Neutral Citation No. [2009] IEHC 599

THE HIGH COURT

COMMERICAL LIST

JUDICIAL REVIEW

2009 99 JR

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA AND

IRELAND AND THE ATTORNEY GENERAL AND

THE MINISTER FOR THE ENVIRONMENT,

HERITAGE AND LOCAL GOVERNMENT

RESPONDENTS

AND

GALWAY COUNTY COUNCIL AND GALWAY CITY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Birmingham delivered the 9th day of October 2009.

1. This matter comes before the Court by way of a so-called telescoped application for leave to seek judicial review of a decision of An Bord Pleanála ("the Board") dated the 20th day of November, 2008, whereby the Board authorised the notice parties, Galway County Council and Galway City Council ("Galway"/"the local authorities") to proceed with a proposed road development known as the Galway City Outer By-Pass ("GCOB"). Simultaneously, it is sought to quash the decision in question by way of an order for certiorari.

The Parties

2. The parties to the hearing are as follows. The applicant is described in the statement required to ground an application for judicial review as a photographer and a person having an interest in the environment and in promoting the protection of the environment. His grounding affidavit makes clear that he is a veteran environmental activist, having lodged in excess of 500 submissions in relation to hundreds of different developments over the years. He also has been an applicant challenging planning decisions before the High Court by way of judicial review on a number of occasions. When an application was made by Galway County Council on behalf of itself and Galway City Council to the Board for approval of an intended road scheme under s. 51 of the Roads Act 1993, he made a submission to the Board. Subsequently, he was a very active participant in the oral hearing that was held in relation to the proposal which commenced on the 13th November, 2007, and concluded on the 23rd January, 2008, after 21 sitting days.

3. The first respondent, the Board, is the statutory body charged with approving or refusing a proposal put before it.

4. The second, third and fourth named respondents, Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government ("the Minister") came to be involved in the proceedings in these circumstances. The applicants originally advanced a great number of grounds of challenge. Quite a number of these were based on a contention that there was a failure on the part of the State to properly or adequately transpose into Irish Law the provisions of Article 10(a) of Council Directive 2003/35/E.C. of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/E.E.C. and 96/61 E.C., O.J. L156/17, 25.06.2003, ("the Public Participation Directive").

5. However, while a very large number of challenges were originally formulated, the written submissions filed on behalf of the applicant made it clear that only three remained live. One of these three grounds of challenge has not been pressed at this stage, though one aspect of it remains open as it had been held over until the conclusion of the case when the question of costs comes to be determined. Since argument concluded, the European Court of Justice ("ECJ") has given judgment in the Case of Commission v. Ireland (Case C-427/07), which will have relevance to the question of costs. I will refer to these three grounds of challenge in shorthand as:-

(1) a complaint that the reasons given for the decision were inadequate,;

(2) a complaint that the Board had misinterpreted in a fundamental way Article 6(3) of Directive 1992/43/E.E.C. of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. L206/7 22.7.1992 ("the Habitats Directive") and Article 30 of the European Communities (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997) ("the Regulations of 1997"/"the Natural Habitats Regulations").

(3) a complaint that Article 10(a) of the Public Participation Directive has not been transposed into Irish Law.

6. In a situation where a complaint was being made that there had been a failure on the part of the State to comply with its obligations and properly transpose into Irish law provisions of a directive, Ireland, the Attorney General and the Minister were named as respondents.

7. The response of the second, third and fourth named respondents ("the State respondents"), having been joined in the proceedings, was a slightly unusual one and has given rise to some controversy. I will be returning to this in due course, but in essence it was to deny that the applicant was entitled to relief on what might be called the failure to transpose grounds but to concede that the applicant was entitled to succeed in relation to his arguments on the failure to give adequate reasons and the alleged misinterpretation of the Habitats Directive and the Regulations of 1997.

8. The notice parties are jointly promoting the roads project which was the subject of the application to the Board. It is the decision of the Board which has given rise to the present proceedings. The project in question is often referred to in short as GCOB. It appears that some €12m approximately has been spent in connection with the proposal to date. The latest estimate for the cost of the scheme is €303.22m.

9. As appears from the affidavit of Mr. John Morgan, Director of Services of the Roads and Transportation Unit of Galway County Council, the project has had a lengthy gestation period and the proposal goes back to 1997 when the need for such a development was identified in the Galway County Council Development Plan of that year.

10. The proposal is one that is seen by its proponents as being designed to relieve congestion, reduce accidents and improve the environment of Galway city and its environs. They see the proposal as central to the economic development of Galway city and in particular, the economic development of the area to the west of the city.

The Decision in Question

The impugned decision dated the 20th November, 2008, approved part of the proposed development, being that part between junction M (Garraun) and Junction A (Gortatleva) but refused to approve that part of the development, being that between Junction A (Gortaleva) and Junction W (An Baile Nua), including the western distributor connection. It should be noted at this point that, in partly approving the proposal, the Board was departing from the recommendations of the inspector who conducted the oral hearing and had recommended that approval be refused.

The Role of the State Respondents

11. Before going on to consider the decision and the challenge to it in any detail, it is necessary to address the question of the role of the State respondents in these proceedings and in particular, their entitlement to mount a challenge to the validity of the decision and to offer support to the challenge advanced by the applicant. This consideration is required in a situation where the State respondents have not themselves commenced proceedings challenging the decision but have sought instead to avail of the opportunity presented by the somewhat fortuitous, at least seen from their point of view, fact that they had been named by the applicant as respondents. The element of chance involved emerges with greater clarity once it is appreciated that the arguments in relation to the inadequate transposing of the Pubic Participation Directive that had formed the basis for the involvement of the State respondents in the first place have not been pressed by the applicant. One aspect, though, relating to the reference in the Directive to the availability of procedures that are fair, equitable, timely and not prohibitively expensive, has by agreement, and at the suggestion of the State respondents, been left in abeyance until the question of costs comes to be decided at the end of the case.

12. I now turn to the State respondents' entitlement to take the course it wishes to take which has been challenged by both the Board and the notice parties.

13. In order to provide some context for this dispute, it is necessary even at this stage to refer very briefly to the factual background to the application for judicial review and to identify in outline the legal issues that now arise. The application by Galway for approval of the road project gave rise to a very lengthy public hearing. As is to be expected with a project of this magnitude, a great number of issues emerged requiring consideration, but of those only one is now relevant to the present proceedings.

The oral hearing was conducted on the basis that the proposed road would pass through an area regarded by all as a candidate Special Area of Conservation ("cSAC"). If this happened, everyone was in agreement that there would be an impact on the area and indeed there was broad agreement on the physical scale of the impact, which, after certain mitigating measures identified were agreed, would see the loss of approximately 1.5 hectares of the Lough Corrib cSAC.

14. To put that in context, the site as originally defined amounted to some 185 hectares and an extended area proposed for inclusion, which is the area most directly relevant to the proposal, amounted to 85 hectares.

15. However, the current dispute arose because, while the inspector and the Board were of the view that although the proposal would involve a significant effect on the site and would have a localised severe impact on the Lough Corrib cSAC, the effect would not be such as to adversely affect the integrity of the site. The applicant disagreed with the approach taken and complains that the Board's decision involves a serious misinterpretation of European and domestic legislative provisions. It argues, with the support of the State respondents, that if a conclusion is reached that a proposed development would have a significant effect on a site and that it is an adverse effect that such a finding equates with a conclusion that the project is one that will adversely affect the integrity of the site concerned and accordingly once there has been a conclusion that there will be a significant adverse effect it follows as a matter of law that the proposal must be refused approval at this stage and that if the project is to proceed resort must be had to an alternative procedure designed to deal specifically with projects that adversely effect the integrity of relevant sites.

16. Against this background, the State respondents have sought to argue that because of what they assert is a mistake of law on the part of the Board, that the decision ought to be quashed. They have further argued that in any event the decision is invalid by reason of the failure to state the reasons for it with sufficient particularity.

17. Both the first respondent and the notice parties have objected to the State respondents taking on the role that they have in mind. The point is made that s. 50(2) of the Planning and Development Act 2000 (as amended), ("the Act of 2000"), provides that a person shall not question the validity of any decision made by the Board in the performance of a relevant function otherwise than by an application for judicial review under O. 84 of the Rules of the Superior Courts, 1986. Section 50(4)(a) of the Act of 2000, provides that any such application must be made within eight weeks. The first respondent and the notice parties point out that the State has made no such application and is accordingly statutorily precluded from now mounting such a challenge.

In addition, the Board in particular, makes a more fundamental objection. It points out that the proposed development, if it is to be constructed by the Councils, will be undertaken by them in their capacity as road authorities under the Roads Act 1993 ("the Act of 1993"). Section 15(1) of the Act of 1993 enables the Minister for Transport to give a direction in writing to a road authority with which that roads authority is bound to comply. In this situation it is said that it is therefore clearly within the competence of the

Minister for Transport not to permit the construction of the proposed road. The failure of the Minister for Transport to issue such a direction is described as inexplicable. If the concern within Government was that the authorisation given by the Board was not a valid one and that acting on foot of it involved damage to a sensitive habitat which was not permitted under European or national law, then the manner in which the issue has been approached by the Minister for the Environment, Heritage and Local Government on the one hand and the Minister for Transport on the other, was incoherent and meant that the Government was not acting as a collective authority and was not acting as mandated by Article 28.4.2 of Bunreacht na hÉireann.

Urging that the State respondents should be permitted to participate in the way they have in mind, Mr. Garrett Simons S.C., for those respondents, says that the State, as the entity responsible for the implementations of EC Directives, is directly effected by the outcome of the judicial review proceedings. He argues that the proceedings will inevitably involve the High Court, when giving judgment, setting out an interpretation of Article 6 of the Habitats Directive and the equivalent provisions of the Regulations of 1997 and that these are matters which directly effect the State respondents. Moreover, he pointed out that since the State is the entity ultimately responsible for the implementation of EC Directives, the State may find itself embroiled in infringement proceedings, and this alone gives them an entitlement to make their case. The State respondents addressed the argument that the proceedings might be rendered moot were the Minister for Transport to exercise the powers available to him in a particular way, which is made against their participation, by saying that this amounts to a suggestion that the High Court should seek to force the Minister for Transport to exercise the discretionary powers available to him in a particular way, thus denying the State respondents a right to be heard. If the Court were to do so, this would amount to a failure to observe the principle of separation of powers as provided for under the Constitution. Furthermore, it is argued that if the Minister for Transport who is not a party to the present proceedings, were to issue such a direction to the road authorities, he would be interfering with the legal proceedings now before the Court. If that were to happen the Minister, and indeed the State, would find themselves in a situation similar to that which was considered in the case of Buckley v. Attorney General [1950] I.R. 627, a case usually referred to as the "Sinn Féin funds" case.

18. I feel bound to say that I find this particular response by the State respondents quite surprising, and indeed, lacking in reality. I see no basis for the suggestion which is inherent in these arguments that because a challenge to a decision of An Bord Pleanála has been commenced, the statutory discretion of the Minister for Transport has in some manner been ousted.

19. However, it remains the case that there is a very substantial public dimension at issue in relation to the interpretation of the Habitats Directive and the Regulations of 1997. It seems to me understandable that the State would wish to be heard on the issue. The fact that the State in any guise, did not seek to launch judicial review proceedings when unhappy with the approach taken by the Board, does not mean that the State will not have a keen interest in contributing and advancing views when the matter is in fact brought before the High Court with the possibility, in certain circumstances, of the matter going for consideration to the Supreme Court.

20. That one of the State respondents wishing to advance arguments is the Attorney General is a matter of some significance. He of course has a particular role in protecting the public interest. Historically, he has on occasions performed that role by intervening in proceedings. The judgment of Denham J. in T.D.I. Metro Limited v. Delap (No. 1) [2000] 4 I.R. 337 is instructive in that regard.

21. I am, therefore, of the view that the State is entitled to advance the arguments that it wishes in support of the applicant's challenge on this issue of legislative interpretation. The entitlement of the State, though is to address arguments in support of the challenge formulated, not to now come up with new and discrete grounds of challenge. If grounds of challenge which were not encompassed by the applicant's challenge are to be considered, it is incumbent on the State, or indeed any other party desiring to achieve that end to commence separate proceedings.

22. It seems to me that the justification for permitting the State respondents to address the question of the adequacy of the reasons given for the Board's decision is less clear cut and that here there is greater force to the suggestion that this involves unacceptable meddling in other parties disputes.

23. However, the practical situation is that the State has been permitted to advance arguments in relation to the adequacy of reasons, albeit initially, on a de bene esse basis, and that being so, there is much to be said for permitting the arguments made to be considered. This is particularly so given the very substantial conformity of approach between the State respondents and the applicant on this issue. While it is possible to identify some nuances of difference relating to the arguments advanced by each, and I will be referring to one such, I do not believe those are such as to cause significant difficulties. While it might be that had the State respondents commenced their own proceedings and produced a statement of grounds on which the arguments they subsequently advanced were to hang, the grounds might have been formulated somewhat differently than the applicant's statement of grounds, this does not undermine the overall uniformity of approach. In those circumstances and notwithstanding that there is a considerable element of opportunism in the attitude being taken by the State respondents in relation to the adequacy of reasons, I propose to consider the arguments that have been advanced on their behalf.

24. I have earlier referred to the intentions of the State respondents to support the applicant as unusual, but it is not unprecedented and a very similar situation would seem to have arisen in the case of Usk v. An Bord Pleanála, [2009] I.E.H.C. 346, (Unreported, High Court, MacMenamin J., 8th July, 2009) ("Usk"), a case in which judgment was given only a short number of days after arguments in this case had concluded. Indeed, it appears that the role played by the State respondents in that case was more unusual still, in that it seems only on the second day of the hearing did it emerge that the State respondents had changed position and was now backing the applicant in its challenge.

25. I am pleased to say that my decision to permit the State to advance arguments and to consider these arguments accords with the approach of MacMenamin J. in Usk.

The Actual Status of the Impacted Site

26. I have already referred to the fact that all parties at the oral hearing operated on the basis that the site was a site of community interest or a cSAC. It is clear that the Board when it came to consider its decision approached its task on exactly the same basis. However, it now emerges that the consensus may not have been based on an entirely solid foundation.

27. In these proceedings Galway County Council has for the first time sought to raise an issue as to the exact status and extent of the cSAC as of the date of An Bord Pleanála's decision. In particular, the case is now made for the first time that the part of the cSAC most directly affected by the proposed road development had not in fact been adopted by a European Commission decision as a site of community importance until after the Board gave its decision. This arises in a situation where a process had been put in train with a view to extending the dimensions of the original Lough Corrib site of Community Importance beyond its original boundaries. It should be explained that both the site as originally defined and the extended area serve as hosts to limestone pavement habitats and their commonly associated habitats, namely semi-natural dry grasslands and scrublands facies on calcareous substrates. Such

habitats are referred to as Annex I priority natural habitat areas and as such are recognised as areas of particular importance and sensitivity.

28. The sequence of events concerning the original and extended sites are helpfully summarised in the course of the written submissions of the State respondents. As regards the original site, the relevant dates are as follows:-

> • *July 1999: Notified for the purpose of Regulation 4 of the EC (Natural Habitats) Regulations, 1997 – those Regulations, at Chapter I, headed "Sites of Community Importance", require, at Reg 3, the Minister, (then the Minister for Arts, Culture and the Gaeltacht), to prepare a list of sites based on criteria set out in the Habitats Directive and relevant scientific information, for the purpose of identifying sites of Community Importance. Then, by Regulation 4, the Minister is required to cause a copy of the candidate list of sites to be sent to various other ministers and agencies including the planning authority within whose functional area the land to which the list relates is situated.*
>
> • *November 2000: Proposed in a list of sites transmitted to the Commission as a site of Community Importance pursuant to Article 4 of the Habitats Directive and Reg. 5(4) of the Habitats Regulations. Article 4 of the Directive imposed an obligation on member states within three years of the notification of the directive to propose a list of sites and to furnish particular information in respect thereof. A similar obligation to submit a candidate list of sites is imposed on the Minister by Art. 5(4) of the Natural Habitats Regulations 1997.*
>
> • *December 2008:The site was formally adopted as a site of Community Importance and the Commission published updated lists of such sites for the Atlantic biogeographical region, which list included the Lough Corrib site.*

29. As regards the proposed extended site, the relevant dates are as follows:-

> • *December 2006: Notified for the purpose of Regulation 4 of the Habitats Regulations.*
>
> • *December 2007: Proposed in a list of sites transmitted to the Commission.*
>
> • *December 2008/February 2009: The site was formally adopted by the Commission decision as a site of Community Importance on 12th December, 2008, and this fact was formally published in the Official Journal on the 13th February, 2009.*

30. On the basis of this sequence of events, it is clear that at the time of the Board's decision on the 20th November, 2008, the extended area had not been adopted by the Commission in accordance with the provisions of Article 4(2) and Article 21 of the Habitats Directive and this formal step was taken only after the Board issued its decision.

31. In Societa Italiana Dragaggi SpA v. Ministero delle Infrastructure e-dei Transporti (Case C-117/03), [2005] ECR 1 – 167 (" Societa Italiana Dragaggi"), the European Court of Justice ("the ECJ") was invited to address the issue as to when Article 6 protection commences. At para. 30 of the judgment, the ECJ commented as follows:-

> *"on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2),(3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive."*

32. At first blush, this information about the precise status of the site, would seem highly significant – information which came to light only after the commencement of the proceedings and only after quite persistent efforts undertaken by Ms. Angela Casey, a solicitor with Galway County Council.

33. However, on closer examination it emerges that the new information is in reality of little or no practical effect. There are two reasons for this. First of all, the decision in Societa Italiana Dragaggi, which makes it clear that the protective measures prescribed in Articles 6(2), (3) and (4) are applicable only to sites which have been adopted by the Commission, is absolutely unequivocal in asserting the obligation on Member States to take appropriate protective measures for the purpose of safeguarding the ecological interest of the site, even prior to it being selected by the Commission. The second reason is that whatever doubts or arguments existed about the position of a portion of the site in European terms, there is absolutely no doubt whatever but that the extended site was certainly a "European site" under national law and in particular, under the Regulations of 1997 (as amended) by s.75 of the Wildlife (Amendment) Act 2000. As a matter of national law, protection applied from the earlier date of the notification of the proposed inclusion of the extended area on the list to be submitted, that is December, 2006. As will clearly emerge when the details of the domestic and European legislation, which it is suggested has been misinterpreted, comes to be considered in detail, the protection afforded by domestic law is at least as extensive as that provided for under the Habitats Directive.

34. I now turn to the two grounds of challenge which have been at the centre of the present proceedings. Before doing so, for ease of reference, I will set out the principal domestic and European legislative provisions which will be discussed. Article 6 of Council Directive 92/43/EC ("the Habitats Directive") provides as follows:-

> *"(1) For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.*
>
> *(2) Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*
>
> *(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

35. The language of Article 6 of the Habitats Directive is echoed in Regulation 30 of the Regulations of 1997, which provides as follows:-

"(1) Where a proposed road development in respect of which an application for the approval of the Minister for the Environment (the application is in fact now to the Board) has been made in accordance with s. 51 of the Roads Act, 1993 is neither directly connected with nor necessary to the management of a European site but likely to have a significant affect thereon, either individually or in combination with other developments, the Minister for the Environment shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objective is undertaken.

(2) An Environmental Impact Assessment as required under subsections (2) of s. 51 of the Roads Act, 1993, in respect of a proposed road development referred to in paragraph (1) shall be an appropriate assessment for the purposes of this Regulation.

(3) The Minister for the Environment shall, having regard to the conclusions of the assessment undertaken under paragraph (1), agree to the proposed development only after having ascertained that it would not adversely affect the integrity of the European site concerned.

(4) In considering whether the proposed road development will adversely affect the integrity of the European site concerned, the Minister for the Environment shall have regard to the manner in which the proposed development is being carried out or to any conditions or restrictions subject to which their approval is given.

(5) The Minister for the Environment may, notwithstanding a negative assessment and where that Minister is satisfied that there are no alternative solutions, decide to agree to the proposed road development where the proposed road development has to be carried out for imperative reasons of overriding public interest.

(6) (a) Subject to paragraph (b) imperative reasons of overriding public interest shall include reasons of a social or economic nature;

(b) If the site concerned hosts a priority one natural habitat or priority species, the only considerations of overriding public interests shall be –

(i) Those relating to human health and public safety,

(ii) Beneficial consequences of primary importance for the environment, or

(iii) Further to an opinion from the Commission, to other

imperative reasons of overriding public interest."

The Adequacy of the Reasons Provided

36. The decision to grant authorisation, which is suggested inadequately sets out the reasons for having come to that conclusion, is some thirteen and half pages long.

37. Each section is set out first in the Irish language and then in the English language. The operative part is in the following terms:-

"Reasons and Considerations

Having Regard to

(a) The objectives of the Galway County Development Plan, 2003 – 2009 and the Galway City Development Plan, 2005 – 2011 in relation to the provision of an outer by-pass of Galway City as an essential component of the strategic transport network for the Galway area and the particular route indicated for the by-pass,

(b) The unsatisfactory traffic conditions in and around the city, a gateway city under the national special strategy, which is undergoing rapid expansion,

(c) The imminent completion of the new N6/M6 national primary route between Galway and Dublin,

(d) The need for the by-pass route to cross the River Corrib, North of Galway City and the absence of satisfactory alternative routes,

(e) The impact on the Lough Corrib candidate Special Area of Conservation and,

(f) The design of the proposed bridge over the River Corrib."

and having considered the report of the person who conducted the oral hearing into the application for approval of the proposed road development, the Environmental Impact Statement and the submissions received by the Board in relation to the application, it is considered that the part of the road development being approved would be an appropriate

solution to the identifiable traffic needs of the city and surrounding area (from junction N to junction A) and, while having a localised severe impact on the Lough Corrib area candidate Special Area of Conservation would not adversely effect the integrity of this candidate Special Area of Conservation. The development, hereby approved, would not therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area." (Emphasis added).

38. These reasons and considerations are set out in a situation where the actual decision was to approve that part of the development between Junction M (Garraun) and Junction A (Gortatleva), and to refuse to approve that part of the development between Junction A (Gortatleva) and Junction W (An Baile Nua), including the western distributory connection, based on the reasons and considerations given in the decision. Of note is that fourteen conditions are also set out in the decision.

39. The decision also included the following statement:-

"The Board agreed with the inspector's assessment of the Environmental Impact of the proposed road development through both the Lough Corrib candidate Special Area of Conservation and the Moycullen Bogs Natural Area."

40. The existence of an obligation to state reasons and what is required to adequately comply with that obligation is an issue that has been much litigated before the Irish Courts in recent years. In Mulholland v. An Bord Pleánala (No. 2) [2006] 1 I.R. 453, Kelly J. at para. 34 offered this helpful summary of what was required before a statement of reasons would pass muster as sufficient was that it would:

1. "give the applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision,

2. arm himself for such hearing or review,

3. know if the decision maker has directed his mind adequately to the issues which it has considered or is obliged to consider; and

4. enable the courts to review the decision."

41. In truth, there has been little disagreement in relation to these principles but when it comes to applying them on a case by case basis, some differences of approach have emerged.

42. One of the earliest discussions of the issue in the planning/environmental law context of recent times is to be found in the case of O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 ("O'Keeffe"), often referred to as the Radio Tara case. This case is of particular interest given that it was concerned with a situation, as is the case here, where the Board had granted permission notwithstanding that in doing so it was differing from the report of its inspector. In the High Court, Costello J. had concluded that in the absence of any statement of reasons for its decisions, it was impossible to determine what considerations the Board had taken into account in reaching a decision. However, the unanimous Supreme Court was of the view that the Board's decision, coupled with the detailed conditions attached to the decision and the reasons for each condition constituted an adequate discharge of the Board's statutory duty to give reasons. The operative part of the decision under consideration was in these terms:-

"The Board, having considered the evidence submitted in connection with the appeal, is satisfied that the erection and operation of a long wave transmitting station and ancillary facilities as proposed, would not be contrary to the proper planning and development of the area provided that the development is undertaken in accordance with the conditions set out in the second schedule hereto."

Finlay C.J., rejected the contention that had been made on behalf of the plaintiff that; the Board should be prohibited from relying on a combination of the reasons given for the decision and the reasons given for the conditions, together with the terms of the conditions, which he regarded as a contention that was contrary to common sense and to fairness. He went on to say that what must be considered is what an intelligent person who had taken part in the appeal would understand from the document and from the conditions and the reasons for the conditions. This point, that the decision has to be assessed from the perspective of an informed participant, is one that recurs throughout many of the decisions.

43. The question of adequacy of reasons was also considered by Laffoy J. in Village Residents Association Ltd v. An Bord Pleanála (No. 3) [2001] 1 I.R. 441 ("Village Residents"), a case involving a challenge to a decision of the Board to grant, subject to conditions, permission for a McDonalds Restaurant in Kilkenny. There, the operative part of the decision at p. 448 was in these terms:-

"Having regard to the planning history of the site, it is considered that, subject to compliance with the conditions set out in the second schedule, the proposed development would not seriously injure the amenities of the area or of property in the vicinity and would be acceptable in terms of traffic safety and convenience. The proposed development would, therefore, be in accordance with the proper planning and development of the area".

In that case, six conditions were set out in the schedule of the decision of the Board. Laffoy J. was of the view that the Board had fulfilled its statutory obligations because the decision explained why the first respondent decided to grant permission subject to conditions and to reject the objections.

44. It is fair to observe that the formulation of reasons in both O'Keeffe and in Village Residents was somewhat terse and could not be said to be any more elaborate than those at issue in the present case.

45. In the course of her judgment in Village Residents, Laffoy J. referred to the consideration of the obligation to state reasons in Ní Éilí v. Environmental Protection Agency (Unreported, Supreme Court, 30th July, 1999), a case involving an application for a licence for a hazardous waste incinerator, where the court. upheld a decision of the Environmental Protection Agency (the "Agency"), the operative part of which was in the following terms at p. 28:-

"The Directors accepted the Chairman's recommendations subject to an extension of the compliance date for lower emissions limit values, to September, 1998."

Murphy J. in his judgment was content to accept that the Agency, in its decision, was indicating that it was granting the licence sought because it was satisfied to accept, adopt and apply the conclusions reached by the hearing officer and his proposed

rejections of the arguments raised by the objectors. The reasons for the rejections were to be found in the report of the hearing officer and they were as ample as any party could require and were incorporated by reference in the decision. It is, however, only right to say that Murphy J. did indicate that this approach of incorporation by reference would not be appropriate in less complex cases. I will be commenting further on this question of incorporation by reference and the extent to which it is permissible to have regard to the contents of an inspector's report in more detail later, but at this stage, I would merely observe that it would be instantly obvious to any one reading the decision of the Board or the report of the inspector in the present case, that matters of the utmost complexity were under consideration.

46. It may be noted, that the present case is not one that is governed by s. 34(10) of the Planning and Development Act 2000 which in respect of certain planning appeals imposes an obligation on the Board to state the main reasons and considerations, although it does appear that at one stage the applicant was operating under a misapprehension in that regard. Even that obligation, where applicable, has been described by O'Neill J. in Grealish v. An Bord Pleanála [2007] 2 I.R. 536, at p. 553, as "a very light one, one could even say almost minimal". A similar approach was taken more recently by Hedigan J. in O'Neill v. An Bord Pleanála [2009] I.E.H.C. 202, (Unreported, High Court, Hedigan J., 1st May, 2009) (at para. 28-37), where he commented as follows:-

> *"The respondent [i.e. the Board]… is not obliged to engage in a lengthy review or analysis of its own reasoning when communicating its decision… [A]lthough the reasons provided by the respondent were in some respects quite limited, they were not so insufficient as to be unlawful. It is clear that the respondent did, through the main body of its decision as well as the appended conditions, adequately address its mind to the concerns which were raised by the inspector. Although the respondent's conclusions on the issues of size and visual amenity differed from those of the inspector, it is nonetheless clear that these considerations were to the forefront of the respondent's deliberations. The respondent was not required to deliver a discursive judgment nor to engage in a full re-evaluation of the inspector's report. The reasons provided were ample in order to allow the applicant and the Court to review the decision in the manner required."*

47. In the present case the decision was one made under s. 51 of the Roads Act 1993. That section does not impose any express statutory obligation in relating to giving reasons. However, the absence of such a specific statutory obligation does not of course mean that the Board was not bound to furnish reasons and indeed the Board has never sought to argue otherwise. Such an obligation clearly arises as a matter of traditional Irish administrative law and that traditional obligation is reinforced by the provisions of Article 9 of Council Directive 97/11/EC, of 3rd March, 1997 on the assessment of the effects of certain public and private projects on the environment, O.J. L073, 14.03.1997 ("the EIA Directive").

48. Article 9, of the EIA Directive provides as follows:-

> *1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:*
>
> *- The contents of the decision and any conditions attached thereto*
>
> *- The main reasons and considerations on which the decision is based*
>
> *- A description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects…"*

49. Having regard to the reference in the Directive to "main reasons and considerations", it seems to me to be a reasonable starting point to expect that the decision in the present case should provide an equivalent level of information to what would be expected if s. 34(10) of the Planning and Development Act 2000 was in fact applicable.

50. A major dispute between the applicant and the State respondents on the one hand, and the Board and the local authorities on the other, has been the extent to which it is permissible to look beyond the precise terms of the decision itself, though both the Board and the local authorities have been firm in asserting that even if, contrary to their submissions, they were to be confined to the decision, then that even taken in isolation would be more than sufficient.

51. We have already seen that this was an issue addressed by the Supreme Court in O'Keeffe, where firm views were expressed on the matter. However the applicant and the State respondents have relied heavily on the case of Deerland Construction Limited v. Aquaculture Licences Appeal Board [2008] I.E.H.C. 289, (Unreported, High Court, Kelly J., 9th September, 2008) ("Deerland"). In that case, Kelly J. referred with approval to a number of passages from Simons (2nd ed. 2007) Planning and Development Law (Thomson Round Hall), the leading text book in this area, and having done so declined to go outside the terms of the decision itself. In so doing, Kelly J. was departing from his own approach in Mulholland and Kinsella v. An Bord Pleanála (No. 2) [2006] 1 I.R. 453 as well as the decision of Finnegan P. in Fairyhouse Club Limited v. An Bord Pleanála (Unreported, High Court, Finnnegan P.,18th July, 2001).

52. However, there are a number of features of the Deerland case that would appear to clearly distinguish it from the present one. First of all, the actual decision which was impugned in that case really did not offer any reasons at all. The decision was essentially confined to a recital of a statutory formula and a statement that it was in the public interest to grant the licence that had been sought. Therefore, it was not a question of placing reliance on the report of the Technical Advisor to amplify or clarify reasons already contained in the decision. In addition, the Deerland case was concerned with a quite different statutory scheme. Section 40(8) of the Fisheries (Amendment) Act 1997, as inserted by s. 10 of the Fisheries (Amendment) Act 2001, provided that a determination of an appeal under that section including an appeal to which s. 52 referred, and the notification of that determination shall state the main reasons and considerations on which the determination was based (my emphasis). Here, there is absolutely no stipulation that the notification of the determination itself must state the reasons and considerations.

53. There is also the fundamental difference that, while when all the information became available, it became possible to infer that a decision was being taken to endorse the approach of the technical advisor, it would seem that it was only when affidavits were filed in court, that the approach taken to reaching a decision first came into the public domain. In effect the respondents in that case sought, as Kelly J. pointed out at p. 32 of his judgment, to "fill the material gaps by affidavit evidence". In contrast, the decision in the present case contains a specific statement that the Board agreed with the inspector's view of the environmental impacts of the proposed road development through, so far as is relevant, the Lough Corrib cSAC. Here the Board has not sought to introduce affidavit evidence, nor had it any need to do so.

54. I am quite satisfied that it must have been obvious to anybody who observed the hearing, and still even more obvious to those who actually participated, that on the aspect of the decision now in controversy, namely the impact of the proposed road

development on the Lough Corrib cSAC, that what was in issue between the parties was essentially a question of interpretation. Indeed, if there was ever any doubt about that, such doubt as there might have been is resolved by the applicant's own grounding affidavit in these proceedings where at para. 13 he refers to his written closing submissions in relation to the cSAC at the public hearing and describes them as being primarily in the nature of a legal submission.

55. The question in this case is not how or why the Board came to the decision that it did. In truth how they arrived at their conclusion must be obvious to any informed observer and suggestions to the contrary can really only be advanced by those who choose not to be informed. Such arguments might be thought to border on the disingenuous. Rather the real question is whether the Board was correct to interpret European and domestic legislation in the way that they so clearly did when reaching the conclusion arrived at or whether the approach taken was fundamentally flawed.

56. Before moving on from the question of an entitlement to look for assistance beyond the terms of the decision itself, I wish to refer very briefly to some English authorities. In an area which has received such considerable attention from the Irish courts, it is scarcely necessary to look further afield for authority, and I do so only because Kelly J. in Deerland, in the case on which much reliance has been placed by the applicant, referred to the existence of a body of relevant case law in England.

57. Overall, the approach taken in England seems very similar. The observations of Lord Brown of Eaton-under-Heywood in South Bucks District Council v. Porter [2004] 1 W.L.R. 1953, which offers an overview of how the situation is viewed in England and Wales generally accords with the approach of the Irish courts. In that case, at p.1964, Lord Brown said that the decision must be intelligible and adequate and the decision must enable the reader to understand why the matter was decided as it was and what conclusions were reached on "the principal important controversial issues, disclosing how any issue of law or fact was resolved". Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. Such adverse inferences will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission or as the case may be, it should enable the development's unsuccessful opponents to understand how the policy or approach which underlines the grant of permission may impact upon future, similar applications. The reasons for the decision must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. Therefore, a challenge based upon the reasons of the Board, will only succeed if the party aggrieved can satisfy the court that he is genuinely being substantially prejudiced by the failure to provide an adequately reasoned decision.

I will refer to only one other English decision, and again I do so because it was referred to in the Deerland case, and that is the case of Nash v. Chelsea College of Art and Design [2001] E.W.H.C. Admin. 538 ("Nash"). In so far as it has been suggested that Nash offers support to the applicant and indeed the State respondents in resisting any suggestion that regard can be had to the inspector's report as a source of elaboration and amplification of the Board decision, it is appropriate to consider just how far removed it was from the facts of the present case. The claimant in that case, Ms. Nash, was apparently unhappy with the grade that she had been awarded at the end of her second year in college. In earlier proceedings the decision of the academic committee to which the claimant had appealed her grade had been quashed by Elias J. on the grounds that the chairman of that committee had wrongfully made a decision as to the material that should go before the committee, a decision that was more properly that of the committee as whole. In the aftermath of the initial judicial review proceedings, the claimant returned to the committee but her appeal was once more unsuccessful. The letter she received informing her of her lack of success did not give any reasons for the committee's rejection of the substantive case. On the contrary, the letter gave the impression that the only matters considered by the committee as constituting possible irregularities were certain purely documentary matters to which reference was made. Despite the fact that the claimant's solicitor protested that no reasons had been given, a course of action which Stanley Burton J. categorised as very sensibly giving the college an opportunity to explain the decision of the academic committee, the college in correspondence reiterated that the only matters considered by the committee were certain inconsistencies in the records of the board of examiners.

58. Only after proceedings had been drafted, which were furnished to the solicitors for the college in draft form, did a letter issue which purported to set out the substantive reasons.

59. Having engaged in a very comprehensive review of the authorities, Stanley Burton J. set out the following principles at para. 34:-

> *"In my judgment, the following propositions appear from the above authorities:*
>
> *(i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in Northamptonshire County Council ex p D) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons.*
>
> *(ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:*
>
> *(a) Whether the new reasons are consistent with the original reasons.*
>
> *(b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.*
>
> *(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).*
>
> *(d) The delay before the later reasons were put forward.*
>
> *(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly."*

Having set out these considerations and principles, Stanley Burton J. decided, though not without considerable hesitation, that he should have regard to the letter that belatedly set out reasons. In doing so, he was agreeing to take into account information contained in a letter which issued only after draft proceedings had been served and which was inconsistent with, or at the very least, went well beyond what had been stated earlier. In these circumstances I really cannot see how the decision in Nash offers any assistance to the applicant or to the State respondents. If one applies the propositions identified by Stanley Burton J., it may be

noted that while in the present case there was undoubtedly a duty to state reasons, this was not a statutory duty and certainly there was no statutory duty to state the reason in the body of the decision or as part of the notification of the determination, as had been required in Deerland. It will also be noted that the reasons to be found within the inspector's report are entirely consistent with the Board's decision and indeed the decision expressly endorsed the approach of the inspector. There can be no suggestion whatever that the reasons for the conclusion ultimately reached are other than those set out in the Board's decision and as are to be found in the inspector's report. Furthermore, there can be no question of any retrospective justification. The Board's decision and the inspector's report were made available simultaneously. So far as the question of any delay is concerned, there was absolutely no delay. Indeed, there is no question of subsequent evidence as to the basis of the decision being made available. This is a case of two documents being made available simultaneously and a decision document containing an express reference to the inspector's report.

Overall, I am quite satisfied that the decision of the Board, even without recourse to the inspector's report, clearly and succinctly addresses the major issue in the case and leaves no room for doubt as to how and why the Board came to the decision that it did. Indeed, the decision of the Board, even without amplification, is more comprehensive and more precise than the language used in other cases to which I have referred and which passed muster with both the Supreme Court and High Court. For those seeking further elaboration, it seems to me entirely legitimate to have regard to the contents of the inspector's report, given that the agreement of the Board with the inspector's approach was expressly recorded in its decision. In relation to its contents, while both the State respondents and the applicant engaged in a fine-combing exercise and as a result have been in a position to formulate certain criticisms, overall it is an admirable document. In the course of his judgment in the Supreme Court in Ní Éilí v.Environmental Protection Agency, Murphy J. referred to the fact that the hearing officer had performed his task with extraordinary clarity and cohesion and that he fully deserved the compliment that had been paid to him by the Environmental Protection Agency at one of its meetings. It seems to me that this is language that could very easily be adopted in relation to the work undertaken by the inspector in the present case.

60. In these circumstances, I do not believe that there are substantial grounds for contending that the decision is invalid by reason of a failure to state reasons and accordingly I propose to refuse leave on this ground.

61. I turn now to consider the contention that the Board has fundamentally misinterpreted E.U. and domestic legislation. While this issue has been very fully and carefully argued, the dispute between the parties is really quite a net one. The applicants say that the scheme put in place by the legislation requires, in the first instance, that all plans or projects, not directly connected with or necessary to the management of a site, but likely to have a significant effect should be the subject of an appropriate assessment. Then, when the appropriate assessment has concluded, the authorities must consider whether the impact which it has identified the plan or project will have, is one that will adversely affect the integrity of the site, and then if, and only if, a conclusion is reached that the plan will not adversely affect the integrity of the site, can it be approved. In essence, the Board and notice parties take the view that the scheme requires that once it is established that a plan or project will have a significant effect, it is necessary to go on to a further stage which involves assessing whether the significant impact is one that either will or will not affect the integrity of the site having regard to its conservation objectives. This staged process is rejected by the applicant and the State respondents ("the challengers"). They say that once it is established that a project will have a significant impact and it is an adverse impact, that this of itself means that the integrity of the site is affected. The State respondents have categorised the Board's drawing of a distinction between projects that will have a significant impact on a site but not affecting its integrity, and those which will affect the integrity of the site as a "de minimis" approach. Those challenging the decision have argued that the reference to "integrity" is designed to be, and is actually, an added protection for the site in question and that it was in no sense a derogation from the general level of protection provided. It is suggested that it was designed to deal with the situation where an effect on the site, although not a direct one, might nevertheless undermine the integrity of the site. An example given was that it would deal with situations where upstream activity might impact on water quality, habitats or species downstream.

62. I can see little basis for any such suggestion. Had the reference to integrity of the site been omitted entirely, then Article 6(3) of the Habitats Directive and Regulation 30 of the Regulations of 1997, would, it is absolutely clear, require any plan or project to be assessed, and any plan or project to be refused if it would have a significant adverse effect. Absent any reference to the integrity of the site, there is absolutely nothing to confine the category of plans or projects requiring assessment to those where the impact is direct. On the contrary, the reference to the consideration of its impact either individually or in combination with other plans or projects would clearly seem to have in mind activity outside the boundaries of the site.

63. The simple exercise of re-reading Article 6(3) and Regulation 30, excluding the three words "the integrity of" clearly demonstrates that the argument presented is erroneous. With those three words deleted, Article 6(3), so far as is material, provides any plan or project likely to have a significant effect on a site, either on its own or in combination with other plans or projects, should be subject to appropriate assessment of its implications for the site, in view of the site's conservation objectives. In light of the conclusion of the assessment of the implications for the site, and subject to the provisions of para. 4 (which require separate consideration), the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the site concerned and, if appropriate, after having obtained the opinion of the general public.

64. Read with the three words in question deleted, the Article would offer protection that was comprehensive, unqualified and unconditional. If there was any desire to extend the protection that the Directive would afford, and it is hard to see why there would be given that the protection is entirely comprehensive, that could be achieved with much greater clarity by inserting words such as "whether direct or indirect" after the word "thereon", so that the requirement for an appropriate assessment would be stated to apply to all plans or projects likely to have a significant effect on a site, whether directly or indirectly.

65. The applicant and the State respondents have placed heavy reliance on the case of Waddenzee v. Staatsecretaris van Landbouw (Case C-127/02) ("the Mechanical Cockle Fishing case") [2004] E.C.R. I -7405. That case is relied on not only as offering assistance in relation to the interpretation of the Habitats Directive and by extension the Regulations of 1997, but it is also relied upon as an application of what is known as the "no reasonable scientific doubt" test. On this point, there is no room for doubt as the ECJ was absolutely clear and unambiguous that development may be authorised only if the authorities ascertain that the activity would not adversely affect the integrity of the site and for that to be the case, there must be no reasonable scientific doubt as to the absence of such effects.

66. It is therefore clear that, irrespective of how the Habitats Directive and the Regulations of 1997 are to be interpreted and, in particular, irrespective of what significance is to be attached to the phrase "integrity of the site", the Board could permit the project to proceed only if it was certain that the integrity of the site would not be adversely affected and they could be so certain only where there was no reasonable scientific doubt as to the absence of such adverse effects.

67. However, that observation must be seen in the context that there was in fact no significant scientific disagreement as to the impact on the site. In particular, the two experts who addressed the issue, Dr. Fossitt of the National Parks and Wildlife Services ("

the NPWS") and Mr. McCrory, who was called to give evidence by Galway County Council, were not in disagreement as to the effect the road proposal would have on the site. It was not a case where there were two views as to whether a particular by-product would be produced, nor was it a case where there was disagreement between scientists as to whether the particular activity would have an impact on flora or fauna or fish stocks. The issue rather was how an impact that everyone agreed would occur should be labelled or categorised.

68. A measure of the importance of the Waddenzee case to the challenge now before the court is that Mr. Paul O'Higgins S.C., on behalf of the applicant opened the case in extenso. Accordingly, it is appropriate to consider the case in some detail.

69. The Waddenzee case concerned mechanical cockle fishing which had been carried out in the Waddenzee over a number of years, but in a situation where the activity was subject to annual authorisation. The primary issue was whether the words "plan or project" in Article. 6(3) of the Habitats Directive were wide enough to cover what was really a continuing activity. This led to the Dutch courts referring five questions to the ECJ. for a preliminary ruling. The questions referred were as follows:-

> *"1(a) Are the words "plan or project" in Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora to be interpreted as also covering an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period, with a fresh assessment being carried out on each occasion as to whether, and if so in which section of the area, the activity may be carried on?*
>
> *(b) If the answer to Question 1(a) is in the negative, must the relevant activity be regarded as a "plan or project" if the intensity of this activity has increased over the years or an increase in it is made possible by the authorisations?*
>
> *2(a) If it follows from the answer to Question 1 that there is a "plan or project" within the meaning of Article 6(3) of the Habitats Directive, is Article 6(3) of the Habitats Directive to be regarded as a special application of the rules in Article 6(2) or as a provision with a separate, independent purpose in the sense that, for example:*
>
> *(i) Article 6(2) relates to existing use and Article 6(3) to new plans or projects, or*
>
> *(ii) Article 6(2) relates to management measures and Article 6(3) to other decisions, or*
>
> *(iii) Article 6(3) relates to plans or projects and*
>
> *Article 6(2) to other activities?*
>
> *(b) If Article 6(3) of the Habitats Directive is to be regarded as a special application of the rules in Article 6(2) can the two subparagraphs be applicable cumulatively?*
>
> *3(a) Is Article 6(3) of the Habitats Directive to be interpreted as meaning that there is a "plan or project" once a particular activity is likely to have an effect on the site concerned (and an "appropriate assessment" must then be carried out to ascertain whether or not the effect is "significant") or does this provision mean that an "appropriate assessment" has to be carried out where there is a (sufficient) likelihood that a "plan or project" will have a significant effect?*
>
> *(b) On the basis of which criteria must it be determined whether or not a plan or project within the meaning of Article 6(3) of the Habitats Directive not directly connected with or necessary to the management of the site is likely to have a significant effect*
>
> *thereon, either individually or in combination with other plans or projects?*
>
> *4(a) When Article 6(3) of the Habitats Directive is applied, on the basis of which criteria must it be determined whether or not there are "appropriate steps" within the meaning of Article 6(2) or an "appropriate assessment", within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project.*
>
> *(b) Do the terms "appropriate steps" or "appropriate assessment" have independent meaning or, in assessing these terms, is account also to be taken of Article 174(2) EC, and in particular the precautionary principle referred to therein?*
>
> *(c) If account must be taken of the precautionary principle referred to in Article 174(2) EC does that mean that a particular activity, such as the cockle fishing in question, can be authorised where there is no obvious doubt as to the absence of a possible significant effect or is that permissible only where there is no doubt as to the absence of such an effect or where the absence can be ascertained?*
>
> *5 Do Article 6(2) or Article 6(3) of the Habitats Directive have direct effect in the sense that individuals may rely on them in national courts and those courts must provide the protection afforded to individuals by the direct effect of Community law, as was held inter alia in Case C-312/93 Peterbroeck [1995] E.C.R. I-4599?"*

70. The E.C.J. answered these questions as follows:-

> *1. Mechanical cockle fishing which has been carried out for many years but for which a licence is granted annually for limited period, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of the Habitats Directive. In the light of that reply the court did not find it necessary to answer question 1(b).*
>
> *2. In relation to the second question, the ECJ commented that the national court was in essence asking what the relationship was between Article 6(2) and Article 6(3) of the Habitats Directive. The ECJ responded to this question by stating that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the Directive's objectives, and cannot be applicable, concomitantly with Art. 6(3).*

3. Question 3(a) was answered by the court saying that the first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives, if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects. The court answered question 3(b) saying that where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk has been made in the light inter alia of the characteristics and specific environmental conditions of the site concerned.

4. So far as question 4(a) is concerned, the court did not find it necessary to address the questions of the concept of "appropriate steps" within the meaning of Article 6(2). In relation to appropriate assessment that requires that prior to its approval, all aspects of the plan or project which, by themselves or in combination with other plans or projects affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. Competent authorities are to authorise an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

5. The ECJ. answered the fifth question in relation to Article 6(3) by saying that when a national court is called upon to ascertain the lawfulness of an authorisation for a plan or project, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though the provision has not been transposed into the legal order of the Member State concerned.

Dealing with the relationship between Article 6(2) and Article 6(3) of the Habitats Directive, the ECJ had this to say at paras. 35 and 36 of the judgment:-

"35. The fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2).

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

71. There is no doubt that the phrase that I have highlighted offers significant encouragement to the challengers. It appears to mean, without saying so expressly, that a conclusion that there will not be an adverse effect on the integrity of the site is equivalent to a conclusion that it is not likely to give rise to deterioration or significant disturbance. Put positively, this means that the words in question lead to a conclusion that a deterioration or significant disturbance is to be equated to an adverse impact on the integrity of the site.

72. It may be noted that Article 6(2) speaks of significant disturbance in the case of species, but that the reference to deterioration is unqualified. The applicant sees this as a matter of considerable importance.

73. However, while paras. 35 and 36 of the judgment of the ECJ may offer encouragement to the challengers, the notice party and the Board ("the defenders") have also been able to find solace in certain other passages. In particular they have relied heavily on para. 38 of the judgment, which is in the following terms:-

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

This paragraph clearly seems to envisage that there will be certain projects which will be permitted to proceed even though the proposal will have a significant effect on a site. The defenders say that this clearly establishes that the ECJ envisaged that after it had been established that there would be a significant effect, and that a further assessment would be required to determine whether that significant effect was one that would adversely affect the integrity of the site.

74. Irrespective of those areas where there is scope for disagreement, anyone reading the judgment as a whole would have to accept that a high threshold must be crossed before a project can be approved as being one that will not adversely affect the integrity of the site. In this vein, para. 56 of the judgment, provides as follows:-

"It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned." (Emphasis added).

Paragraph 57 provides that where doubt remains as to the absence of adverse effects on the integrity of the site, the plan or project would have to be refused.

75. The restrictive approach of paras. 56 and 57 of the judgment emerges with even greater clarity on para. 59 of the judgment which provides:-

"Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of [the plan or project in question] for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects." (Emphasis added).

The Court then referred to the case of Monsanto Agricoltura Italia SpA and Others v. Presidenza del Consiglio dei Ministri and Others

(Case C-236/01) [2003] E.C.R. I-0000 paras. 106 and 113) in support of this decision.

76. By any standards, it must be seen that this is indeed a formidable threshold to be crossed and it is this threshold which will have to be overcome, regardless of whether it is the interpretation of the challengers or of the defenders which is accepted.

77. Irrespective of how Article 6(3) of the Directive is to be interpreted, competent national authorities are, one way or another, significantly fettered when considering authorisation. Having regard to the objectives of the Directive, it is not at all surprising that it should be so. That the Directive sets such a high threshold, and does so irrespective of how the matters in dispute are resolved is a matter than can itself assist when it comes to interpretation.

78. The inspector in his report spoke of the provisions being in plain English. In that regard, in my view, he was perfectly correct. The language of the Habitats Directive and of the Regulations of 1997 is clear. If the language of each is read in its ordinary and natural meaning then it provides that the first stage involves an appropriate assessment of a plan or project with a view to the site's conservation objectives, and then, when that assessment has taken place and the conclusions of the assessment are available, the project will not be permitted to proceed unless competent national authorities ascertain that it will not adversely affect the integrity of the site concerned. Accordingly, once it is established that there will be a significant impact, there is what amounts to a presumption that the project will not be approved and that presumption is rebutted only if it is positively established that there will not in fact be an adverse impact on the integrity of the site. The language of the Habitats Directive and the Regulations of 1997 also make it clear that even if the integrity of the site is adversely affected, it is not necessarily the end of the matter and it is possible that some such projects may still proceed when the provisions of Article 6(4) are applicable. Article 6(4) is itself a two- tier structure, in that projects can be permitted to proceed for imperative reasons of overriding public interests, but there is a specific and very restrictive interpretation of the considerations which may be raised when the sites host a priority natural habitat and/or a priority species.

79. I have referred to the fact that in my view the clear language of the Habitats Directive, in its ordinary and natural meaning, provides for a two stage procedure involving the national authorities ascertaining in the first instance whether a project under consideration is one that is likely to have a significant effect on the site and then, if that is established, moving on to consider whether the proposal is one that will affect the integrity of the site. It seems to me that that approach is one which is supported by the language of documents prepared by the Irish authorities and also consistent with the approach adopted by the European Commission in its guidance document, entitled "Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC" (the "Natura 2000 document"). This was exhibited by Dr. Julie Fossitt of the NPWS in the course of an affidavit sworn on behalf of the State respondents. While the document is careful to confirm that it reflects only the views of the Commission and does not offer a binding interpretation, its contents are nevertheless of interest.

80. Paragraph 4.2 of the Natura 2000 document, headed "Scope", states that Article 6(3) and (4) define a step-wise procedure for considering plans and projects (emphasis in the original):-

> *"(a) The first part of this procedure consists of an assessment stage and is governed by Article 6(3), first sentence.*
>
> *(b) The second part of the procedure, governed by Article 6(3), second sentence, relates to the decision of the competent national authorities.*
>
> *(c) The third part of the procedure (governed by Article 6(4)) comes into play if, despite a negative assessment, it is proposed not to reject a plan or project but to give it further consideration."*

The text of this section of the document refers to a simplified flow chart presented in Annex 3 at the end of the document. The flow chart, which also appears in a document entitled "Methodological guidance on the provisions of Article 6 (3) and (4) of the Habitats Directive 92/43/EEC",, demonstrates by way of a diagram the "step-wise procedure", to use the language of the Commission in the Natura 2000 document.

81. Paragraph 4.4.1. of the document addresses the question of significant effect. It says it is clear that what may be significant in relation to one site may not be significant in relation to another. It offers the following example: loss of a hundred square metres of habitat may be significant in relation to an orchid site, while a similar loss in a large steppic site may be insignificant. Paragraph 4.6.3, headed "The concept of the 'integrity of the site'", might usefully be quoted in full:-

> *"It is clear from the context and from the purposes of the directive that the 'integrity of the site' relates to the site's conservation objectives… For example, it is possible that a plan or project will adversely affect the integrity of a site only in a visual sense or only where habitat types or species other than those listed in Annex I or Annex II. In such cases, the effects do not amount to an adverse effect for the purposes of Article 6(3), provided that the coherence of the network is not affected.*

On the other hand, the expression 'integrity of the site' shows that focus is here on the specific site. Thus, it is not allowed to destroy a site or part of it on the basis that the conservation status of the habitat types and species it hosts will in any way remain favourable within the European territory of the Member State.

As regards the connotation or meaning of 'integrity', this can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation.

The 'integrity of the site' has been usefully defined as 'the coherence of the site's ecological structures and function, across its whole area, or the habitats, complex of habitats and/or populations of species for which the site is or will be classified' (quotation from Planning Policy Guide 9, UK Department of the Environment, October 1994).

A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required.

When looking at the 'integrity of the site', it is therefore important to take into account a range of factors, including the possibility of effects manifesting themselves in the short, medium and long-term.

The integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be

limited to the site's conservation objectives."

82. At least implicitly a similar approach is to be found in the National Roads Authority document entitled "Guidelines for Assessment of Ecological Impacts of National Road Schemes"(1st March, 2006), Interestingly, one of the main authors of that document is Dr. Julie Fossitt of the NPWS, a deponent in this case. At Appendix 4 p. 43 of the document, a table is set out containing the criteria for assessing impact significance. The sites are categorised or graded with sites that are internationally important at one end of the scale and any sites of low value but locally important at the other end. Impacts are considered on a scale ranging from "severe negative" to "major positive". In so far as the sites that are internationally important are concerned, any permanent impact is categorised as falling into the severe negative category. It does not however at any stage appear to equate "severe negative" with "effect on the integrity of the site".

83. The applicant and the State respondents have argued for a purposive or teleological approach to the interpretation of the Directive and the Regulations. For my part, I would be extremely anxious to give effect to the intention of the framers of the Directive. The question is how that intention is to be identified. The first route towards identifying the intention of the framers of the Directive is to look at the language that has been used. If, as is effectively contended by the applicant and the State respondents, the Habitats Directive and Regulations of 1997 need to be interpreted other than in accordance with their ordinary meaning and given an absolute interpretation so as to give effect to the intention of the framers, then it is surprising that no clear and utterly unequivocal statement to that effect has been found. The Habitats Directive has been considered in many cases, both at national level and European level, and many papers, articles and text books have dealt with it over many years now. Notwithstanding this, I have not been referred to, nor am I aware of, any specific and unequivocal statement that a significant effect on the site equates to an effect on the integrity of the site.

84. I have commented, and it is indeed the case, that I would be very anxious to give effect to the intentions of the framers of the Directive. However, there is a point at which interpretation ends and legislation begins. From his perspective, it is very natural and understandable that the applicant would wish to see the concept of significant impact and the effect on the integrity of the site equated. Unfortunately, from his point of view, the framers of the Directive have chosen to use language that does not do this.

85. In the absence of such language, it is not at all clear to me that such was indeed their intention. On the contrary, it seems to me there are a number of indications present that they had sought to achieve not an absolutist position, but one that was more subtle and more graduated and, in the process, one that more truly reflected the principles of proportionality. Article 6(3) of the Habitats Directive refers to the authorities agreeing to the plan or project where, if appropriate, the opinion of the general public has been obtained. If, once an appropriate assessment established that there would be a significant effect on the site, then this inevitably must lead to the conclusion that the proposal affects the integrity of the site, and so the project could not be permitted to proceed without resort to an alternative procedure. What then was there to consult the public about?

86. The language of the Directive makes clear that regard is to be had to economic, social, cultural and regional requirements. If that is to be done effectively, and if at the same time, the objectives of preservation, protection and improvement of the quality of the environment is to be achieved,a step by step approach, or to use the language of the Commission in the Natura 2000 document, a "step-wise" approach is called for.

87. I have referred to the conformity of approach between the applicant and the State respondents, but their approaches diverge in one respect. The applicant has made it clear that he believes that the Directive requires that if there is a significant adverse effect on any relevant site, then a project cannot proceed without resort to the Article 6(4) procedure. The State respondents dispute this saying rather that it is only in the case of Annex I priority habitats that "significant impact" and "affecting the integrity" ought to be equated without the necessity for further consideration.

88. In terms of striking and maintaining a balance, what the State urges may have much to recommend it. Unfortunately, no support for their approach is to be found in the language of the Directive. This divergence of approach between the applicant and the State respondents is of interest, in that it shows how problematic matters become once one steps outside the obligation to interpret what appears in the measure under consideration. If one concludes that the framers meant to say and intended something other than what they actually said, it then becomes necessary to identify what they intended and what they ought to have said to give effect to it. On that, this divergence of approach shows that there is no consensus.

89. While no specific statement has been found, that a significant adverse effect is to be equated with an impact on the integrity of a site, the challengers have referred to a number of decisions of the ECJ and opinions of Advocates General which they say tend to point in that direction. It is worth considering just how different the context of the present case is from a number of those referred to. Here the project was one that had been long under consideration. It was the subject of an environmental impact statement, many submissions in relation to it, both for and against, were received and a twenty-one day public hearing resulted. All agreed that it was necessary to identify what the impact of the proposal would be and having identified the effects to give consideration to them. In the Waddenzee case, the authority upon which reliance has principally been placed, the question in dispute was whether the Habitats Directive had any application to annual renewal in a situation where the activity had been going on over a significant period. In the case of Commission v. France (Case C-241/08) where the conclusions of Advocate General Kokott became available while this matter was at hearing and where some of the language used by her certainly offers encouragement to the challengers, what seems to have been involved was a deeming provision. Essentially fish farming, shooting and other forms of hunting activities were deemed by the French legislation, as not having a disturbing effect. Commission v. Portugal (Case C-239/04) [2006] ECR I-10183 (the Castro Verde case) involved authorisation of a motorway between Lisbon and the Algarve notwithstanding that there had been a negative assessment of the impact of the motorway on the Castro Verde special protection area. No regard whatever was had to the provisions of Art. 6(4). Commission v. Italy (Case C-304/05) ECR I-07495 involved a proposal to proceed to the construction of an entire ski resort to host the world ski championships without any assessment. The case of Bund Naturschutz in Bayern eV and Others v. Freistaat Bayern (Case C-244/05) [2006] ECR I-08445 initially appears to have more in common with the present case in that it involved the selection of a route for a federal road. The case was primarily concerned with identifying whether the protection scheme was applicable to sites which had been designated by the competent national authority with a view to recognition as sites of Community importance but whose conclusion was awaiting a decision by the Commission. Paragraph 46 of that judgment may be noted. It provides:-

> *"Member States cannot therefore authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site, as defined by those criteria. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics" (Emphasis added).*

Implicit in the reference to interventions that significantly reduce the area of the site is that there may be interventions that reduce the area of a site, but do not do so significantly. This is a further indication that a qualitative exercise is demanded. If the arguments advanced by the applicants were correct, any loss of habitat area, however limited, would have to be deemed to have affected the integrity of the site. On their view, there was no scope for categorising a loss of any area of habitat as insignificant. Issues of applicability or the extent of obligations could not be further removed from the present case where the proposal has been subjected to intense scrutiny and a conclusion reached after lengthy study.

90. In all the circumstances, I am not at all persuaded that the Board, in its decision, has misinterpreted the Directive and the Regulations. On the contrary, its approach accords with the clear language of the legislation. Appeals for a purposive or teleological interpretation in the present case are misplaced. Of course, one would wish to interpret both the European and domestic legislation so as to give effect to the intention of the framers. However, no approach to interpretation authorises "guess work", nor does it authorise a court to engage in legislating. This is not a case where it is sought to give a broad or even expanded interpretation to a particular phrase so as to cater for a particular set of facts, when doing so would clearly have been the intention of those responsible for the legislation. Neither, is it a question of interpreting the words of legislation in a broad or expansive manner so that lacunae can be filled. Instead, what is sought is that the Directive and the Regulations be read as if the reference to integrity of the site were deleted or that the phrase was entirely otiose. What is sought is not a "reading in" or a "reading up", but rather a "reading out" and the taking of a red pencil to the clear words of both the Directive and the Regulations. I feel quite unable to engage in such an exercise.

91. However, having regard in particular to the passages to which I have referred in the Waddenze case as well as the observations of Advocate General Kokott in Commission v. France (Case C- 241/08), I am of the view that had the case proceeded simply as a leave application, it would clearly have been proper to grant leave and thus to have permitted a substantive hearing. Being of that view, it appears to me that even in the context of the telescoped hearing that has taken place, it is proper that leave should and will be granted on this point. However, on the substantive point, the challenge fails and accordingly, I decline to quash the decision. The question of a reference to the ECJ has been canvassed in written and oral submissions. I have considered that option, but having regard to the view that I have taken in relation to the language of the Directive and the Regulations, I do not find it necessary for the purposes of this judgment to involve that Court at this stage.