Mussel must be assessed. Suitable mitigation measures must be put in place.

The adequacy of the proposed mitigation measures have not been assessed in order to ascertain whether adequate to protect the Nore Freshwater Pearl Mussel, particularly the undertaken that discharges to water courses shall not exceed 35mg/l total suspended solids

The NIS has not considered cumulative impacts of this wind-farm development on the Nore Freshwater Pearl Mussel in combination with other developments."

29. The Planners Report of 2nd October 2013 also took a similar negative view on these grounds stating (at para. 6.3):

"The Planning Authority is not satisfied on the basis of the information contained in the Nature Impact Statement and related chapters contained within the EIS received with this application, that appropriate or adequate consideration has been given to the effects of the development on the environment in accordance with Article 6(3) of the EU Habitats Directive or that the integrity of Special Areas of Conservation and Special Protection Areas would not be adversely affected by the proposed development."

30. The application was refused by Laois County Council by decision given on the same day, with the deficiencies in the EIS and NIS cited expressly as grounds for refusal.

31. Coillte duly appealed this decision to the Board and for this purpose RPS prepared a hugely detailed appeal running to some 127 pages. Paragraphs 50 to 53 of this appeal expressly addressed the concerns which had been expressed by the Department of the Arts, Heritage and the Gaeltacht:

"50. It is acknowledged that limits for total suspended solids are stated as both 35mg/l and 25mg/l within the NIS. It is confirmed that the references should be 25mg/l throughout in accordance with Inland Fisheries Ireland guidance. This

25mg/l level is set in accordance with EU Freshwater Fish Directive (78/659/EC) as transposed into Irish law under the EC (Quality of Salmonid Waters) Regulations 1988 (S.I. No. 293 of 1988). In general, the water quality (based on EPA Q-values) within the proposed development site was good (Q4 or Q4-5). However, to ensure that the proposed mitigation measures to protect the Nore Freshwater Pearl Mussel are adequate, it is proposed that the limits proposed to be imposed on the levels of total suspended solid within the streams draining the proposed development site be altered and set to reflect those levels of total suspended solids which currently exist within those watercourses prior to any clear-felling or construction activities commencing.

51. The following is proposed:-

- Continuous monitoring of total suspended solids will be undertaken on all streams draining the site across both a summer winter season.
- This will identify an average seasonal total suspended solids level with each of the streams draining the site.
- The total suspended solid limits to be imposed as part of the proposed development will be based on the average seasonal total suspended solids level identified in the stream draining the site and these limits will be agreed with NPWS and IFI.
- Such limits for total suspended solids levels would ensure that the proposed development will not result in any increase in total suspended solids as a result of the proposed development.
- The limits for total suspended solids will be achieved through appropriately sized settlement ponds (or industry equivalent) located in the detailed drainage design.

52. Such limits for total suspended solids levels would ensure that the proposed development will not result in any increase in total suspended solids as a result of the proposed development. In addition, the Forest Service felling licence requirements will ensure that the surface waters draining the proposed development site are not impacted by clear-felling and construction activities; and therefore, shall not impact on the Nore Freshwater Pearl Mussel population downstream.

53. 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."

32. It will be seen that the appeal thus addressed the major concern which the Department had expressed, namely, that the proposed discharge limit of 35mg/l was simply too high and would lead to increased sedimentation. In effect, RPS confirmed that the references to 35mg/l found in the original EIA/NIS were in error and that the references should instead be to 25mg/l throughout in accordance with the Inland Fisheries guidelines.

33. The Board arranged for an inspector's report in response to the appeal. A hugely detailed report was prepared by the inspector, Ms. Joanna Kelly, on 11th February 2014. Ms. Kelly deal with the potential impact on the Nore Freshwater Pearl Mussel in the following terms (at paras. 14.7.7 to 14.7.8):

"14.7.7 In terms of the activities involved in this application, mainly construction of turbines in a forested area, 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 NPW "Freshwater Pearl Mussel Assessment" 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 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'

The NIS indicates that the Pearl mussel is highly sensitive to hydrological changes and it is set out that there would be no direct effects predicted on the species. Indirect effects may occur during proposed wind farm development and bridge works. I would point out to the Board that there is a submission from the Department of Arts, Heritage and the Gaeltacht that sets out the impacts of the development on the downstream population of the critically endangered Nore Freshwater Pearl Mussel has not been adequately addressed. It is submitted by the first party that the EIS referred to limits for solids as both 35mg/l and 25mg/l within the NIS. It is confirmed that this should read as a limit of 25mg/l in accordance with the Inland Fisheries Ireland Guidance. It is set out that the levels of total suspended solids within the streams draining the proposed development site will reflect those levels of total suspended solids which currently exist within those watercourses prior to any felling or construction work.

14.7.8 Whilst the appeal site contains a number of watercourses which drain to the Nore Catchment area and the Barrow catchment area, it is my considered view having regard to the existing forestry activities carried out on site; the proposed development in this instance together with the mitigation measures proposed; and the general separation distance between the appeal site and the River Nore and Barrow SAC that the proposal in question would not have a significant impact on the Freshwater Pearl Mussel or the Nore Fresh Water Pearl Mussel."

34. Ms. Kelly recommended that the application be refused, although the reasons given by her related largely to standard planning considerations rather than environmental reasons as such. She considered that the scale of the project would have an unduly negative impact on the visual amenities of the local residents. She also stated that the extent of the works required to ensure that the haul route was capable of being used by exceptionally wide vehicles had not been properly assessed. It is nonetheless significant

that considerations based on the Habitats Directive did not appear to play any role in the reasons given by her of her recommendation to refuse the application.

35. By decision dated 9th June 2014 the Board decided not to follow the recommendation of the inspector and to allow the appeal. The Board expressly stated that it was not satisfied that the proposed development would adversely affect the integrity of the River Nore SAC. The Board also stated in its decision:

"The Board noted the submission made to the planning authority on the 1st day of October 2013 by the Department of the Arts, Heritage and the Gaeltacht which expressed concern in relation to... [the] Freshwater Pearl Mussel. The Board had regard to these concerns as set out in the appeal documentation and, in particular, to the identified distance to populations...[of] the Freshwater Pearl Mussel within the...River Nore Special Area of Conservation, to the absence of suitable habitat for such species within and in the vicinity of the subject site, and to the detailed mitigation measures proposed in respect of water quality, including control of sediment, the preliminary drainage design submitted and the scale of the felling coupes proposed. The Board also noted the limited nature of the works required along the haul route, and the distances relating to the Conservation Objectives of the River Barrow and River Nore Special Area of Conservation in this regard."

36. One complication is that due to an oversight, the Department of Arts, Heritage and the Gaeltacht did not get to make a submission before the Board. While this is unfortunate, it is clear that their original concerns were certainly addressed by RBS in its submission on behalf of Coillte. As we have seen that submission rectified the matter of greatest concern to the Department, namely, the otherwise elevated level for suspended solids by ensuring that the new limit of 25mg/l was in line with Inland Fisheries requirements. The Department's concerns were also uppermost in the minds of both the Board's inspector and the Board itself.

37. Two key conditions were also attached to the planning permission by the Board. Condition 4 required that:

"All environmental mitigation measures set out in the Environmental Impact Statement, Nature Impact Statement and associated documentation submitted by the applicant to the planning authority and An Bord Pleanála, shall be implemented in full, except as may otherwise be required in order to comply with the following conditions."

38. Clause 17(k) provides:

"The construction of the development shall be managed in accordance with a construction management plan, which shall be submitted to and agreed in writing with, the planning authority prior to the commencement of the development. The plan shall provide details of intended construction practices for the development, including....

(k) means to ensure that surface water run-off is controlled such that no silt or other pollutants enter watercourses.....

Prior 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."

The affidavit of Dr. Evelyn Moorkens

39. It is next necessary to give consideration to the affidavit of Dr. Moorkens dated 23rd January 2015. In that affidavit Dr. Moorkens was critical of the failure of the planning authorities and the Board to retain an appropriate environmental scientist who would have the necessary expertise to assess the likely impact of the development on the Nore Freshwater mussel. She further criticised the failure of the Board to assess the potential "for recovery of the species as required by the Habitats Directive has been completely missed."

40. Dr. Moorkens also criticised the 25mg/l total suspended solids limit, saying that it was inappropriate in the case of the Freshwater pearl mussel:

"These are vulnerable to sediment pollution, for which a limit of 25mg/l total suspended solids would be completely inadequate for their protection."

41. She also stated that the development would inevitably lead to an increase in run-off "due to the hard standing surfaces and continued drainage."

42. Dr. Moorkens is undoubtedly a very distinguished environmental scientist who is the country's leading authority on the Nore Freshwater Pearl Mussel. This does not necessarily mean, however, that her criticisms of the Board's decision are well founded.

43. First, for the reasons already stated, the object of Article 6(3) is simply to ensure that the integrity of the site is not compromised. Save in those cases where the development would inhibit or prevent the ultimate restoration of the interested species, Article 6(3) is simply concerned with ensuring that the site is not adversely affected and not with restoration as such. There has been no suggestion in the present case that the proposed development would inhibit the ultimate restoration of the freshwater mussel. If that is so, then it is irrelevant that the Board did not seek to impose conditions on the developer which would have furthered the goals of restoration.

44. Second, so far as the balance of Dr. Moorkens' objections are concerned, it must be stressed that the effect of Conditions 4 and 17(k) of the planning permission is such that the Board has sought to bring about a state of affairs whereby *no silt or sedimentation* whatever will enter the watercourses as a result of the development. To that extent the Board has fully acknowledged that even the 25mg/l limit may be insufficient to ensure that the Nore Freshwater Pearl Mussel will be adequately protected.

45. The question, however, of whether this objective can be achieved is fundamentally a question of engineering and hydrology. Condition 17(k) envisages that the entire procedure will be agreed in advance with the planning authority and will be subject to monitoring by an environmental scientist or an equivalent professional. If this condition can be met in practice so that no silt whatever could enter the water run-off, then it will address all the concerns voiced by Dr. Moorkens. It may be, on the other hand, that condition 17(k) imposes a burden on the developer which, as a matter of practical engineering and hydrology, is simply too onerous and is one which cannot be realised. If that were to transpire to be the case then, of course, the development simply could

not proceed.

The Sweetman test

46. In this context, the relevant test is that posited by the Court of Justice (at paragraph 43) of *Sweetman*:

"So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements."

47. In our view, the documentary material – ranging from the RBS reports and the inspectors' reports – complied with these requirements. They did not have lacunae since the precise issue critical to the protection of the protected species – namely, the vulnerability of the Nore Freshwater Pearl Mussel to the risk of increased sedimentation through the entry of silt into the watercourses – was thereby identified and fully addressed. There were also precise scientific findings regarding the potential for adverse effects by reason of the sedimentation. Insofar as there was any doubt on these matters – namely, whether a suspended solid limit of 25mg/l would in fact be sufficient to address the specific sedimentation concerns in the case of the Nore Freshwater Pearl Mussel – they were addressed by Condition 17(k) of the permission which effectively obliged the developer to ensure that no silt or sediment at all will enter the upstream watercourses.

48. In these circumstances, we are of opinion that the Board has met the *Sweetman* test in that it has demonstrated to the necessary degree of certainty that the integrity of the SAC will not be affected by the proposed works.

49. In the light of this conclusion we can now answer the specific elements of the second question posed by Haughton J. as follows:

"Question 2(a) What obligation (if any) is on An Bord Pleanála, to seek or procure the best scientific evidence in carrying out an appropriate assessment?"

50. **Answer:** In the light of the judgments of the Court of Justice in cases such as *Waddenzee* the obligation which is placed on the Board is to have access to the best scientific knowledge which is reasonably available. The objective here is to ensure that the appropriateness of any assessment meets proper contemporary scientific standards.

51. "Question 2(b): In light of the scientific evidence that was before An Bord Pleanála with regard to the Nore Freshwater Pearl Mussel, in carrying out its appropriate assessment was An Bord Pleanála entitled to regard this as the best scientific evidence for the purposes of deciding the appeal?"

52. **Answer:** Yes. There was no suggestion at all that the Board did not have available to it the best scientific knowledge in the sense we have just described. Further, the Board identified the precise hazard posed by the development (the risk of increased sedimentation due to water run-off into the upstream watercourses) and imposed a stringent standard (Condition 17(k)) on the developer in order to ensure that no such contaminated run-off entered the watercourses.

53. "Question 2(c): In reviewing the decision of An Bord Pleanála in respect of appropriate assessment was the Court constrained only to consider matters that were before An Bord Pleanála or was it entitled or obliged to have regard to the new or additional evidence in the affidavit of Dr. Evelyn Moorkens sworn on 23rd January, 2015 with regard to the Nore Freshwater Pearl Mussel?"

54. **Answer:** It is not strictly necessary to answer this question, because even if the Board might have been so obliged, it is clear that the admissibility of this affidavit does not affect the validity of the Board's decision.

55. "Question 2(d) If so, does this evidence demonstrate a lacuna in the best scientific evidence put before An Bord Pleanála such that its decision should be quashed or remitted for further consideration?"

56. **Answer:** No. For the reasons already stated, the Board identified the area of vulnerability of the protected species in the SAC and took appropriate measures to ensure that no risk was posed as a result of the development.

Question 3: The Mitigation Measures

57. The third question concerned the mitigation measures and was in the following terms:

Question 3:

Where a proposed development may adversely affect the integrity of a European Site but such effect may be avoided by mitigation measures to what extent, if at all, is it lawful for the detail of such measures to be left over by An Bord Pleanála for post consent agreement between the developer and named authorities?"

58. It is clear that the question of the detail of the mitigation measures and the manner by which the precise nature of these mitigation measures is to be finally determined is, in principle, a matter of national law save only that, as indicated in cases such as *Sweetman*, the national authorities cannot by reason of the delegation of such issues to local planning authorities permit the obligations imposed by Article 6(3) of the Habitats Directive to be compromised.

59. So far as the issue of delegation is concerned under national law, it is clear from the Supreme Court's decision in *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 that the delegation of technical matters of this kind is, in principle, acceptable. In *Boland* the Board had granted permission for the re-development and extension of the existing ferry terminal at Dún Laoghaire, subject to conditions in relation to the management of ferry traffic and new design plans for traffic access and egress arrangements. The Court held that these conditions were permissible, since they were "essentially technical matters of matters of detail relating only to one aspect of the development, viz., the control of the flow of traffic": see [1996] 3 I.R. 435, 467 *per* Hamilton C.J. The Chief Justice further stated that "what is required to be agreed is merely a matter of detail" and for that reason the conditions which prescribed that these details were to be agreed with the planning authority did not amount to an abdication of the Board of its statutory duties.

60. For our part, we can see no great difference in principle so far as the conditions at issue in the present case are concerned. The Board's statement of principle is crystal clear, namely, that no silt or sediment whatever should enter the run-off thus contaminating the up-stream watercourses. The realisation of that objective is largely a question of designing the appropriate engineering and hydrological solutions under the supervision of an environmental scientist or other similarly qualified professional. Given that the

Board's decision has already articulated the relevant principle, the actual design of these mitigation measures is essentially a matter of detail in the sense envisaged by the Supreme Court in *Boland*.

61. For these reasons, therefore, we are of the view that the delegation of the finalisation of these conditions to the planning authority is within the scope of delegation envisaged in *Boland* and is not unlawful.

Whether a reference to the Court of Justice pursuant to Article 267 TFEU should be made

62. While we were pressed by counsel for the applicants to make a reference to the Court of Justice pursuant to Article 267 TFEU, we do not think that such is required, even if this Court were to be regarded as a court of final resort for this purpose, a question which it is unnecessary for present purposes to determine. The EU law issues in this case focus on the interpretation of Article 6(3) of the Habitats Directive, a provision which has already been the subjective of extensive guidance from the Court of Justice in cases such as *Waddenzee* and *Sweetman*.

63. In fact, the Court of Justice has with its decision in *Sweetman* already provided a definitive interpretation of the meaning of Article 6(3) so far as cases of this kind are concerned. Indeed, the Court of Justice has further indicated that the application of these principles in an appropriate case is a matter for the national courts. This Court has endeavoured faithfully to apply the *Sweetman* principles in the present case. As, therefore, there are no issues or questions of interpretation of EU legislation which properly arise for determination, there is no necessity for such a reference.

Conclusions

64. As all three certified questions have been resolved adversely to the applicant and as this Court has concluded that there is no necessity for a reference to the Court of Justice pursuant to Article 267 TFEU, it follows, therefore, that the appeal must be dismissed.