Neutral Citation: [2013] IEHC 402

THE HIGH COURT

[2011 947/J.R.]

BETWEEN

Enda Craig

Applicant

v.

An Bord Pleanála

Respondent

-And-

Donegal County Council

Notice Party

Judgment of Mr. Justice Hedigan delivered on the 26th of August 2013.

Application
1. The applicant seeks to quash the respondent's decision of the 12th August, 2011, to grant approval to the notice party under s.226 of the Planning & Development Act 2000 for a waste water treatment plant. The applicant submits that the Court is both entitled and obliged to examine whether or not there has been substantial compliance with the requirements of the Environmental Impact Assessment Directive and the adequacy of the Environmental Impact Statement delivered and if an error has been made then the decision should be quashed.

Factual background
2.1 Donegal County Council plans to construct a waste water treatment plant (hereinafter "WWTP") in Co. Donegal for a population equivalent of 8,800 with an outfall into Lough Foyle at Carnagave, 1.5km north of Moville. It is envisaged that the plant will encompass four pumping stations, rising mains, overflow pipelines and associated road improvement works. Treated effluent outfall would be into Lough Foyle.

In September 2007 the Council sought an opinion from An Bord Pleanála under s.226 (7) of the Planning & Development Act 2000 (as amended) in relation to the proposed development, owing to the trans-boundary nature of the project (Lough Foyle borders both the Republic and Northern Ireland) and the potential environmental effects on the Lough. The proposed development and ancillary pipe work did not come above the threshold for a mandatory Environmental Impact Statement (hereinafter "EIS") - which is a population equivalent of 10,000 or more. However the Council requested An Bord Pleanála to treat it as a project requiring an EIS and on the 2nd January, 2008, owing to the sensitivity of the site An Bord Pleanála determined an Environmental Impact Assessment (hereinafter "EIA") be prepared and submitted to it for approval.

2.2 On the 22nd August, 2008, Donegal County Council applied, pursuant to s.226 of the Planning & Development Acts 2000-2011 to An Bord Pleanáa for permission for the construction of the WWTP. The Board appointed Mr. Daniel O'Connor as inspector to advise on the application and he presided at an oral hearing on the 30th June and the 1st July, 2009.At the hearing a preliminary draft of the project was presented by the Council .On the 6th October, 2009, he reported on this hearing and his report recommended for a number of reasons that the proposed development be refused. On the 4th February, 2010, the Board met and requested further information in relation to the project from the Council. On the 8th April, 2010, the inspector reported on this further information and again recommended refusal. In all the inspector recommended refusal of the application three times.

The Board disagreed with the inspector's opinion and planning permission for the project was granted subject to conditions in the Board's decision of the 12th August, 2011.

On the 6th October, 2011, the applicant made an ex-parte application to Peart J. and obtained leave to apply for judicial review of the Board's decision.

Environmental Assessment
3. The EIA is a four stage process. It commences with the submission of an EIS to An Bord Pleanála by the local authority under sections 175 and 226 of the Planning and Development Acts. An EIS is required where a WWTP has capacity in excess of 10,000 population equivalent and where there are sensitive environmental issues such as where a site is designated a special area of conservation (hereinafter "SAC") and would be affected by the project. Following submission of the EIS the local authority is obliged to publish a notice of the proposed development. Thereafter, third parties may make submissions/observations and such evidence as may be adduced before an inspector. This evidence and the report/recommendation of the inspector forms part of the totality of material placed before the Board. At the discretion of An Bord Pleanála a request for further information may be made for the purposes of the EIA. A copy of the EIS is also furnished to the EPA as a prescribed body, dealing with water quality.

Applicant's Submissions
4.1. Bias

The applicant had initially argued that the appointment of Mr. Conall Boland to the board of An Bord Pleanála raised an apprehension of subjective bias but he later amended this to allege an apprehension of objective bias. The applicant argues that the involvement of Mr. Boland in the determination of whether the project should be granted permission was inappropriate having regard to his past employment. Mr. Boland was previously a technical director of RPS Consultants (or its sister company) which carried out studies in respect of the development the subject matter of the application and produced what the applicant considers was a critical and contentious report entitled "Hydrodynamic and water quality modelling study" in the EIS. This report concerned an area of expertise with which Mr. Boland is familiar. The applicant argues that the apprehension of bias is heightened due to the fact that Mr. Boland

was central to the processing of the application for the WWTP. He was the author of all of the Board's directions regarding the application for the WWTP and in particular the Board's directions which on three separate occasions (being the 4th February, 2010, the 8th April, 2010, and the 24th June, 2010) departed from its own inspector's recommendation to refuse consent for the proposed WWTP. The applicant submits that it is highly unusual if not unprecedented for an inspector to recommend refusal of consent three times and for the Board to ignore this recommendation.

The applicant contends that because the inspector's recommendation did not accord with the views of Mr. Boland he effectively removed the inspector entirely from the process by way of his final direction of the 24th June, 2010, whereby the board sought information from the Environmental Protection Agency (hereinafter "EPA")without any recourse to the inspector.

The applicant argues that there were other board members having no conflict of interest who could have undertaken the role Mr. Boland performed and his involvement was therefore unnecessary. Also of note, the applicant argues, is the fact that the Board's code of conduct would have required Mr. Boland not to handle the application for the WWTP had it come before him two years earlier as this would have been within one year of his employment with the company that produced the study.

The applicant contends that having regard to all of the above there was an understandable apprehension of objective bias on his part.

The test for objective bias was alluded to by Fennelly J. in *Kenny v Trinity College Dublin* [2008] 2 IR 40. where he stated at paras.18-21:-

> "The test for deciding whether objective bias exists in the case of any adjudication has been repeated in slightly different terms in many cases over many years.....Denham J. described the test authoritatively in her judgment in *Bula Ltd v. Tara Mines Ltd. No 6* [2000] 4 IR 412 .At p.441 she stated:-
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> > ' .. .it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues....it is an objective test-it invokes the apprehension of the reasonable person."

The applicant submits that it is clear that he passes this test in showing that the Board's decision was motivated by bias.

4.2. Inadequacy of EIS/EIA

The applicant contends that the EIS and EIA process carried out by the Board were deficient for the purposes of the Board's assessment of the likely impacts of the proposed development. His argument in this regard is premised on two points.

Firstly, he argues that the Board contravened Directive 85/337 EEC (hereinafter the "EIA Directive") in carrying out an assessment without having sufficient information (such as regarding the design of the project) to enable it to be carried out correctly. Article 3 of the EIA Directive provides that:-

> "The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:
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> -human beings, fauna and flora,
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> -soil, water, air, climate and the landscape,
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> -the inter-action between the factors mentioned in the first and second indents,
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> -material assets and the cultural heritage.

He argues that Article 3 should be complied with prior to development and contends that the Board did not carry out an adequate assessment of the overall impact of the scheme but concentrated on the wastewater treatment plant and pipe.

Commission v Ireland (Case C- 50/09) dealt with the adequacy of Ireland's transposition of the EIA Directive .The ECJ ruled therein that the Planning & Development Act 2000 (as amended) and the Environmental Protection Agency Act 1992 (as amended) inadequately transposed the EIA Directive and was in breach of it. The ECJ made a distinction between the obligation at the end of the decision making process to take into consideration information gathered by the Board and the obligation of the Board to carry out an assessment of that information. At paras. 36-40 it held:-

> "Article 3 of Directive 85/337 makes the competent environmental authority responsible for carrying out an environmental impact assessment....[a]s stated in Article 2(1) of the directive, that assessment is to be carried out before the consent applied for to proceed with a project is given.....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.....[t]hat assessment obligation is distinct from the obligations laid down in Articles 4 to 7,10 and 11 of Directive 85/337,which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts.....[h]owever, that obligation to take into consideration, at the conclusion of the decision making process, information gathered by the competent environmental authority must not be confused with the assessment laid down in Article 3 of Directive 85/337."

There were four matters in relation to the project about which the inspector was concerned and on which the respondent never received information despite seeking same (correctly deeming this necessary following case 50/09) from the EPA by way of letter to it on the 30th June, 2011. These matters were:-

> 1. The standard of treatment to be employed at the proposed WWTP at Camagave;
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> 2. The revised discharge standard for the plant by Donegal County Council during the course of the oral hearing;
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> 3. The potential impacts on the quality of the receiving waters arising from the operation of the proposed WWTP at Camagave;

4. The potential impacts on the receiving waters from the proposed emergency outfalls at the pumping stations at Carrickarory, River Row (Moville) and Greencastle pier.

It is argued that the EIA stopped at the point the letter to the EPA was sent as the respondent did not have sufficient information to make an assessment and it could not continue until this information was received.

The applicant argues that from the wording of the letter to the EPA it is clearly evident that the Board was requesting the EPA to provide it with an analysis of information as part of the EIA and it was not an idle request especially considering it enclosed almost the whole file on the matter with the letter. The applicant points to the fact that the letter refers to the oral hearing where the environmental impacts of the WWTP discharge to Lough Foyle and associated dispersion modelling were discussed. The respondent informs the EPA that at the hearing the applicant proposed a stricter treatment standard for effluent than that set out in the EIS and said that "....it is considered appropriate that the Board consults further with the Agency prior to completing the environmental impact assessment for the project and making its decision....the Agency is therefore invited to comment on the information contained in the EIS....." (being 1-4 above).

Moreover, the applicant contends, the Board direction dated the 24th June, 2011, and signed by Mr. Boland expressly records that "the board decided to defer consideration of the application and to consult with the EPA having regard to the implications of the ECJ ruling 50/09".

In its response to the Board's letter dated the 22nd July, 2011, the EPA declined the Board's invitation to comment on the above four matters and did not furnish any of the data sought.

The applicant argues that if the Board deemed this information necessary but it was not furnished to it, the Board cannot have conducted an assessment of the information (let alone one in accordance with case C- 50/09). The respondent did not (and could not) undertake either an investigation or an analysis of the standard of treatment to be employed at the proposed WWTP based on 1-4 above to enable it to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 of the EPA Directive and the interaction between those factors.

Moreover, the applicant argues, the Board was further impeded in carrying out an appropriate assessment since it had inadequate information before it in terms of the design of the proposed development. He points to the fact that only a preliminary model of the WWTP (the so called "design and build" project) was presented at the hearing. This type of project leaves the critical decision making to the construction contractor and the applicant queries how a meaningful assessment of it could be done as it had yet to be fully designed.

He argues that the respondent erred in law by failing to consider whether and how the quality of treated effluent could be reduced from the proposed level of 50,000 coliform forming units (CFU) in the EIS to that proposed at the oral hearing of 2,000 CFU .It is obliged under Directive 85/337 EEC and the Planning & Development Act 2000 to show how such a change would be effected and its impacts.

The applicant suggests the inspector also found the EIS inadequate. This is evident from p.137 of his report where at para. 6.1. (a) he states that the proposal for treatment should be refused having regard to:-

"a) The inadequacy of the information provided in the Environmental Impact Statement and in evidence at the oral hearing regarding the proposed form of treatment."

The respondent could have sought the necessary data from the EPA by way of Regulation 44 of the Waste Water Discharge (Authorisation) Regulations 2007 which provides that where the Board considers that a development is likely to have an effect on waste water discharges it may request the agency to make observations in relation to same. However, the Board did not do this and instead proceeded to make its decision of the 8th August, 2011, in the absence of any of the data it had determined was necessary to make an assessment for the purposes of the EIA Directive.

The applicant does not dispute the need for a WWTP and is not against the project *per se*. He argues that if the process is done correctly and according to legislation he would have no further complaint. However, he submits that in fact the process was not completed correctly and the Board is in clear breach of the EIA Directive and the judgment of the ECJ in case C- 50/09. The applicant therefore contends that the Board's decision must be quashed. He relies *on Berkeley v Secretary of State* (2003) 3 All ER 897 where Lord Hoffman stated at p.907:

"Although s. 288(5)(b), in providing that the court 'may' quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether....the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the directive. To do so would seem to conflict with the duty of the court under article 5 of the EC Treaty (now article IOEC) to ensure fulfilment of the United Kingdom's obligations under the Treaty."

4.3 Northern Ireland-EIS/EIA

The second point on which the applicant argues that the EIA/EIS fell short of requirements is in relation to Northern Ireland. The applicant argues that there is no evidence that Donegal County Council assessed the trans-boundary effect of the project or considered what areas and territories the project would impact upon, given that Lough Foyle borders both the Republic and Northern Ireland.

The applicant submits that the Board never appears to have directed its mind to the extent and status of that boundary in its assessment as posited by Mr. McCartney. The respondent may argue that it notified the Northern Irish authorities of the project however the applicant argues that merely notifying them is inadequate. He submits that the respondent should have considered from the outset where the outfall would be placed and this should have been properly assessed by the Council but this was not done.

The applicant further notes that an issue has recently arisen regarding ownership of the seabed of the Lough being the seabed on which the project will impact. If the UK was to lay claim to this it means that the Council would be attempting the compulsory purchase of crown lands for the project to progress.

4.4 Habitats Directive

The applicant submits that the respondent erred in law and acted *ultra vires* in the manner in which it assessed and approved the

proposed project before it had ascertained that it would not adversely affect the integrity of European sites as required by the EC (Natural Habitats) Regulations 1997 (as amended) and Directive 92/43/EEC (as amended) on the conservation of natural habitats and of wild flora and fauna (hereinafter known as "the Habitats Directive") in circumstances where there would be direct discharge into a proposed site.

Pursuant to the Habitats Directive certain sites may be designated as natural habitats and part of the Natura 2000 European Ecological Network. The sites so designated are subject to the provisions of the Directive. Article 6(3) thereof requires 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,....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 ...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."

The respondent Board is the competent authority for the purposes of Article 6.

The applicant accepts that the entire Lough is not designated a natural habitat however portions of it are so designated. The applicant further accepts that the outfall pipe is not spilling into a designated site. However, he contends that it will be spilling into the Lough and argues that effluent could be carried to other parts of the Lough that *are* designated as a SAC.

The applicant submits that following the *Waddenzee* case (Case C- 127/02), the respondent must satisfy itself to an extremely high standard that the proposed WWTP will not have an adverse effect on the integrity of the site. *Waddenzee* was a reference for a preliminary ruling concerning the interpretation of Article 6(3) and the extent of the obligation to ascertain that a project will not adversely affect a site's integrity.

The applicant contends that from this ruling it is clear that where any doubt exists as to the effects of the project, the proposed development must be refused.

The applicant also relies on *Commission v Portugal* (case C-239/04) where General Kokott found in a similar vein to *Waddenzee* at para. 31 of his opinion that:-

> "Under ... Article 6(3)...it is not sufficient .....to prove ex post facto that a project had no negative impact. On the contrary, any reasonable scientific doubt as to the absence of adverse effects on the integrity of the site must be removed before the project is authorised."

Since, as per Article 6 (3) the proposed WWTP, the subject of these proceedings, is not directly connected with or necessary for the management of any European site consent to the proposed development can only be given where an Bord Pleanála has ascertained that it will not adversely affect the integrity of the site.

The applicant is concerned about the adverse effect of the project on the Lough and the beaches and coastline in the vicinity given that it is an important water body and a major amenity. He is also concerned that no consideration was given to the unique ecological situation of the Lough as the Foyle area is a narrow inlet and, while a marine area, it is almost completely enclosed and is unique in terms of its tidal conditions but also in terms of its ecological importance. It is evident from p.63 of the inspector's report that The Loughs Agency shared the applicants concerns that no proper evaluation had been undertaken, specifically regarding receptors such as eel, salmon and lamprey which are protected under the Habitats Directive in the designated areas. The applicant argues, as Mr Me Cartney of the Loughs Agency does at p.77 of the inspector's report, that an appropriate assessment was not carried out under the Habitats Directive in relation to those receptors downstream which while not in a protected area may be affected on the migratory routes to the designated areas.

Respondent's Submissions
5.1 Bias

The respondent refutes the unwarranted allegation that Mr. Boland acted inappropriately and that the Board's decision was motivated by bias. The respondent notes that the applicant in his pleadings complained of subjective bias but in his oral submissions attempts instead to raise an apprehension of objective bias.

The legal principles regarding an evaluation of an allegation of bias were laid out in *Usk & District Residents Association Ltd. V An Bord Pleanála & Ors.* [2009] IEHC 346 where Me Menamin J. said at para. 22:-

> "Objective bias is to be distinguished from subjective bias. To establish the former, it must be shown that there existed some factor, extraneous to the decision making process, which could give rise to a reasonable apprehension that the decision-maker might have been biased."

In *O'Reilly v Cassidy* [1995] I.L.R.M 306, Flood J. held that the fact that a judge's daughter was briefed before him on a licensing application was not a reasonable ground on which bias could be found. He found that in addition to such relationship there must exist some factor which could give rise to a fear in the mind of a reasonable man that in the circumstances the relationship could affect the outcome of the case.

The respondent submits that it is evident from the applicant's second affidavit dated the 8th January, 2013, at para. 59 (wherein he says "...it would be very difficult, no matter how objective Mr.Boland would try to be, to distance oneself from a firm that he was once employed by...when one has held such a senior position in that firm...it is difficult to reconcile this with a person who was disinterested in the outcome sufficient to allow an objective assessment ...")that bias is not being prosecuted from the viewpoint of someone who might have a reasonable apprehension of bias (objective bias) but is based on a claim of subjective bias. The applicant's allegation of bias is without foundation. Mr. Boland swore an affidavit setting out that he had no involvement with RPS. MCOS was one of the leading Consultancy firms in Ireland. Mr. Boland began working there at the beginning of his career and rose to the position of technical director. Kirk was similarly one of the leading firms in Northern Ireland. Both firms were acquired separately by an international company- RPS, between 2002 and 2004. The respondent submits that the applicant sought in his pleadings to impute an improper relationship from the sole fact that Mr. Boland worked for a company which carried out a particular study for the EIS and was related to one in Northern Ireland. He has now changed tack and characterises his claim in this regard under the heading of objective bias.

The respondent argues that the applicant's concerns are baseless and relies on *O'Neill v Irish Hereford Breed Society Limited* [1992] 1 IR 431 where at p. 450 Murphy J. held:-

> "...not every prior involvement by a member of a body exercising a quasi judicial function with a person or the conduct of a person whose affairs are under consideration by the body would necessarily disbar the member from acting in the matter, certain forms of involvement would undoubtedly have that result."

The standard a reasonable person may expect as regards the "prior involvement" rule must depend entirely on the context of the case. Under s.106 of the Planning & Development Act 2000 as amended by s.15 of the Planning & Development (Strategic Infrastructure) Act 2006 there is a legislatively mandated make-up of the Board of An Bord Pleanála and the persons thereon are appointed by reason of their experience and background. A reasonable person must realise that those persons appointed to the board will be nominated by representative associations of persons whose professions relate to engineering and would have considerable engineering background and expertise in the field. There are few engineers in Ireland dealing with the area the subject matter of waste water treatment plants and by virtue of this Mr. Boland was appointed to the board.

It is denied that Mr. Boland took advantage of his role on the Board to ensure that the board's decision would be favourable to RPS or that he usurped the role of the inspector. It is submitted that the applicant misunderstands the inspector's role *vis a vis* An Bord Pleanála. Under s.146 of The Planning & Development Act 2000 the inspector's function is to consider an application by making a written report and recommendation. The Board is the ultimate assessor of a project not the inspector.

The respondent argues that *Kenny v. Trinity College Dublin* on which the applicant relies is not in point herein. That case is distinguishable from this one, it is contended, since *Kenny* involved not merely a planning issue but an allegation of fraud against an architect, where the brother of the judge hearing the matter was a partner in the firm of architects implicated. No such relationship exists herein. In the circumstances the respondent contends there is no reason for a reasonable person to have any grounds for suspicion much less to conclude that Mr. Boland might have been actuated by bias or a desire to assist RPS.

5.2 Habitats

The respondent contends that there is no legal or factual basis for the applicant's contention that it has breached the EC (Natural Habitats) Regulations 1997 or the EIS requirements. The respondent notes that Lough Foyle itself is not a designated site although there are two Natura 2000 designated sites within the Lough. Those sites are roughly 11.5km and 4.5 km away from the discharge point of the WWTP.

Thus, the respondent argues it did not have to meet the requirements of Article 6(3) of the Habitats Directive as the discharge will not take place into a protected site. Similarly it is argued that the board is not bound to meet Article 6(3) on the basis that areas near the protected sites must not be harmed since the protected areas in question are far from the outfall.

There is no basis for contending that the Council did not consider the impact on Northern Ireland as it is patently obvious from the EIS and the inspector's report that the entirety of the Lough was assessed.

The assessment obligations which arise in relation to habitats were considered in *Sweetman vAn Bard Pleanála* [2010] IEHC 53 where it was held that such obligations only arise for projects which are likely to have a significant effect on SACs. As *Sweetman* makes clear the decision of which projects fall within this category is a decision for the board. The Board felt it had sufficient evidence before it to determine that the effect of the project on the receiving waters in Lough Foyle was unlikely to produce a significant effect on the relevant sites.

Despite an assessment not being required the EIS did deal with these matters and the inspector in his report of the 6th October, 2009, in fact outlined how the EIS dealt with them under the heading "Flora and Fauna" at s. 3.4 of his report. On water quality the inspector expressly stated at s. 5.6 of his report that the EIS found that "the impact on water quality....is not considered to give rise to significant negative water quality impacts". Donegal County Council took the view that the overall impact of the scheme on water quality would be positive and the inspector agreed.

The applicant appears to be relying on the expert report of Ms. Dubsky entitled "Considering Impacts on Sea Grass Zostera Marina" wherein she states that insufficient consideration was given to eelgrass. The respondent considers the manner in which the applicant characterises her report to be of concern. The report actually states that the main problem arises from the discharge of raw sewage which is what the WWTP seeks to eliminate. Ms. Dubsky correctly acknowledges that Lough Foyle is not as a whole a designated Nature 2000 site and there is no designation in the vicinity of the outfalls. Nonetheless the outfall location was considered in light of portions of the area being covered by nature conservation designations.

She deals with the legal status of eelgrass at p.4 of the report. She explains that it is a qualifying species but is not designated in Lough Foyle. Thus, the respondent argues, while the grass is of significance it is not of legal significance in the context of the Habitats Directive. Nonetheless, the effect on marine habitats including eel grass was also considered, as is evident from the inspector's report and part 4 of the EIS, as were oysters, which are not a protected species under the Directive.

The applicant is concerned about the effect on salmon, otters and rare birds. It is clear from the inspector's report that the impacts on otter, birds and salmon was considered. It is clear from part 4 of the EIS that Donegal County Council also addressed the impacts on potentially affected species.

5.3 Northern Ireland.

The respondent argues that the applicant in his second affidavit has introduced a point on which leave was not sought, being the jurisdictional issue, where he maintains that the "extent of the national territory" was "the most fundamental consideration in the entire application" and that the respondent failed to take this into account when assessing the project. He further contends that the development for which permission has been granted lies in part outside the jurisdiction, to the extent of contending that it may require the compulsory acquisition of "crown lands". The respondent asserts that the only grounds the applicant may advance are those for which he was granted leave and the applicant's arguments are in any event completely without foundation and entirely misconceived.

The respondent denies that it failed to consider its obligations *vis- a- vis* the status and extent of the adjoining territory or that it omitted to assess any trans-boundary effects the development may have had, and argues that any claim to the contrary is without merit and factually baseless. Trans-border effects were identified and engaged with. In fact Donegal County Council specifically asked

the board to submit an EIA because of those potential effects.

There were detailed consultations between Donegal County Council and the relevant Northern Irish authorities. The respondent submits that almost as many northern bodies as southern were consulted demonstrating that the Council was concerned with the cross- border effects of the project.

Moreover, p.5 of the Board's decision expressly refers to its consideration of input from the Loughs Agency and the Planning Service of Northern Ireland. Although in the end the Board did not agree with the suggestion made by the Loughs Agency it cannot be presumed from this that it did not have any regard to the agency's suggestions.

The entities who made submissions have not made any complaints and the respondent submits that the applicant does not have standing to now make a complaint on their behalf.

5.4 EIA/EIS

It is the statutory function of An Bord Pleanála to assess the adequacy of the EIS as part of the EIA process. In this process the planning authority, and on appeal the Board, must be appraised of the likely significant effects on the receiving environment of a proposed development. The Board in its decision (at p.2 "Reasons and Considerations") indicated that it completed its assessment on the basis of the EIS furnished by the Council and the modelling exercise as presented at the oral hearing and was satisfied that the proposed discharge would be compatible with protecting water quality in Lough Foyle.

The Board clearly felt that the EIS contained a sufficient and appropriate level of information to assist it in assessing the main effects of the proposed development and to enable it to carry out the EIA having regard to the requirements under the Planning Act 2001 and Planning & Development Regulations 2001. The inspector expressly stated at s. 5.1 of his report on the 6th October, 2009, that "The EIS submitted is considered to comply with legislative requirements."

It is argued that the applicant's contentions in relation to the inadequacy of the EIS are misconceived, having regard to the requirements of the discretionary provisions of Article 94 of the 2001 Regulations which states:-

> "94. An EIS shall contain-
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> (a) the information specified in paragraph 1 of Schedule 6,
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> (b) the information specified in paragraph 2 of Schedule 6 to the extent that-
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> (i) such information is relevant to a given stage of the consent procedure and to the specific characteristics of the development or type of development concerned and of the environmental features likely to be affected, and
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> (ii) the person or persons preparing the EIS may reasonably be required to compile such information having regard, among other things, to current knowledge and methods of assessment, and
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> (c) a summary in non-technical language of the information required under paragraphs (a) and (b)."

It is argued that the applicant fails to recognise the discretion afforded to the competent authority to seek and obtain further information as part of the EIA process, in addition to the EIS.

The applicant maintains that the EPA was not consulted until 2011, some weeks before the application was determined. This is incorrect. From a memo dated the 25th May, 2010, it is clear that the board received submissions from the Agency in relation to both sets of additional information submitted by the Council. Moreover, the respondent denies that a letter to the EPA of the 30th June, 2011, was a request for further information. It submits that the language used in that letter can be contrasted with a letter dated the 10th February, 2010, to Donegal County Council where the respondent clearly states that it is looking for further information. It says "....hereby requires you to furnish the following further information...". whereas the letter sent to the EPA states that the EPA "...is invited to comment on the information contained in the EIS....". The board argues that the letter of the 30th June, 2011, is no more than an invitation to comment and nothing arises from the EPAs failure to do so.

The respondent argues that the applicant errs in its reliance on case C-50/09 and argues that the split decision process in that case is irrelevant to this case. In that case the European Court of Justice accepted that the Supreme Court interpretation of the EIA complied with the Directive, but found that there were shortfalls in the legislation therefore clarity was needed as it was not evident in the transposing measures.

The respondent submits that the requirement of the EIA process is to assess the likely environmental effects of a proposed development for which the EIS merely sets the agenda for further discussion and deliberation. It relies on the dicta of Mac Mahon J. in *Klohn v. An Bord Pleanála* 1 I.R. 59 who noted at p.63:-

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

Thus the EIS is merely the point of departure in the EIA, which is followed by written submissions then possibly an oral hearing. The EIS is only intended to facilitate the board in assessing the likely significant effects of the development which must form part of the process of considering the planning application. The respondent does accept that the WWTP design was preliminary, but this does not signify that the board was unaware of the very elements of the design. It is not necessary for an EIS to contain exhaustive detail. As Elias J. held in *Hereford Waste Watchers Limited v. Hereford Council* [2005] EWHC 191 Admin at para.22:-

> "It is therefore only with respect to anticipated significant effects that relevant information, including relevant data, should be provided".

The Board had ample evidence before it on which it could assess the likely impact of discharge from the outfall pipe of Lough Foyle

which is the applicant's main concern and was satisfied that the proposed discharge would be compatible with protecting the quality of water at Lough Foyle and would not result in any significant adverse effects on the environment.

It is well established that assessment of the adequacy of an EIS is a factual matter requiring a particular planning expertise and is a matter for the decision maker (An Bord Pleanála).

In *Klohn v An Bard Pleanála* Me Mahon J. at p.64 held:-

> ".....[T]he content of the environmental impact statement is primarily determined by the wording of the relevant regulations ...whereas its adequacy is determined by the decision maker..."

Therefore there is a limited basis upon which the respondent's decision may be judicially reviewed either in respect of the adequacy of the EIS or whether it has sufficient information before it to conduct an EIA.

In *Klohn* at 73 Mac Mahon J. also held:-

> "...in cases such as this the court in reviewing the Board's decision will not interfere with the *bona fide* exercise of its discretion in these matters. It is not the court's function to second guess the respondent and substitute its own decision for that of the Board. The legislature, in its wisdom, vested the power to make such a decision in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions in this specialised area than the court....."

Moreover, there is a presumption that the decisions of the board are valid and that it has performed its functions properly until the contrary is shown The respondent points again to *Klohn* where Mac Mahon J. held at p.74:-

> "Furthermore one must assume....that statutory bodies....exercise their powers and discharge their functions in a lawful and proper manner..."

5.5 Failure to give reasons

In its decision the board explains in detail its main reasons and considerations in granting planning permission. It also explains it reasoning for deciding not to accept the inspector's recommendation.

The Board's obligation to recite its main reasons is contained in s.34 (10) of the Planning and Development Act 2000. This provides that :-

> "(10) (a) A decision given under this section or section 37 and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions, provided that where a condition imposed is a condition described in subsection (4), a reference to the paragraph of subsection (4) in which the condition is described shall be sufficient to meet the requirements of this subsection.
>
> (b) Where a decision by a planning authority under this section or by the Board under section 37 to grant or to refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in-
>
> (i) the reports on a planning application to the manager (or such other person delegated to make the decision) in the case of a planning authority, or
>
> (ii) a report of a person assigned to report on an appeal on behalf of the Board, a statement under paragraph (a) shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission."

In *Grealish v An Bord Pleanála* [2007]2 IR 536 at para. 40 O'Neill J. described the legal duty arising under s. 34(10) of the 2000 Act as:-

> "....a very light one, one could even say almost minimal."

There are two different requirements in s.34(10) and this distinction was highlighted in *Mulholland v An Bord Pleanála (No.2)* (2006] 1 IR 453 wherein Kelly J. drew a distinction between s. 34(10) (a) which requires that the main reasons and considerations should be provided for a decision to grant or refuse permission, and (as is pertinent in this case) s. 34(10)(b) which requires that a decision to differ from the recommendation of an inspector should be supported by the main reasons alone.

On the particular standards required of reasons in such a case in *O'Neill v An Bord Pleanála* [2009] IEHC 202 at paragraphs 34-37 Hedigan J. held with specific regard to the s.34(10)(b) situation that :-

> "There was no obligation to provide detailed reasoning equivalent to the highly professional and highly detailed report of the inspector herself. Only the main reasons were required and, in my opinion, they were amply provided...The respondent was not required to deliver a discursive judgment not to engage in a full re-evaluation of the inspector's report."

In this case the respondent argues its decision contains a proper and adequate indication of the main reasons for not accepting the recommendation in the inspector's report and the board has complied fully with its obligations under s.34 (10) and there is no obligation on the board to outline every matter that to which it had regard in arriving at its decision.

Notice party Submissions
6.1 Adequacy of EIS/EIA

The notice party adopts the respondent's submissions.

It notes that the WWTP itself was sub-threshold the requirements for a mandatory EIS as was the associated pipe work. Nonetheless, an EIS and EIA were conducted and the overall proposal was assessed therein.

As part of this assessment it was noted in the EIS that the proposed project would have an overall positive environmental effect,

however the notice party submits, the applicant has attempted to argue the matter in such a way as to make it appear that the statement concluded that a negative environmental impact would ensue.

The matters of which the applicant complains such as flora & fauna, water quality and soils were considered in the EIS and by the inspector in his report and it was found that there was no significant impact on any of them.

The Loughs Agency did not raise any concerns in respect of the Northern Irish side of the Lough. It is accepted that it did raise concerns regarding salmon, eel and lamprey which would travel throughout the Lough however the notice party submits that this concern was adequately addressed by the County Council.

The notice party asserts that the preliminary design of the project upon which the EIS was based was conclusive in a number of respects e.g. the hydraulic design, as is evident from the affidavit of Ms. Conibear. Therefore it is argued that the respondent did have enough information to conduct a thorough assessment of the project. The applicant has not raised any precedent in support of his argument that final design is a requirement of the EIS process.

In *Klohn v An Bord Pleanála & Ors.* [2009]1 IR 59 Me Mahon J. explained the role of the EIS at p.63 finding that:-

> "Although the EIS is intended to be comprehensive, it is rarely definitive. As the first document in the investigation process, it is, at most, the point of departure in an ongoing process. It is intended to launch a process which will attract comment and submissions from other parties, including observations from those with entitlements to participate in the process. The intention is that, as a seminal document, it sets the agenda for further discussion and deliberation which will, finally, provide a body of information which will enable the decision maker to make its assessment in full possession of the relevant environmental factors."

It is submitted that the EIS prepared by the Council contained an appropriate level of information having regard to the above and requirements under the Planning Act and Planning Regulations 2001.

The difference between the EIA and EIS and their relationship was set out by Clarke J. in *Arklow Holidays Ltd. v. An Bord Pleanála & Ors.* [2006] IEHC 15 where he stated at para. 6.2:-

> "It is, of course, necessary to note that there is a distinction between the EIS (which is a document prepared by the developer and submitted to the planning authority) and the environmental impact assessment ("EIA") which is the process required, as a matter of EU law, of the competent authority (in this case the planning authority) prior to the grant of development consent. It is clear that, as a matter of EU law, it is open to the competent authority to supplement any information submitted on behalf of the developer with its own enquiries."

The applicant contends that where there is reliable scientific information that a development would have a severe negative impact on European sites, the standard of certainty, as required by *Waddenzee*, is met and therefore the Board must refuse the Development. The notice party argues that this is an untenable argument on the facts. There is no opposing scientific information that it would have any impact on any EU site.

Decision

7.1. The issues that arise in this case are as follows;

> (a) objective bias;
>
> (b) failure to assess the impact on the Northern Ireland side of Lough Foyle;
>
> (c) inadequacy of the EIS/EIA.

7.2 The bias issue, as first raised, claimed direct bias on the part of Mr. Boland in his handling of the application to An Bord Pleanála, *i.e*. subjective bias. This is the only bias that was pleaded in the case. It was vigorously pursued with references to alleged clear bias on the part of Mr. Boland. In his second affidavit, the applicant alleged that Mr. Boland usurped the role of the inspector. It was speculated that he may have known the engineers involved in the project and was even friendly with them. No evidence of this was produced but clear impropriety was alleged. When Mr. Boland swore an affidavit explaining in detail his very tenuous link with RPS (Northern Ireland), it appears the response to this was to increase the level of allegation. No evidence of any kind was produced to back up these allegations. They appear to have been based on a misunderstanding of the role of the Inspector *vis-a-vis* An Bord Pleanála. Presumably on wise advice, the allegation of actual bias, i.e. subjective bias, was withdrawn at the hearing. In its place was raised a claim of objective bias. This involves the reasonable apprehension of a reasonable person fully informed of all the relevant facts that he would not have a fair hearing from an impartial tribunal. See *Kenny v. TCD* [2008] 2 I.R. 40, Fennelly J. at paragraphs 18- 21, where he cited the judgment of Denham J. in *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412 at p. 441. Before dealing with this entirely changed claim in relation to bias, I think it is important to point out the following. Sad and sobering experience has shown that the planning process attracts egregious forms of corruption and dishonesty. Constant vigilance is undoubtedly required to combat this plague. Sharp and focused litigation is certainly one of the effective tools for doing this. The courts, therefore, must always be alert to any allegations of impropriety alleged to be present in the planning process and ready to investigate in accordance with their proper role. Litigants bringing cases before the courts are frequently private individuals dedicated to trying to protect the environment. Their battle is often a David and Goliath struggle. Nevertheless, such litigants should be careful not to unjustly indict the good name and integrity of those involved in the planning process in their pleadings before these courts. To do so without solid evidence, completely absent herein, is an abuse of the process of the court and does nothing to assist the case of good planning or environmental protection. In justice to the parties involved herein, I think I must state unequivocally that Mr. Boland's good name and integrity have been thoroughly vindicated in these proceedings. I am sorry to say that, on the other hand, the plaintiff's credibility as a plaintiff has been badly damaged by his apparent ratcheting upward of his allegations against Mr. Boland after he, in his affidavit, had given a more than reasonable answer to the allegations of bias. No reasonable or fair person would have responded thus. Turning to the bias issue as it is now raised, do the facts of this case support the claim of objective bias? On the basis of the pleadings and the affidavit herein, it appears that the claim is essentially based, firstly, on an alleged link between Mr. Boland and RPS (Northern Ireland) who prepared the Hydrodynamic and Water Quality Modelling Study dated March 2007, and, secondly, on Mr. Boland allegedly taking over the role of Inspector.

7.3 In his replying affidavit herein sworn on the 29th May, 2012, Mr. Boland deals comprehensively with the relationship between his former employer, RPS Consulting Engineers Limited, located in Ireland and RPS Consulting Engineers Limited, located in Northern Ireland. He explains how those two companies were originally completely independent from each other. The company in Ireland being

originally M. C. O'Sullivan & Co. Ltd., the one in Northern Ireland being originally, Kirk McClure Morton. This company was the largest consulting engineering firm in Northern Ireland and did some work in Ireland. Both these companies were acquired in or about 2002 by RPS Group plc., a U.K. company. RPS group acquired a number of other companies in Ireland and Northern Ireland providing planning and environmental services in both jurisdictions. These companies were re-branded as RPS- MCOS (the Ireland Company) and RPS Consulting Engineers Ltd. (the Northern Ireland Company). RPS- MCOS subsequently re-branded again as RPS Consulting Engineers. Both, he avers, are different corporate entities and each company in the RPS Group in Ireland and in Northern Ireland acted independently. Mr. Boland also states that although as an engineer he can understand such reports, he has no specific expertise in hydrodynamic and water quality modelling which is a highly specialised area of environmental engineering. He further explains that he was a technical director with his former company employer and not, as the applicant thought, a company director. He swears further that during his employment he was unaware that Donegal County Council had engaged RPS in Belfast or that they were seeking to build a waste water treatment plant near Moville. He states he does not know the staff of RPS Northern Ireland other than through corporate social events nor did he know in what projects they were involved. He himself was not involved in any way with the preparation of the report nor was he in any way involved with the Moville project. He notes lastly that he was first involved with the Board's file in this project in November 2009, almost three years after he left RPS and the Board's decision was made over four and a half years after he left RPS. The Court must also bear in mind that persons such as Mr. Boland are chosen to sit on the Board precisely because of their professional background and experience. See s. 106 of the Planning and Development 2000, as amended. As is clear from this provision, those appointed to the Board will first be nominated by representative associations prescribed for that purpose and appointed by reason of their expertise. In relation to this case, appointments must be made of two members from nominations of bodies representative of persons whose professions or occupations relate to physical planning, engineering and architecture as may be prescribed. Consequently, the apprehension that a reasonable person may have must accommodate the fact that such persons (including engineers) are appointed precisely by reason of their experience and background. By definition they must have a very considerable engineering background. Ideally they should be persons of considerable experience and be leaders in their field.

7.4 The test of objective bias is as set out by Fennelly J. in *Kenny v. TCD* (cited above). In that case the apprehension raised involved one of the Judges of the Supreme Court who was the brother of an architect who was one of the partners of a firm, Murray O'Laoire Architects. It was alleged this firm had deliberately misled the High Court in its reports. The apprehension alleged was that the Judge in question might find difficulty in adjudicating on such a serious charge against his brother's architectural practice. Fennelly J. cited the test set out by Denham J. in *Bula Ltd. v. Tara Mining Ltd. (No. 6)* [2000] 4 I.R. 412 at p. 441;

> "... it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test- it invokes the apprehension of the reasonable person."

Fennelly J. continued;

> "20. The hypothetical reasonable person is an independent observer, who is not over sensitive, and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias....
>
> 21. The test of objective bias is expressed in general terms. Its application demands an appreciation of all the circumstances of the individual case, followed by a particularly careful exercise of the faculty of judgement. In his judgment in *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419, where the allegation was one of pre-judgment bias, Finlay C.J. expressed the view, at p. 439, that, in analysing the facts, he should 'take the interpretation more favourable where there is ambiguity to the plaintiff than to the defendant.' Whether or not that is a principle of general application, it applies in a special way in the present case, where this court is asked, in a very real way, to adjudicate on whether one of its own judgments was tainted by objective bias. That fact obliges it, in order to ensure respect for the principle that justice must not only be done but be seen to be done, to act with great care and circumspection. It should err on the side of caution.
>
> 22. An important aspect of this case is the substance and character of the allegations being made by the plaintiff in these proceedings. He alleges that the first defendant engaged in deliberate misleading of the High Court with the result that the court made an incorrect decision. The affidavits exchanged in the High Court show that the plaintiff alleges that the firm of architects were implicated in this action by the first defendant.
>
> 23. In his judgment in *Orange Ltd v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159, Barron J. approved a lengthy passage from the judgment of the Court of Appeal in England (consisting of Lord Bingham C.J., Lord Woolf M.R. and Sir Richard Scott V.C.) in *Locabail (UK.) Ltd v. Bayfield Properties Ltd* [2000] 1 Q.B. 451, which contains the following relevant statement at p. 480:-
>
> > ,... a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case .. .'
>
> A witness will suffice. The question is whether a reasonable observer might have a reasonable apprehension that a Judge, hearing such allegations being made against the firm of architects in which his brother was a member, although that brother was not in any way directly involved in the subject matter of the litigation, might find it difficult to maintain complete objectivity and impartiality. Could such an observer be concerned that the allegations were of a nature to cast doubt on the integrity of at least one member of the firm and that a Judge should not adjudicate in such a dispute. Applying the most favourable interpretation of the facts from the plaintiff's point of view, and bearing in mind that the Court should be especially careful where it is considering one of its own judgments, I believe that the test of objective bias should be held in all the circumstances to be satisfied."

7.5 Applying this test to the present case, it is clear no relationship anywhere close to that in *Kenny* exists herein between the firm who produced the hydrodynamic report and Mr. Boland, the decision-maker. No allegation such as was made in *Kenny* is levelled at RPS. It seems to me that it would not be reasonable for an independent observer appraised of all the facts to have an apprehension that they would not get an impartial hearing from An Bord Pleanála for these reasons. Thus I find that the claim of bias has not been substantiated.

Alleged failure to assess the impact on the Northern Ireland side of Lough Foyle
7.6 This claim is made at paragraph (E) (11) of the statement of grounds. In paragraph 25 of his grounding affidavit, the applicant states his view that nobody appears to have considered the effect that the development would have on the Northern Ireland part of Lough Foyle. Notwithstanding this statement, in the same paragraph he acknowledges that the application was forwarded to the Northern Ireland authorities and that they made submissions. He expresses the view that their concerns were not met.

This claim appears entirely at variance with the evidence. The reason that Donegal County Council decided to submit the application to An Bord Pleanála was because there was a trans-border aspect to it. Further, the EIS report at 1.4.3 notes that there had been consultation with the Londonderry Port Authority and the Loughs Agency, which is a trans-border body established under the 1998 Good Friday Agreement. The following page of the EIS lists thirteen Northern Ireland bodies that were consulted. At 4.1.3.2 it notes the partial jurisdiction of the Environment and Heritage Service of Northern Ireland and in the context of designated areas it refers again to this Northern Ireland body at 4.3.3.2. Finally, in its decision at page 5, An Bord Pleanáa considered but did not accept a suggestion made by the Planning Service of Northern Ireland and the Loughs Agency to locate the discharge pipe outside of Lough Foyle due to the limited scale of discharge and the EIA assessment that impacts on water quality would be acceptable and would be a substantial improvement on the current situation.

In the light of the above, it is clear that there was, in fact, a trans-border assessment made based on submissions made by the Northern Ireland authorities. This in fact was done at the request of Donegal County Council in choosing to make the application to An Bord Pleanála. This part of the applicant's case is entirely without foundation.

No adequate EIS/EIA carried out
7.7 The applicant contends that the Board contravened Directive 85/337 EC by carrying out an assessment without having sufficient information. This in turn is based upon the proposition that the Board sought information from the Environmental Protection Agency, presumably on the basis it needed such information and did not obtain any information therefrom. What was the status of this request for information by the Board to the EPA? Is it really a formal request for information as the applicant claims or just an invitation to comment which was declined by the EPA as the respondents claim? A comparison with an admitted formal request for information may be helpful. By letter dated 10th February, 2010, the Board sent a request for information to Donegal County Council. In its first paragraph the Board invokes its statutory power to require that certain information be furnished to it. The request is quite clearly a demand. The specific information is outlined and Donegal County Council is warned that the response should be delivered by a very specific time and date. The Board also reserves its right to require Donegal County Council to publish newspaper notice of the furnishing of any additional information, to allow for inspection of the same and for the making of further submissions in relation to the same to the Board.

By contrast, in its letter to the EPA dated 30th June, 2011 which the applicant considers to be in the nature of a request for information pursuant to s. 175(5)(a) as applied to s. 226 of the Planning and Development Act 2000 and as made above to Donegal County Council, the Board invites the EPA to comment. The Board states that it would greatly appreciate a response by a particular date.

These two requests are clearly entirely different from each other in nature. Whilst the first is mandatory in nature, the second is no more than an invitation to an interested party to comment on the information contained in the EIS and the mitigation measures proposed therein. The EPA, for their own reasons, declined to provide this information. The applicant mischaracterises this invitation to the EPA when he equates it with the requests made pursuant to s. 175(5) (a) of the Planning and Development Act 2000. The invitation to comment is not made pursuant to the statute and there is no obligation upon the Board to insist upon an answer nor any bar on their proceeding without one. Thus, the ground upon which the applicant relies in order to argue that the Board did not examine the substance of the EIS is not supported by the evidence upon which it sought to base that argument.

7.8 The second ground was that there was not an adequate EIS. The adequacy of an EIS is dealt with in Article 111 of the 2001 Regulations;

> "(1) The Board shall consider whether an EIS received by it in connection with an appeal complies with Article 94."

The adequacy of an EIS is thus clearly a matter for the Board which is the decision maker. See *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59 at p. 64, *Kenny v. An Bord Pleanála* [2001] I.R. 565 at p. 578. The assessment of the adequacy of the EIS is a factual matter involving considerable expertise in planning. It is classically a specialist matter upon which an expert body must decide. The test for this Court in examining such an assessment is thus the O'Keeffe one. Was there relevant evidence before the Board upon which it could rationally rely in order to come to its decision?

Examining this question, the following must be noted; the inspector stated in his report that "the EIS submitted is considered to comply with legislative requirements". See s. 5.1 of the Inspector's report of the 6th October, 2009 (at p. 96).

In *Kenny v. An Bord Pleanála* cited above, McKechnie J. held;

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

Thus, the statutory requirements having been found to have been complied with, and the above is evidence they were, the adequacy of the assessment by the Board of the EIS is not something this Court needs further consider. In any event, it does appear to be a statement that deals with all the matters required by the sixth schedule to the Planning and Development Regulations 2001. I have heard no convincing evidence that it does not.

7.9 The applicant alleges that there is a direct discharge into a "proposed site". He accepts that the entire Lough is not designated a natural habitat, but states that certain portions are. It is accepted that the outfall pipe is not filling into a designated site, but is into Lough Foyle and it is claimed that the effluent could be carried into other parts of the Lough that are designated. He argues that where there is any doubt, planning permission should be refused, see *Waddenzee v. SLNV* ECR 2004 1-07405. He finally notes that s. 63 of the Inspectors' Report shows that the Loughs Agency shares its concerns specifically in relation to eel, salmon and lamprey.

The respondent argues that the Lough is not designated although there are two Natura 2000 designated sites within it. These are 11.5km and 4.5km respectively from the discharge point. The only two designated areas are on the Northern Ireland side. Therefore,

the respondent argues that they do not have to meet the requirements of Article 6(3) of the Habitats Directive, because there is no discharge into a protected site.

It seems to me that there is no evidence, only an assertion, that the discharge might affect these designated areas above. It should be noted that the evidence is that approximately twenty times the effluent flows into the Lough from the Northern Ireland side than from the Ireland side. In any event the Inspector agreed with Donegal County Council that the overall impact of the scheme on water quality would be positive, although barely noticeable. Moreover Part 4 of the EIS did in fact address the impact on species it considered likely to be affected. See the report at 4.3.3.4, 4.3.3.5 and 4.3.4.2. The Habitats Directive envisages projects that are likely to have a significant effect on special areas of conservation and it is only those that require an assessment. The Board's decision on such matters is an exercise by it of its planning expertise and challengeable only on O'Keeffe grounds. See *Sweetman v. An Bard Pleanála* [2010] IEHC 53. As noted above, the Board did have evidence before it as to the possible effects of the proposed outfall pipe. Thus, even were it a designated area, the effects were considered and found not significant.

7.10 More generally on this aspect of the applicant's case, it seems to me that the evidence does not support a case of an inadequate EIA by the Board herein. The Board had a very substantial volume of evidence before it enabling a thorough assessment of the likely impact of the discharge from the proposed outfall pipe on Lough Foyle. There was sufficient evidence to assess this whole project so as to decide upon any significant effects thereof on the immediate environment. It is quite clear that the Board, whilst accepting some of the reservations of the inspector, notably, with regard to the Glen Burnie pumping station, did not share all and ultimately disagreed with his recommendation. That is its role. The inspector recommends but the Board decides. The decision is given by the Oireachtas to the Board and not to the inspector. That such a scenario is contemplated by the planning infrastructure provided by law is demonstrated by the provision requiring the Board to state its reasons when it does not follow the inspector's recommendation. This the Board did fully in this case.

7.11 The purpose of the project dealt with herein is the improvement of the water quality in Lough Foyle. All of the evidence is that the present situation is untenable. Ms. Dubsky's report, produced by the applicant, shows that raw sewage is being discharged into Lough Foyle at the moment. The evidence establishes that this project will greatly enhance the water of this beautiful Lough to the great benefit of all. The evidence as opened to the Court in this case overwhelmingly demonstrates that the sooner this project commences, the better. It is a great pity it has been delayed so long.

7.12 For all the above reasons the reliefs sought are refused.