Neutral Citation [2015] IEHC 593

THE HIGH COURT

COMMERCIAL

[2014/533JRJ

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

BETWEEN

EDEL GRACE AND PETER SWEETMAN

APPLICANTS

AND

AN BORD PLEANALA

RESPONDENT

AND

ESB WIND DEVELOPMENT LIMITED & COILLTE

FIRST & SECOND NAMED NOTICE PARTY

AND

THE DEPARTMENT OF ARTS, HERITAGE AND THE GAELTACHT

THIRD NAMED NOTICE PARTY

JUDGMENT of Mr. Justice Fullam delivered the 1st day of October, 2015

1. In this judicial review, the applicants challenge a grant of planning permission to construct a 16 turbine wind farm development proposed for the Slieve Felim to Silvermines Special Protection Area (SPA), Bunkimalta, Co. Tipperary. The objective of the SPA is to maintain and restore the favourable conservation condition of the hen harrier, an Annex 1 protected species under the Birds Directive.

Background
The Site

2. The site is located in North Tipperary on the slopes of Keeper Hill in the Silver Mines Mountains. The proposed development site is of a stated area of 832 hectares and is primarily within the ownership of the second named notice party Coillte and comprises a Sitka Spruce and Lodge Pole pine forest dating from the 1950s and 1960s. The stated total area of the overall Keeper Hill forest is 3,385 hectares. The character of the site is dominated by commercial forestry, which is the main habitat within which the turbines will be placed.

3. The site was designated as an SPA m 2007, with the conservation objective:-

> *"Maintain or restore the favourable conservation condition of the hen harrier which is listed in Annex 1 of the Birds Directive. "*

The Applicants

4. The first named applicant is a self-employed crafter and since 2005 has resided at Grouse Hall, Milestone, Thurles, Co. Tipperary. Her home is situated less than 1km from the SPA and 10km from Keeper Hill. Ms Grace is involved in a number of craft and community associations.

5. The second named applicant is an environmentalist and resides at Bunahowen, Cashel, Co. Galway.

6. The applicants seek an order of *certiorari* quashing the decision of the respondent made on the 22nd July, 2014 granting the first and second named notice parties planning permission for 16 wind turbines and ancillary development.

The Respondent

7. The respondent is the statutory authority which granted planning permission on appeal from a decision of North Tipperary County Council.

The Notice Parties

8. The first and second notice parties are State bodies and are joint developers of the Bunkimalta Wind Farm.

9. ESB International, an associate company of the first notice party, processed the planning application and appeal. The second notice party is owner of the subject land and is engaged in commercial forestry.

10. The third notice party is the department of government (DAHG) responsible for the National Parks and Wildlife Service (NPWS) charged with the protection of habitats and certain avian species. DAHG took part in the planning process before North Tipperary County Council and the Appeal to the Board up to 30th September 2013.

Reliefs sought

11. Essentially, the applicants seek three reliefs:

> (i) A declaration that the decision of the respondent was in breach of Council Directive 92/43EEC of 21 May, 1992 ("the Habitats Directive") in that the respondent failed to carry out an adequate appropriate assessment as required by Article 6 of the Directive having regard to the jurisprudence of the Court of Justice of the European Union and in particular the decision in case C-258/11, *Sweetman & Others v. An Bard Pleanala & Others,* unreported judgment of the court (Third Chamber) of 11th April, 2013. The applicants allege that the respondent wrongly took replacement habitat into account as a mitigatory measure in carrying out an Appropriate Assessment under Article 6.3, whereas the correct procedure was to treat it as a compensatory measure under Article 6.4.
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> (ii) A declaration that the respondent failed to carry out an adequate Environmental Impact Assessment (EIA) as required by Article 3 of Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 ("the Consolidated Environmental Impact Assessment (EIA) Directive) and s.171 A of the Planning and Development Act 2000 as amended. The applicants allege that the respondent failed to assess the climate impacts of clear felling of 41.7 hectares of existing forest.
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> (iii) A declaration that both applicants have *sufficient interest* for the purposes of s.50A (3)(b) of the Planning and Development Act, 2000 as amended. This issue arises because the applicants did not participate either in the decision-making process before the local planning authority, North Tipperary County Council, and in the subsequent appeal to An Bord Pleamila

The hen harrier

12. The particular SPA involved is one of the strongholds for hen harriers in the country. The mix of forestry and open areas provides optimum habitat conditions for the hen harrier.

Species and Habitat Management Plan (SHMP)

13. In overall terms, the plan proposes that the potential loss of habitat of 162.7 hectares at turbine locations and surrounding exclusion zones of 250m would be mitigated/replaced by the provision of 164.3 hectares of habitat, during the lifetime of the project.

According to the developer, the development would allow a mosaic of different aged strands to develop which would optimise the value of the area to foraging hen harriers. The managed replanted area is strategically placed between two areas of open bog and heath (Keeper Hill and Knockane) and would create a foraging corridor linking optimum habitat areas.

14. The developer acknowledges that foraging habitat rather than nesting habitat limits the size of the hen harrier population. The 'loss' of hen harrier habitat is based primarily on the loss of pre-thicket second rotation forestry from the development, which scientific studies have shown is important for hen harrier nesting and foraging. The SHMP is focused on the continuous provision of foraging habitat within the site. Optimum habitat conditions occur where there is a mosaic of vegetation yields.

The Planning Decision Process

15. On 26th March, 2004 the developers obtained a prior planning permission for a development comprising 17 wind turbines on the site. The respondent upheld the decision of the local planning authority. At that time, the site had not been designated an SPA.

16. On the 12th February, 2013, the developer submitted its planning application to North Tipperary County Council. The documentation submitted included an Environmental Impact Statement, a Natura Impact Statement and the Species and Habitat Management Plan. The developer engaged in on-site discussions with representatives of the Department of Agriculture, Heritage and the Gaeltacht (DAHG) I National Parks and Wildlife Service (NPWS).

17. On 13th March, 2013, the deadline date for submissions to the local authority, DAHG made a submission recommending refusal for the following reasons:

> (i) 162.76 hectares of hen harrier foraging habitat would be lost through a displacement effect around the turbines based on the best scientific advice and the proposed removal of trees and sensitive replanting was not acceptable as mitigatory habitat as it was not demonstrated beyond reasonable doubt that the habitat would be used by foraging hen harriers;
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> (ii) The Appropriate Assessment (AA)/NIS submitted by the developer did not adequately address the cumulative impacts of the proposed development in combination with other windfarms in the SPA; and
>
> (iii) The project should wait until mid-2015 by which time the DAHG would have drawn up a national Threat Response Plan for hen harriers based on further research commissioned to University College Cork to "*provide greater scientific certainty to assist decision-making*."

18. On the 2nd April, 2013, the local authority refused planning permission stating the reason as follows:

> *"The proposed development is located within the Slieve Felim to Silver Mines Mountains SPA. It is a policy objective as set out in the County Development Plan 2010 to restrict development that would be harmful to or that would result in a significant deterioration of habitats and/or disturbance of species within an SPA. The proposed development, which would result in significant loss of foraging habitat for the hen harrier, which is Annex 1 species protected by EU Directive, would have a seriously detrimental impact on the conservation status of this designated site. Therefore, it is considered that the proposed development would materially contravene policy HERT 29A of the County Development Plan 2010 and would be contrary to the proper planning and development of the area.*

On 26th April, the developer lodged a Notice of Appeal to the respondent in which it addressed the reasons for refusal and the submission made by DAHG. The respondent received submissions from the following prescribed bodies:-

> Department of Agriculture, Heritage and the Gaeltacht.
>
> Department of Communications, Energy and Natural Resources.

Irish Aviation Authority.

Health Service Executive,

An Taisce

Planning Authority North Tipperary County Council

The Developers Grounds for Appeal

19. The developer's principal point was a simple one, namely that available scientific research contradicted the DAHG view that the proposal for the removal of trees and sensitive replanting was inappropriate due to a lack of evidence that it would be used for foraging. DAHG 's calculations of potential loss of hen harrier habitat were based mainly on the loss of pre-thicket second rotation forestry plantation. The developer said that the scientific evidence shows that normal pre thicket second rotation forestry is in fact used for foraging and the SHMP ensures there would be no loss of hen harrier habitat and that the proposal that pre-thicket second rotation forestry would be sensitively managed would be even more attractive for foraging hen harriers.

20. DAHG responded to developer's grounds of appeal on the 23rd May, 2013. The developer submitted a revised EIS dated the 2nd August, 2013, following which DAHG responded by letter dated the 30th September.

21. It is not necessary to set out the details of the respective positions taken by DAHG and the developer other than to make the following observations. When the developer pointed out that the DAHG position on the foraging value of a second rotation plantation was not substantiated, DAHG, in its response of the 23rd May, accepted that the developers view was based on scientific evidence and "*the conflict of interpretation*" could be resolved by a condition in a planning permission. It is to be noted that the Inspector in her report concluded that the local authority wrongly refused planning permission on this ground urged on it by the DAHG. (The Report of the Inspector at pages 13-14 notes "the planning authority was guided by the advice of DAHG and noted also the submission of An Taisce as well as the test under the Habitats Directive of "*beyond scientific reasonable doubts.*")

22. DAHG changed the focus of its scientific objection to the ability of the slow growth varieties of tree chosen by the developer to deliver continuous hen harrier hunting habitats.

23. The developer pointed out that the choice of tree species was based on discussions with representatives of DAHG on site in June 2012 and offered to plant whatever species the DAHG specified.

24. The developer further pointed out that the planning condition sought by DAHG was almost in the exact terms of a mitigation measure included at section 2.3.4 of the SHMP submitted in the original application and (justifiably) queried whether DAHG had considered all the mitigation measures put forward in the plan.

25. The final DAHG submission of 30th September began by its acceptance of the valid arguments of the developer but nevertheless recommended refusal until a number of new points were dealt with. The most significant of these were:

> (1) DAHG's assertion that it could not ascertain from the documentation provided when the 137.3 hectares of open canopy forest in area D would be made available and, surprisingly, notwithstanding that the basis for its objection to the planning authority was demonstrated to be manifestly and scientifically incorrect, DAHG now recommended that the developer reapply for planning permission with the figures clearly outlined, as the NIS was "*currently inadequate in their absence*". At the same time DAHG at section 4 of its submission specified 10 conditions that should be included if the Board decided to grant permission.
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> (2) DAHG's recommendation that the Board get legal advice as to whether the loss of habitat around T1 required A 6(4) compensation or A 6(3) mitigation elsewhere.

26. The submission concluded:

> "Please forward any further information and a copy of the decision made, as soon as available to
>
> The Manager
>
> Development Applications Unit
>
> Department of Arts, Heritage and the Gaeltacht, Newtown Road, Wexford or by email to the email address given."

27. Following receipt of this submission the respondent decided to seek a report of its inspector, Ms. Mairead Kenny.

Inspectors Report 15 October 2013

28. The Inspector reviewed all the material submitted and dealt with the issues arising on Appropriate Assessment in pages 32 to 38 of her report.

29. The Inspector expressly disagreed with the planning authority on the reason for refusal of planning permission. She agreed that DAHG's acceptance that second rotation forestry was good foraging habitat for the hen harrier was based on the best scientific evidence.

30. She accepted that the developer's calculation of 164.3 hectares was correct for the amount of mitigatory habitat and, that subject to the Board being satisfied on the management of the 137.3 hectares, it would provide suitable hen harrier habitat in accordance with the conservation objectives of the site.

31. She noted that DAHG's final submission made no reference to tree species and that the developer had made a strong case for the use of Sitka Spruce and Long Pole Pine South Coastal Provenance.

32. She concluded that the Board could be satisfied that the proposed development would not give rise to loss of hen harrier habitat within the site, and the measures set out in the SHMP would in fact mitigate the loss of the 162.7 hectares.

33. The Inspector noted the final submission of DAHG which questioned whether or not permanent loss of foraging habitat within an SPA around T1 would require Habitats Directive Article 6(4) Compensation rather than mitigation by recreation of habitat elsewhere within the SPA and the recommendation that the Board seek legal advice on the matter.

34. The Inspector's view was as follows:

> *"I remind the Board that when considering the integrity of the SPA the objective is to protect the hen harrier. Thus, the managed forest and restored bog areas are not of intrinsic value but are valued in relation to favourable conservation status of the hen harrier. I consider that legal requirements under the Habitats Directive are properly addressed in this instance by the mitigatory habitat. I consider that the Board can be satisfied that the development would not give rise to significant adverse effect on the integrity of the SPA having regard to the conservation objective. "*

Notwithstanding her agreement with the developers' plan on the issues originally raised by DAHG, the Inspector recommended refusal on 2 grounds, (1) the interruption of a protected view and (2) the substantial risk of peat slippage.

Board Direction 2 December 2013

35. Following receipt of the Inspector's report, the Board issued the following Direction :-

"3. Turbine 1 and Loss of Foraging Habitat

> *Having regard to the submission made to An Bord Pleanála by the Department of Arts, Heritage and the Gaeltacht on 30th September, 2013, the board might be minded to omit Turbine 1. The applicant is invited to respond to this and to the Department's letter, including points 1 and 2 of that letter in particular. "*

Developer's Response

36. In its response dated 22nd May, 2014, the developer explained the sequence and timing of the replanting, providing a Schedule (Table 4.1) and a map (Appendix 6). The response pointed out that the development would provide a "continuous" as opposed to a "perpetual" supply of open canopy forest. On the T1 mitigation/compensation issue, the developer pointed out at page 28:-

> *"With respect to the issues as to whether the loss of bog/heath habitat at T1 may require Habitats Directive Article 6(4) compensation rather than mitigation (as detailed in the SHMP), it should be noted that the habitat present at T1 is disturbed heath/bog habitat and is not comparable with the priority Annex I habitat (i.e. Limestone Pavement) involved in the cited N6 Galway City outer bypass project. "*

The Developer accepted the 10 conditions proposed by DAHG.

Board Decision 22 July 2014

37. On 22nd July the respondent granted planning permission. Under the heading 'Appropriate Assessment', the Board concluded at page 4 of its decision:-

> *"Subject to the implementation of the identified mitigation measures, including the implementation of the SHMP and in the context of the current pattern of foraging habitat availability, the Board is satisfied that no adverse long term implications for hen harrier would arise, and the Board concluded that the proposed development, by itself, or in combination with other plans or projects, would not adversely affect the integrity of these European sites in view of the Conservation Objectives of the sites. "*

Environmental Impact Assessment

38. At page 5 of its Decision, the Board stated:

> *"Having regard to the nature, scale and design of the proposed development, the Environmental Impact Statement and supporting documentation submitted at planning application and appeal stages, the submissions and documents on file generally, the Inspectors assessment of environmental impact and, in particular, to the significant further information submitted to An Bard Pleanála on 6th August, 2013 and 23rd May, 2014, the Board completed an environmental impact assessment."*

39. The Board concluded that the proposed development would not have unacceptable effects on the environment. In relation to the specific issue of the area in the vicinity of turbine 1, the respondent noted that it was not identified as priority habitat and that furthermore, no concern was raised by DAHG in its submission of 30th September 2013 in relation to loss of priority habitat.

Discussion
Sufficient Interest- Locus Standi

40. Since the enactment of the Environment (Miscellaneous Provisions) Act, 2011, the threshold for obtaining leave to apply for judicial review of a planning decision is contained in s.50A(3), which provides:-

> *"(3) the court shall not grant section 50 leave unless it is satisfied that-*
>
> *(a) there are substantial grounds for contending that the decision or act concerned is invalid, or ought to be quashed, and*
>
> *(b)(i) The applicant has a sufficient interest in the matter which is the subject of the application or*
>
> *(ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being a development which may have significant effects on the environment, the applicant-*
>
> *(I) is a body or organisation (other than a stated authority, a public authority or Governmental body or*

agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) a sufficient interest for the purposes of subsection (3) (b)(i) is not limited to an interest in land or other financial interest. [emphasis added] "

41. It is clear that the significant words in the present circumstances are "sufficient interest". While subsection (4) rules out a narrow definition of the term, there is no precise definition either in the Planning and Development Act, as amended, or in Order 84 of the RSC which also prescribes a threshold of "sufficient interest" in judicial review outside of the general planning context

42. Where projects are likely to have significant effects on the environment, Directive 2011/92/EU (the Environmental Impact Assessment/EIA Directive) applies for the purposes of the issue of *locus standi*, the Directive makes provision for public participation in two distinct procedures:

1. The decision making procedures (Article 6) and

2. The judicial review of that decision (Article 11).

43. Relevant definitions in Article 1.2 are:-

"(D) 'Public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

(E) 'Public Concerned' means the public affected or likely to be affected by, or having an interest in, the Environmental decision making procedures referred to in Article 2(2). For the purposes of this definition, non Governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest. "

44. Article 6.4 states:-

"The public concerned shall be given early and effective opportunities to participate in the environmental decision making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken. "

Article 11

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

(a) Having a sufficient interest, or alternatively;

(b) Maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a pre-condition;

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

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

4. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non governmental organisation meeting the requirements referred to in Article

1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article."

45. The following Recitals are relevant to the decision making process envisaged by Article 6:

(16) Effective public participation in the taking of decisions enables the public to express, and the decisions maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision making process and contributing to public awareness of environmental issues and support for the decisions taken.

(17) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public.

(18) The European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (The Aarhus Convention) on 25 June, 1998 and ratified it on 17th February 2005.

(19) Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well being.

46. Notwithstanding the fact that the Article leaves the obligation of defining "*sufficient* interest" to Member States, in planning cases

where European Directives apply, the court must have regard to the terms of such Directives and the jurisprudence deriving therefrom.

47. The case law of the ECJ shows that the Court will intervene where the national legislature imposes conditions on access to judicial review which are too restrictive.

48. For example in *Djurgarden-Lilla Vartans Miljoskyddsforening v Stockholms kommun* Case C-263/008, the Court held that a Swedish rule which required that an NGO, which had participated in the decision making process, had to have a minimum of 2,000 members in order to participate in the review procedure was an impermissible limitation on the right of access to justice. At paragraph 49 of its judgment, the Court rejected the submission by Sweden that its National Rules offered extensive opportunities to participate in the early decision making process as justifying the "*very restrictive conditions*" at the review stage.

49. Apart from these cases of the European Court of Justice, the matter of *locus standi* falls to be considered in the light of the case law of the Irish courts on *locus standi* generally and in relation to planning decisions. The latter aspect is somewhat complicated by the fact that, prior to 2011, the threshold per the original section 50(4)(b) of the Planning and Development Act 2000 was "*substantial* interest" with access to review being limited to an applicant for planning permission, a prescribed body or other persons who had made submissions or observations in relation to the proposed development. The "substantial interest" requirement was maintained in the Planning and Development (Strategic Infrastructure) Act, 2006 although this criteria was extended to include a bodies or organisations (other than a state authorities or governmental bodies or agencies) whose aims or objectives were the promotion of environmental protection.

50. In *Cahill v. Sutton* [1972] IR 269, the plaintiff challenged the constitutionality of s. 11 of the Statute of Limitation Act, 1957 which prescribed a three year time limit for bringing claims for damages for personal injury suffered as a result of tort or breach of contract. The plaintiff's complaint was that the section did not provide a saver stipulating that commencement of this temporal limit was the date of a person's awareness of the tort or breach of contract. The plaintiffs claim was for negligent medical treatment and advice in 1968. The plaintiff commenced proceedings in 1972. However, on the facts of the case it was patent that she was aware of the negligence/breach of contract and the consequential injuries in 1968. Nevertheless the plaintiff sought to challenge the validity of s.l1 on the basis of a hypothetical plaintiff who became aware of the relevant elements subsequent to the expiration of the three year limitation period.

51. At page 283, the Supreme Court (Henchy J), said:-

> *"While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented.*

52. At page 285 the learned judge said:-

> *"It is undesirable to go further than to say that the stated rule of personal standing may be waived or relaxed if, in the particular circumstances of a case, the court finds that there are weighty countervailing considerations justifying a departure from the rule."*

53. At page 287 Henchy J stated:

> *"Were the Courts to accede to the plaintiffs plea that she should be accorded standing merely because she would indirectly and consequentially benefit from a declaration of unconstitutionality, countless statutory provisions would become open to challenge at the instance of litigants who, in order to acquire standing to sue, would only have to show that some such consequential benefit would accrue to them from a declaration of unconstitutionality-notwithstanding that the statutory provision may never have affected adversely any particular person's interests, or be in any real or imminent danger of doing so. It would be contrary to precedent, constitutional propriety and the common good for the High Court, or this Court, to proclaim itself an open house for the reception of such claims."*

54. In *Lancefort Limited v. An Bard Pleanala* (No.2) [1999] I.R 270, the applicant, a company whose members had participated in an oral hearing prior to the decision of the respondent to grant planning permission, sought leave to challenge that decision on the basis that the respondent should have required the submission of an Environmental Impact Statement from the notice party. At the time, the general "*sufficient interest*" test for leave applied. Furthermore, the leave application was on notice to the decision maker. Leave was granted but the subsequent substantive application for judicial review was refused. The Supreme Court upheld the decision of the High Court that the applicant did not have *locus standi*.

55. Keane J said at page 315:-

> *"It is clear, as was held by this Court in Chambers v. An Bard Pleanala [1992] 1 I.R. 134, that the fact that a person affected by a proposed development did not participate in the appeals procedure is not of itself a reason for refusing locus standi . It may even be that a company which came into being after the decision which it is sought to challenge may, in particular circumstances, be in a position to assert locus standi, as held by Comyn J in (Reg. v. Hammersmith and Fulham L.B.C. (1981) 80 L.G.R. 322). But it would, in my opinion, be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the application was made for leave to bring the proceedings. "*

56. Continuing on at page 318 Keane J said:

> *"I cannot agree, however, with the submission advanced on behalf of the applicant that the fact that there were "substantial grounds" for contending that the decision was invalid necessarily leads to the conclusion that they had locus standi. Since the amendment effected by s. 19(3) of the Act of 1992 obliges the applicant in a case such as this to proceed by way of an application under O. 84 of the Rules of the Superior Courts and since the latter expressly requires that the applicant should have "a sufficient interest" in the matter, it must be presumed that the Oireachtas intended*

that an applicant, in addition to establishing substantial grounds for contending that the decision was invalid, must also show that he or she has such an interest. Moreover, in the present case, all of the grounds on which the applicant's were originally given leave (including a challenge to the constitutionality of one of the provisions of the Act of 1976) were abandoned with the exception of the point as to the absence of an E.I.S. For the reasons I have already given, when the legal and factual merits of that issue are analyzed, it is clear that this was not a case in which the applicant should have been recognized as having locus standi to mount such a challenge. "

57. Since 2011 "*sufficient* interest" has been the test for leave in respect of planning matters and general judicial review.

58. In practical terms, public access to the decision making process is unlimited, whereas access to the review procedure is conditional on having a sufficient interest.

59. It seems to me that the following propositions can be distilled from

Articles 6 and 11 of the Directive and the relevant case law:

1. The Directive requires effective public participation and consultation with authorities likely to be concerned by a development, in the decision making process.

2. While the Directive envisages wide access to justice at the subsequent stage of judicial review, that access is conditional on members of the public concerned demonstrating (a) sufficient interest or (b) maintaining the impairment of a right. Such conditions should not be so restrictive as to render the remedy ineffective.

3. Failure to participate in the decision making process should not, of itself, be determinative of the issue of *locus standi*.

4. "Wide access to justice" does not mean 'open house'.

5. A person who seeks to raise an issue at review stage which he could have raised during the decision making process must provide a cogent explanation for his non-participation.

6. The applicant must show that the issue proposed to be raised at judicial review could not have been advanced prior to the making of the decision impugned.

7. The applicant must show that the interest concerned is personal to him and is not vicarious or general and it must be shown that such interest is adversely affected or in danger of being so affected.

Appropriate Assessment

60. Article 7 of the Habitat's Directive as amended applies the requirements for Appropriate Assessment under Article 6 to obligations arising under Article 4 of Directive 79/409/EEC ("The Birds Directive"), as codified in Directive 2009/147/EC.

61. In *Kelly v. An Bord Pleanala* (unreported judgment of the High Court delivered 25th July, 2014), Finlay Geoghegan J. reviewed the nature of appropriate assessment as considered by the CJEU in a number of cases; *Waddenzee* (Case C-127/02 [2004] ECR 1-7405, *Commission v. Spain* (Case C-404/09 [2011] ECR 1-11853) and *Sweetman v. Ireland* (Case C-258/2011). The judge summarised the position at paragraph 40 of her judgment:-

"It must be recalled that the appropriate assessment, or a stage 2 assessment, will only arise where, in the stage 1 screening process, it has been determined (or it has implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site. Where that is the position, then, in accordance with the preceding case law, the appropriate assessment to be lawfully conducted in summary:

(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.

(ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made, the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."

62. In its response to the respondent dated 23rd May, 2013, the NPWS accepted that pre-thicket second rotation forestry was good foraging habitat based on the best scientific evidence. In other words, DAHG accepted that there was no scientific doubt on the issue.

63. In her report, the Inspector noted that the NPWS accepted that second rotation forestry was good foraging habitat based on the best scientific evidence and the Inspector concluded that the measures set out in the Species and Habitat Management Plan would mitigate the loss of hen harrier habitat. DAHG has chosen not to participate in this hearing.

64. The remaining issue IS whether the SHMP measures around T1 are mitigatory to be taken into account under Article 6(3), or compensatory requiring consideration under Article 6(4). In this regard, the inspector reminded the Board at page 38 of her report that "*when considering the integrity of the SPA, the objective is to protect the hen harrier. Thus the managed forest and restored bog areas are not of intrinsic value but are valued in relation to favourable conservation status of the hen harrier*". The development site is not a Special Area of Conservation and in that context has no intrinsic value, unlike the priority soils in the cases of *Sweetman* (judgment of the Third Chamber of 11 April, 2013) and *Briels* (judgment of the Second Chamber, 15th May, 2014). Both of these cases concerned the loss of part of the habitat, limestone pavement in the case of *Sweetman* and molinia meadows on calcaneous, peaty or clay/silt laid in the soils, in the case of *Briels*. In both cases the loss was permanent. That is not the case with the Slieve Felim to Silvermines SPA. As stated by the inspector, the site has no intrinsic value. Under the afforestation policy of Coillte, the site

has been in an ongoing state of change. It is this policy which has provided continuous foraging habitat for the hen harrier over the years and led to the designation of the site as an SPA in 2007 for the protection of the hen harrier.

65. This is clearly recognised at page 4 of the Decision of the Board which refers to "mitigation measures including implementation of the SHMP in the context of the current pattern of foraging availability".

Environmental Impact Statement- Climate Change

66. At paragraph 22 of her affidavit, amplifying ground 13 of the Statement of Grounds, Ms. Grace avers as follows:

> *"I say and believe that the respondent failed to assess the air and climate impacts of the proposed development and failed to carry out a life cycle assessment of the energy consumption and greenhouse gas emissions associated with the proposed development, including construction and decommissioning. I further say and believe that the respondent erred in failing to assess the climate impacts of the clear-felling of 41. 7 hectares of trees which is proposed to facilitate the development."*

67. Air quality and climate is addressed at chapter 12 of the Environmental Impact Statement of January 2013. At 12.2.1, the EIS states that the primary air quality issue relating to construction is dust potentially arising from earth moving and excavation equipment, the extraction and crushing of stone, transport and unloading of crushed stone, vehicle movement over hard dry surfaces on the site and vehicle movement over surfaces off site contaminated by muddy materials brought off the site. The EIS notes that all residences are at a significant distance and it is unlikely that they will be affected by dust or vibration from the site construction works. It states that the potential impact of exhaust emissions from vehicles during the construction phase is not considered significant. It concludes that there will be no impact on ambient air quality during the operation of the wind farm. The wind farm will have no gaseous emissions into the atmosphere and thus no adverse impact on general air quality or climate.

The development will have a beneficial effect in providing for energy without emissions of the primary recognised pollutants.

68. At 12.2.2 it states electricity generation by wind turbines does not lead to environmental emissions.

Ms. Grace's clear-felling point is addressed as follows:-

> *"Approximately 41.7 hectares of forestry will be lost as a result of the wind farm development with an associated loss of carbon sequestration. However, the extent of forestry loss will be inconsequential when compared with the equivalent environmental benefit in avoided annual air emissions that Bunkimalta Wind Farm will confer."*

69. At 12.3, having set out the measures to be applied in respect of vehicular traffic, the EIS, under the heading 'Mitigation', states:-

> *"It is a condition of a felling licence issued to Coillte that, post harvesting, an equivalent area of forestry must be established. It is expected that new forest plantation will also be planted equal in area to that clear-felled as part of the proposed development. This in time will lead to further sequestration of carbon, thereby further mitigating against the loss due to the project felling requirements.*

70. At 12.4 the section concludes:-

> *"The proposed development will not result in significant adverse environmental impacts and will make a significant positive contribution towards management of environmental emissions from electricity generation leading to a reduction in greenhouse gas emissions and consequential effect on climate change.*

71. The Inspector's report considers environmental impact assessment at pages 45 to 51. There is no express reference to greenhouse gas emissions or climate change. One can infer from this that no submissions were received in respect of this aspect of the development.

72. The respondent had clear evidence before it in chapter 12 of the EIS and was entitled to come to the conclusion that the proposed development would not give rise to pollution and would not have unacceptable effects on the environment.

Decision

73. There is no dispute as to the Applicants' bona fides in bringing this judicial review application.

74. The Applicants did not participate in the planning decision process.

75. Neither of the Applicants is an NGO, which status would deem them to have sufficient interest for the purposes of participating in the review stage.

76. The Applicants have not provided any explanation, much less a cogent explanation, for their non-participation at the decision making stage.

77. The Applicants have not shown that the issues sought to be raised at judicial review could not have been advanced prior to the decision of the Board. In fact the issues raised at this hearing by the Applicants were clearly considered at the decision making stage.

78. The Applicants have not shown an impairment of any rights personal to them.

79. In effect the Applicants seek to take over and run with issues raised by DAHG which they submit were left open as of the 30th September, 2013 and in respect of which they further submit the Board wrongly failed to revert to the Department. It is clear from the report of the inspector and its general adoption by the Board that DAHG had initially objected to the planning application on a ground which was scientifically wrong and which they subsequently retracted, having put the respondents to significant and unnecessary expense.

80. DAHG has, understandably, not participated in these proceedings.

81. In the circumstances, it would be manifestly unjust to the respondent and first and second notice parties to allow the Applicants

stand in the shoes of the Department.

82. In terms of the Board's adoption of the EIS, nothing about that decision falls short of the usual standards the High Court imposes when supervising the decision-making of statutory bodies.

83. The Applicants claim that no adequate appropriate assessment took place. The conditions to be met in making an appropriate assessment were comprehensively set out by Finlay-Geoghegan J. in the *Kelly* decision. It is clear from the correspondence of the DAHG and the conclusions reached in the Inspector's report that such conditions were met in this instance and therefore an appropriate assessment had taken place.

84. In the specific instance of the assessment procedure for the T1 turbine, the Court is satisfied that the nature of the site, coupled with a teleological explanation for the designation of the SPA as regards the hen harrier, requires that the SHMP measures be considered as mitigatory.