THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

2017 No. 145 JR

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 AND 50B OF THE PLANNING AND DEVELOPMENT ACT

BETWEEN

MICHAEL ALEN-BUCKLEY AND GIANCARLA ALEN-BUCKLEY

APPLICANTS

AND

AN BORD PLEANÁLA

FIRST NAMED RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

SECOND NAMED RESPONDENT

AND

WATERFORD CITY AND COUNTY COUNCIL AND ECOPOWER DEVELOPMENTS LIMITED

NOTICE PARTIES

Judgment of Mr. Justice Robert Haughton delivered on the 25th day of September, 2017.

Paragraph No. Title

1. These judicial review proceedings arise out of a decision by An Bord Pleanála ("the Board") dated 14 December, 2016, to grant planning permission to Ecopower Developments Limited ("Ecopower") for a wind farm development at Knocknamona, Co Waterford. The Applicants seek an order of *certiorari* quashing the decision of the Board as well as several other declaratory reliefs as set out in their notice of motion dated 22 February, 2017.

Background

2. On 31 July, 2014, Ecopower applied to Waterford County Council for planning permission for a development of a windfarm consisting of twelve wind turbines, one meteorological mast and various associated works. The application was considered by Waterford County Council who refused permission on 23 September, 2017, on two grounds, namely, (i) that the Environmental Impact Statement ("EIS") submitted with the application was inadequate and (ii) that the development would have an adverse effect on the landscape and visual amenity. Upon refusal, Ecopower appealed to the Board. On appeal Ecopower's proposal was revised to omit three of the twelve turbines to alleviate concerns propounded by the County Council relating to the impact on the landscape and visual amenity.

3. The Board appointed an Inspector to report in relation to the application and furnish the Board with an appropriate recommendation. In a report dated 10 April, 2015, the Inspector recommended refusal of the application solely on the basis that the development would result in excessive noise being generated at dwellings in the vicinity. The Inspector was also of the view that, in light of the decision in *O'Grianna v An Bord Pleanála* (No. 1) [2014] IEHC 632, the EIS was deficient and required further detail relating to the proposed grid connection for the development. However, this particular concern was not recommended as a ground for refusal, the inspector stating that –

> "13.17.4 …If permission is not being refused for any other reason, I consider that it would be appropriate to revert to the applicant by way of further information on this issue."

4. After consideration of the Inspector's recommendation, the Board decided to issue a request for further information from the

Developer pursuant to section 132 of the Planning and Development Act, 2000 (as amended) "the 2000 Act"). This request sought a revised EIS which included details relating to the haul route works required, a minutes per day shadow flicker assessment, the proposed grid connection, a revised Habitats Directive screening report and a revised Nature Impact Statement, if necessary. This information was subsequently furnished to the Board who considered same and decided to (i) notify all parties to the appeal of the receipt of this additional information, (ii) require the developer to publish notices informing the public that the Board had received this further information and invite submissions re same and (iii) refer the matter back to the Inspector for the purpose of preparing an addendum report. Over one hundred submissions were received after publication of the updated notice, including two on behalf of the applicants herein.

5. As requested, the Inspector prepared an addendum report dated 20 September, 2016. In this report, the Inspector stated that he had incorrectly interpreted the Ministerial Guidelines relating to the noise factor and concluded that the noise of the proposed development would not be in excess of the threshold allowed for in the Guidelines issued by the then Department of the Environment, Housing and Local Government. The Inspector also conducted an Environmental Impact Assessment ("EIA") and screening for Appropriate Assessment ("AA"), encompassing the proposed lands, the haul routes and the grid connection. He concluded that the proposed development, either individually or in combination with other plans or projects, was not likely to have significant effects on any European sites. In such circumstances, he deemed 'Stage 2' AA to be unnecessary and recommended that planning permission be granted subject to a number of conditions.

6. In relation to the EIA, the Board in its direction dated 22 November, 2016, stated that after the omission of four turbines, the effect on the environment by the development "would be acceptable by itself and cumulatively with other developments in the vicinity, including other wind farms and the proposed grid connection route, subject to the implementation of the mitigation measures proposed and to compliance with the conditions as set out below." In relation to the AA, the Board stated, "by itself and in combination with other plans and projects in the area, the proposed development would not be likely to have significant effects on European sites…the need for further Stage II Assessment therefore does not arise."

7. The Board decided on 22 November, 2016, to grant planning permission "generally in accordance with the Planning Inspector's recommendation" and attached seventeen conditions or "mitigation measures" to this permission.

8. By order of the High Court dated 20 February, 2017, the applicants were granted leave to judicially review the decision of the Board to grant planning permission to Ecopower for the Knocknamona Windfarm development. These proceedings were transferred into the Commercial Court by Order dated 13 March, 2017. By order dated 22 May, 2017, the proceedings were struck out as against the second named respondent as no EU law transposition or interpretive issue was pursued. The respondent and Ecopower were separately represented and opposed the application. Waterford City and County Council did not appear at the hearing.

Submissions of the Applicants

9. A considerable number of arguments were made by counsel for the applicants in both written and oral submissions. Not all grounds raised in the Statement of Grounds were pursued. The applicants' initial written submission lacked clarity, and was effectively replaced in opening with a written "Outline of Applicant's case" described by counsel as a 'speaking note'. Understandably this drew objection from counsel for the respondent and notice party as it was not furnished in advance or pursuant to leave of the court, but the court found it of some assistance in identifying and narrowing the issues and arguments actually being pursued by the applicants in light of the 37 grounds set out in para.5 of the Statement of Grounds.

10. There is a significant degree of overlap between the Statement of Grounds and the written submissions; however the core arguments can be divided into two categories, namely (a) the issues relating to the granting of planning permission for the grid connection and temporary haul routes, and ancillary issues flowing from same and (b) additional issues with the decision of the Board to grant planning permission to the Windfarm development alone. If the Court finds that planning permission was not in fact granted for the grid connection and haul route works, then the ancillary issues flowing from this fall away. The various arguments as advanced by the applicants can be summarised as follows:

a) The grant of planning permission for the grid connection and haul route works and ancillary matters:

i. The Board extended planning permission to include the grid connection and haul route works. This is evidenced by the Board's amendment of condition 10 to include subsection (b) which states:

"All works arising from the aforementioned arrangements [which relate to the Transport Management Plan] shall be completed at the developer's expense, within 12 months of the cessation of the use of each road as a haul route or grid connection route for the proposed development."

This submission is also supported by condition 1 of the planning permission which requires the development to be carried out in accordance with the plans and particulars received by the Board. The applicants submits that this, in addition to condition 10(b), is indicative of the Board's decision to grant planning permission to parts of the development which were not part of the application, namely the grid connection and haul route works, and of which the public had no notice. The applicants state that this is fundamentally improper and *ultra vires*.

ii. The Inspector assessed the development on the basis that the grid connection and haul route works were not part of the application but still went on to recommend that conditions be imposed in respect of same. The applicants give the example of condition 10 which requires a Transport Management Plan and condition 9 which requires the submission of a Construction and Environment Management Plan. The Board went on to grant planning permission on the basis of these mitigation measures. These measures relate to land over which Ecopower has no control and which were not included in the planning application.

iii. Ecopower proposed two alternative routes for the grid connection which makes the development, and in particular the grid connection works, void for uncertainty and contrary to the Planning and Development Act Regulations and Council Directive 2011/92/EU.

iv. The site notice erected by the Board on 18th February, 2016, did not contain sufficient information relating to the grid connection and haul route works which the applicants contend were now being included in the planning application. This failure to specify the location and extent of the development contravenes the principles set out in *Gormley v ESB* [1985] IR 129, the Planning and Development Regulations 2001 (as amended) and the Aarhus convention in relation to public participation in the planning process.

v. Resulting from the deficient site notice, none of the parties whose lands were affected by the two possible grid connection routes made any submissions to the Board in relation to the application for planning permission nor was any consent given by these parties for grid connection work to be carried out on their land.

b) Other issues arising from the grant of planning permission for the Windfarm development alone:

i. The Board failed to have any regard, or any sufficient regard, to the reasons behind the initial refusal by Waterford County Council of the Planning Permission.

ii. The Board in granting planning permission for the grid connection failed to have any or any adequate regard to Waterford City and County Development Plan. In the later written Outline of Applicants' Case, this was narrowed to a contention that the Board erred in law and acted contrary to the 2000 Act (including s.37(2) in relation to material contravention of a development plan) in its assessment of the *visual impacts* by preferring the Wind Energy Guidelines over the relevant provisions of the development plan.

iii. The applicants submit that the conditions imposed constitute an impermissible delegation to the Planning Authority of various matters relating to the development which is in direct contravention to the Planning Acts and Council Directive 2011/92/EU.

iv. The manner in which the 'Stage 1' Appropriate Assessment (screening) was carried out is contrary to what is required by the Habitats Directive. The test adopted by the Inspector was whether the development would be likely to impact on the qualifying interest of the Natura 2000 site, however the appropriate test is a consideration of whether the development is capable of affecting the integrity of the site.

Preliminary Issue

11. Before addressing these arguments, it is necessary to consider an objection which arose during the hearing. The respondent and notice party submitted that new arguments were advanced by the applicants both in the later affidavits of Ann Mulcrone and by counsel during the course of the hearing which were not pleaded in the Statement of Grounds. In a letter dated 13 June, 2017, the applicants were notified by solicitors for the Board of their belief that such arguments had been raised in Ms Mulcrone's third affidavit, stating "we will strenuously object to attempts to introduce new grounds and arguments regarding the validity of the Board's decision that are outside the scope of the Statement of Grounds on which leave was granted." They contend that arguments which are not sufficiently pleaded are not properly before the Court and rely on Order 84, rule 20(3) of the Rules of the Superior Courts which states:

> "20(3) It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

12. Counsel also directed the Court to the case of *AP v DPP* [2011] IESC 2. In that matter the respondent claimed that many arguments made during the course of the hearing were not sufficiently pleaded in the Statement of Grounds and that the Court should disregard them as a result. In discussing pleadings in judicial review Murray CJ. stated:

> "A party seeking judicial review is required to apply to the High Court for leave to bring these proceedings and can only be granted such leave on specified grounds when certain criteria, required by law, are met. …In the interests of good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which relief is sought."

13. Examples of the allegedly new arguments found in the third affidavit of Ms. Ann Mulcrone include, *inter alia*, insufficient site visits by the Inspector, the alleged effect of Woodhouse Windfarm on the community, defects in photomontages/photographs versus the human eye, the effect of the development on Glenbeg National School, the effect on Strancally Castle, etc. Further arguments were raised by counsel during the course of the hearing – a great deal of time was spent discussing the effect of the proposed development on the Whooper Swan, for example, which was not referenced in the Statement of Grounds or even any affidavit before the Court.

14. In response to this, counsel for the applicants during the course of the hearing stated that many of these issues were raised by the applicants during the course of the planning application and that many of the documents relating to the application contained reference to such issues, such as the Whooper Swan. He also submitted that many submissions could be linked back to grounds pleaded. For example, counsel contended that the Whooper Swam issue could be linked back more generally to the Statement of Grounds where it was pleaded that the manner in which the appropriate assessment was carried out was fundamentally incorrect.

15. After much consideration of the Statement of Grounds and the above submissions, it seems to me that a number of new arguments which were not pleaded sufficiently or at all in the applicants' Statement of Grounds were advanced in both documentation and oral submissions. The rules of pleading governing judicial review are quite clear and require applicants to state specifically each ground advanced and to particularise matters as appropriate. Linking new matters back to generally pleaded grounds is not permissible, nor is pointing to information which was before the Board. The Court is concerned with the contents of the documentation before the Board only in the context of arguments which have been correctly pleaded.

16. Where new arguments or evidence arises, an application should be made to amend the pleadings to include such arguments or evidence (as per O.84, r. 20, s.4). Such an application was not made in this instance. I find that these arguments, including those related to the Whooper swan, were not pleaded and so the Court cannot have regard to the submissions which fall outside those pleaded in the Statement of Grounds as detailed above.

17. Furthermore, a large portion of the third affidavit of Ms. Mulcrone purports to argue that planning permission should not have been granted at all on the basis of the substance or content of the application for permission and the appeal. It is important at this juncture to note that the Court's function in judicial review proceedings is not to examine the decision on its merits and assess whether or not planning permission should have been granted on that basis but instead to examine whether proper procedure was followed during the course of the decision-making process and to determine the legality of the permission in the light of this. Therefore, the Court cannot have regard to any arguments advanced by Ms Mulcrone on behalf of the applicants which purport to invite the Court to decide the suitability or otherwise of the development proposed. Instead the Court will assess the legality of the

decision-making process only.

The Extent of the Planning Permission
18. As previously observed, the first group of issues arising relate to the extent of planning permission granted by the Board to Ecopower. The applicants submit that after the s.132 request was issued and further information was received by the Board, the scope of the application was greatly altered. It appears that the applicants believe the Inspector did not in his first report suggest that planning permission should have been extended to include the grid connection and haul route works – though this isn't entirely clear as both the affidavits and submissions of the applicant were long and at times somewhat contradictory. They do however submit that the Board Direction, specifically the addition made to Condition 10, clearly indicates that the permission granted by them was extended to include these works. In granting this permission, the applicants claim the Board acted *ultra vires* as the application was never intended to cover these works and a number of consequences flow from this, such as the correct procedure to be followed for such an application, the public notification requirements which must be met, the necessity to have a definitive route submitted and the submission of an EIS covering these areas.

19. In their submissions to the Court, the applicants direct the Court's attention to Condition 10 of the Board direction which relates to the Transport Management Plan where the Board made an additional requirement of the Developer not contained in the Inspector's report. In full the condition states:

> "10(a) Prior to commencement of development, details of the following shall be submitted to, and agreed in writing with, the planning authority:
>
> (i) A Transport Management Plan including details of the road network/haulage routes, the vehicle types to be used to transport materials on and off site, and a schedule of control measures for exceptionally wide and heavy delivery loads,
>
> (ii) A condition survey of the roads and bridges along the haul routes and grid connection route to be carried out at the developer's expense by a suitably qualified person both before and after construction of the wind farm development. This survey shall include a schedule of required works to enable the haul routes to cater for construction related traffic. The extent and scope of the survey and the schedule of works shall be agreed with the planning authority prior to commencement of development,
>
> (iii) Detailed arrangements for temporary traffic arrangements/controls on roads, and
>
> (iv) A programme indicating the timescale within which it is intended to use each public route to facilitate construction of the development.
>
> *(b) All works arising from the aforementioned arrangements shall be completed at the developer's expense, within 12 months of the cessation of the use of each road as a haul route or grid connection route for the proposed development.*

In default of agreement on any of these requirements, the matter shall be referred to An Bord Pleanála for determination.

Reason: To protect the public road network and to clarify the extent of the permission in the interest of traffic safety and orderly development."

Sub-paragraph (b) is the addition by the Board.

20. The applicants submit that Condition 1 is also indicative of an extension of planning permission as it requires the development to -

> "be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further information, plans and particulars submitted by way of the first party appeal, received by An Bord Pleanála on the 20th day of October 2014, and by the further plans and particulars received by An Bord Pleanála on the 19th day of August 2015, except as may otherwise be required in order to comply with the following conditions…"

21. It is the submission of the applicants that in interpreting this section and the other conditions attaching to the grant of planning permission, it is clear planning permission was in fact granted for the grid connection and haul route works. A number of authorities were opened to the Court in relation to the proper interpretation of planning permission. The applicants directed the Court to *Lanigan & Ors v Barry & Ors and South Tipperary County Council* [2016] IESC 46, where at page 10 Clarke J., as he then was, stated

> "It is well settled that, in considering the use which may be regarded as being permitted, it is possible to look at the development for which permission has been granted together with any documents submitted in the context of the relevant planning application."

In their written submissions the applicants state "The incorporation of the submitted documents must include and authorise the works provided for in those documents notwithstanding that these are out of the site." Essentially they argue that if the planning permission is to be construed in accordance with condition 1, one must take account of all documentation submitted and assume that planning permission has been granted for the subject area covered by this documentation. This would include the haul route and grid connection works.

22. Counsel for the applicants submitted that if the Court considered all of the documentation submitted in support of the planning application, including the extensive documentation relating to the grid connection and haul routes, alongside the Board Direction and conditions attached to the permission, it would become clear that the permission was extended in the manner suggested. Much of the submissions following this related to the consequences of the extension of such planning permission, such as the failure to properly notify relevant parties, and the failure to submit a definitive route instead of two options.

23. In response to this, a number of arguments are made by the respondents and notice party refuting the allegation that planning permission of this nature was granted.

24. First, in relation to the conditions contained in the Board Direction, the respondent and notice party contend that the conditions imposed are not a planning permission in or of themselves and rely on s.34(13) of the Planning and Development Act, 2000 ("the 2000 Act") which states "a person shall not be entitled solely by reason of a permission under this section to carry out any development."

It is submitted that the grant of planning permission and its implementation are two separate issues – the Board may grant permission for a development which for practical reasons may not be implemented. Furthermore, counsel referred to s.34(1) of the 2000 Act which allows the Board to impose conditions relating to land outside of the defined boundary site of the proposed development, but this does not authorise parties to commence such works on these lands without the requisite consents being obtained. Essentially, the respondent advances the argument that the decision of consent and conditions attaching are a matter for the Board, however the implementation of such permission is the responsibility of the developer and this implementation inevitably involves fulfilling various legal requirements without which the planning permission cannot be implemented. Therefore, such conditions should not be read as extending the planning permission granted but instead, as mitigating measures to minimise any adverse environmental impact.

25. Their argument relating to the imposition of conditions is supported by the Inspector's report dated 20 April, 2015, where he directly addresses the issue of the attachment of conditions to land which the Developer did not own or have any interest in. He stated:

> "I do not consider that this is an impediment to the applicants making a planning application or the Board making a decision in this instance. If the applicants [being the Developer] cannot secure the necessary permissions to enable construction access the development cannot be implemented".

26. In its Statement of Opposition at para.7 the Board submits that the applicants have confused the development consent process with the EIA process. It is submitted that the further information requested which related to the proposed grid connection and haul route works was for the purpose of carrying out "a comprehensive and lawful EIA". The respondent refers to the Inspector's Reports, and quotes from the addendum report of the 20 September, 2016, where the Inspector states:

> "On foot of the S132 request from the board, the applicant has provided further information on both haul routes and grid connection, and brought them within the ambit of the revised EIS. *It is important to note, however, that permission is not being sought for these works at this time*. They lie outside the planning application, but inside the EIA process." (emphasis added)

27. The respondent then references the wording of the Board in its Direction dated 22nd November, 2016, where planning permission is granted "generally in accordance with the Planning Inspector's recommendation". The Board also expressly adopts the EIA of the Inspector. In these circumstances the respondent argues that the Board clearly did not grant planning permission outside of that which was applied for initially, i.e. the Windfarm and associated works.

28. Finally in relation to the interpretation point, counsel for both Ecopower and the Board also relied on *Lanigan & Ors v Barry & Ors* as well as the leading case in this area, *XJS Investments Limited* [1986] IR 750, where McCarthy J. stated:

> "Certain principles may be stated in respect of the true construction of planning documents:
>
> …
>
> (b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning"

It is submitted on behalf of Ecopower and the Board that the planning permission should be construed in its ordinary meaning, that being that it was granted for the development which was initially applied for with the omission of four wind turbines and the attachment of mitigating conditions.

29. In determining the extent of permission granted, the Court has regard to the following facts:

a) The original application was –

"to erect 12 no. wind turbines, overall height of up to 126.6 metres, 1 no. meteorological mast up to 80 metres in height with wind measuring equipment attached, access roads, electrical substation compound, equipment and control building and ancillary site works at Knocknaglogh Lower / Barranstock Upper / Knocknamore / Woodhouse or Tinakilly/ Monageela / Killatoor Dungarvan Co. Waterford."

This does not seek planning permission in respect of the grid connection or haul routes. The only material change in the application on appeal was that 3 no. wind turbines were excluded. In para.103 of the affidavit of Ms. Mulcrone sworn on 12 June, 2017, on behalf of the applicants there is an acceptance that Ecopower did not "include the grid connection as part of the application at the outset of the planning application process or even at the stage where the further information was being submitted…".

b) The Inspector's reports are of significant importance in determining the extent of the planning permission. In his first report, the Inspector discusses the impact of *O'Grianna & Ors v An Bord Pleanála* [2014] IEHC 632 on planning applications generally. He states that there is a need, in the light of this judgment, to assess the cumulative impact of a development, inclusive of grid connection and haul route works. He states:

> "My interpretation of this judgment is that there should be sufficient detail in a windfarm EIS relating to the grid connection to allow for a cumulative and comprehensive assessment of environmental impacts. In the absence of such information, the EIS is defective and permission cannot be granted. Whether the grid connection would or would not be exempted development or would or would not have significant environmental impacts is a moot point. The *O'Grianna* judgment, in my opinion, requires that grid connection be incorporated into the EIS, and that this be before the Board when the Board conducts their EIA."

Similarly, in his addendum report the Inspector states at numerous points throughout that the planning application does not include the grid connection and haul route works:

> "The proposed grid connection and associated road works does not form part of the subject application…There is no exemption for these works, and they are not included in the application…The primary areas covered in the S132

> submission were road widening, grid connection, which now fall within the revised EIS (but not the application)…It is important to note, however, that permission is not being sought for these works [being the haul route and grid connection] at this time. They lie outside the planning application, but inside the EIA process."

It could not be clearer from these two reports that the Inspector was not assessing planning permission for either the haul route works or the grid connection but instead felt obligated as a result of the *O'Grianna* judgment to seek further information in relation to these works in order to carry out a comprehensive and legally valid environmental impact assessment of the development proposed in the planning application as modified on appeal.

It is also relevant that the applicants' Statement of Grounds acknowledges that the Inspector was not including the grid connection/haul route works in his assessment. Paragraph 5(xii) states: "The Inspector assessed the development on the basis that the grid connection works and the haul route did not form part of the planning application". The Court does not find that the Inspector either assessed or recommended planning permission for the grid connection and haul route works.

(c) The second limb of this application was the decision by the Board after it had considered the Inspector's reports and all other submissions and documentation before it. The exact wording contained in the Board Direction states that planning permission was granted "generally in accordance with the Planning Inspector's recommendation" and the Board went on to adopt the various conditions and reasoning contained in the Inspector's report. Aside from certain interpretative arguments made, there is no evidence before the Court to indicate that the Board in their Direction deviated materially from the recommendation of the Inspector, which clearly only recommended planning permission for the Windfarm Development and not the grid connection / haul route works.

d) The Court has also had regard to the affidavit of Ms. Mulcrone dated 27 March, 2017, which was a response to Ecopower's application for admittance into the commercial list. This application by Ecopower was based on the strict timeframe which must be adhered to in order to qualify for the REFIT scheme. At paragraph 5 of her affidavit, Ms Mulcrone states "I say that while at paragraph 6 Ms Kenealy states that it has a valid grid connection offer *it does not have planning permission for that grid connection* and in order to qualify for REFIT II planning permission must have been sought for the project including the grid connection before 31st December 2015".

The admission in the highlighted words is in direct contradiction to the applicants' continued assertion throughout the course of the proceedings that planning permission was in fact granted for these works.

e) In relation to the grid connection, the Developer sought a s.5 declaration for this development on 5 January, 2017, after the Board decision and before the initiation of the within proceedings. On 21 February, 2017, that section 5 certificate was refused. According to the affidavit of Philomena Kenealy sworn on 30 June, 2017, the current position is as follows:

> "I can advise this Honourable Court that Ecopower intend to apply for planning permission for a grid connection from Knocknamona Windfarm to the national grid."

The fact that the Developer is continuing to seek planning permission for the grid connection and associated works tends to confirm that planning permission has not already been granted.

f) Applying the interpretation of the documentation as submitted by the applicants would go against the well-established principle of giving such documentation its ordinary meaning. In *Lanigan & Ors v Barry & Ors*, Clarke J., as he then was, stated "The "text in context" approach requires the Court to consider the text used in the context of the circumstances in which the document concerned was produced including the nature of the document itself." It is clear that the circumstances in which the various documents relating to the grid connection and haul route works were submitted were brought about due to a concern of the Inspector that same were needed in light of the *O'Grianna* judgment. The s.132 notice issued by the Board to obtain further information sought only to remedy this defect and ensure that a legally valid, cumulative assessment was carried out in accordance with *O'Grianna.* In order to displace this clear intention and the clear meaning of the planning permission as expressly stated, the applicants would have to produce some evidence that the Board were extending this planning permission. They have not done so and for this reason the Court must construe this planning permission according to its ordinary meaning.

30. In these circumstances, the Court finds it abundantly clear that the Board neither extended the planning application to include the grid connection and haul route works, nor granted permission for same. It does not seem logical to this Court to apply complex interpretations of the Board's decision when there are explicit references to the fact that the application was not seeking planning permission for the grid connection or haul route works. Furthermore, the fact that the developer has continued to seek permission for the grid connection in the interim seems to indicate quite clearly that both the Board and the Developer have proceeded on the basis that planning permission for these works was not granted.

31. Following from this, the issues relating to the alleged grant of planning permission for the grid connection and haul route works fall away. Thus it cannot be said that the site notice was defective for not including details of the grid connection/haul route works, and no public notification issue arises because these were not included in the planning application.

Two grid connection routes

32. Moreover there was no obligation on Ecopower to decide on a specific grid connection or haul routes as planning permission was not being sought for same, and all that was required was sufficient information to enable the planning authority/the Board to undertake a cumulative EIA. There is also precedent for presenting alternatives for consideration and EIA, such that the Board may consider a range of adverse consequences and mitigation measures dependant on which route is ultimately permitted. This was treated as a valid exercise by Hogan J. in *Keane v. An Bord Pleanála* [2012] IEHC 324, which concerned a windfarm proposal in Co. Mayo where two haul routes and two potential access points to the development site were the subject of EIS/revised EIS and both were considered by the Board in conducting its EIA. At para.15 of his judgment Hogan J. observed: "...After all, the entire purpose of both the Directive and the transposing Regulations was that this range of possible consequences was in view of the decision-maker prior to the award of the planning permission."

33. One other point arises which I wish to address before moving on to the second grouping of issues. The applicants in their written submissions make reference to the manner in which the planning permission was applied for, that is, there was a suggestion that the development inclusive of the grid connection and any other related works should have been applied for together in one application. The applicants' state: "The Respondent planning appeals Board should have in respect of its obligations and jurisdiction to [examine] the further information, required the developer to modify the development so as to include all of the works and the lands thereby

required which were an integral part of the application…"

O'Grianna
34. Insofar as the argument is advanced that the Developer was not entitled to lodge separate planning applications for the main development and the grid connection, it is clear that such an argument is unsustainable in the light of the dictum of Peart J. in *O'Grianna* and the stream of case law which has been generated since that decision. It will be recalled that in *O'Grianna*, Peart J. stated at para 27: "In that way, the connection to the national grid is fundamental to the entire project, and in principle at least, the cumulative effect of both must be assessed in order to comply with the Directive." It was at least implicit from this dictum that while planning permission for the grid connection did not have to be sought at the same time as the application for permission in respect of the windfarm, details of the proposed grid connection did need to be provided to enable cumulative effect to be assessed under the EIA Directive. In *O'Grianna (No. 2)* [2017] IEHC 7, McGovern J. stated at para 41:

> "in the current application the applicants have not raised any point on the substantive EIA carried out, nor have they purported to allege any deficiency in the EIA. The judgment of the Supreme Court in *O'Connor v Environmental Protection Agency* [2003] 1 IR 530 and *Martin v An Bord Pleanála* [2008] 1 IR 336 suggest that an EIA can be carried out at a stage where the partial consent for part of an overall project has been given."

Baker J. in *Daly v Kilronan* [2017] IEHC 308 also expressed scepticism about the argument made on behalf of the applicants in that case that the only permissible means of ensuring that an EIA of a windfarm development project was carried out was to make a single planning application encompassing both the windfarm and the grid connection – see para. 44 of her judgment.

35. McGovern J. clarified any doubts relating to his judgment in *O'Grianna (No. 2)* in the subsequent case of *North Kerry Wind Turbine Awareness Group v An Bord Pleanála* [2017] IEHC 126 where he stated at para. 9:

> "I am satisfied that this case [*O'Grianna No. 2*] disposes of any issue raised by the applicant under that ground and there is no necessity that a grid connection must be included in the planning application for the purpose of seeking consent in order for an EIA to be carried out; rather, the EIA requires information on the grid connection to enable a full EIA to be carried out and for the Board to assess the likely significant impact of the wind farm and the grid connection as a whole."

In my view this is what happened in this case and any argument that the grid connection must be included in the planning application is without foundation.

Site Notice false/deficient
36. In the Outline of Applicant's Case an issue is raised that the Board "erred in law in circumstances where the public notice erected on the site incorrectly identified the height of the turbine and did not specify the blade length". Although not pursued at any great length in argument it is appropriate to address this issue, because it was raised in ground 5 (xxxvii) of the Statement of Grounds and was the subject of a robust response from the respondent.

37. The issue thus raised was based on a photographed site notice exhibited on behalf of the applicants by Ms. Mulcrone as "AM9" which describes the proposed turbines as having "an overall height of up to 162.2 meters", whereas the site notice submitted to the Waterford City and County Council stated the height at 126.6 metres.

38. In the replying affidavit of Ms. Philomena Kenealy sworn on 27th April, 2017, the following response appears:

> "43. I have serious concerns about the photographed site notice exhibited by Ms. Mulcrone at exhibit "AM9". Ms. Mulcrone does not state where this particular site notice was located – there were two site notices erected for the purpose of this application – nor does she aver who took the photograph of the site notice and if she saw the actual site notice in situ as opposed to the photograph.
>
> 44. As Ms. Mulcrone avers, the photographed site notice is different to the one which was submitted to the Council as part of the planning application. When one examines the photographed site notice, exhibited at "AM11" and the site notice submitted with the planning application, a number of differences are evident. Firstly, the townland of "Barranastock" is spelt incorrectly on the photographed site notice. It is spelt "Barrabastook". Secondly, the height of the turbines is incorrectly stated as 162.6 metres as opposed to the correct height 126.6 metres. Thirdly, the word "planning" in the first line of the second last paragraph, appears with a lower case "p" in the photographed site notice, whereas it is a capital "P" in the notice submitted to the Council. Fourthly, there is a space included after the word "The Mall" on the fourth line of the second last paragraph in the photographed site notice which does not appear on the site notice submitted to the Council. Fifthly, the brackets used on the last line of the second last paragraph are different in the photographed site notice to that submitted to the Council. Finally, in the first line of the last paragraph the photographed site notice states "A submission or observation is relation.." while the site notice submitted to the Council states "A submission or observation in relation.."
>
> 45. Ecopower only produced one version of the site notice, that submitted to the Council, which does not contain any of the errors identified above. All site notices erected by Ecopower were identical to that submitted to the Council. Ecopower did not produce or erect a site notice in the form of the photographed site notice exhibited in Ms Mulcrone's affidavit at AM9.
>
> 46. Further, I am advised that even if there was an error in a site notice erected by Ecopower, which I don't accept to be the case, any such error, which occurred in the process before the Council does not invalidate the appeal to the Board.
>
> 47. While I don't accept there to have been an error in the site notice, it is clear that at all times the Applicants were not under any confusion as to the true nature and extent of the development. The submission lodged on their behalf with the Council describes the development as 12 no windturbines with an "overall height of 126.6 metres". Furthermore, the appeal lodged by Ms. Mulcrone refers to the height of the turbines as being 126.6 metres.
>
> 48. Ms. Mulcrone also complains that details of the blade length and rotor diameter should have been stated in the site notice. There is no such requirement to include this information in the site notice. The overall height of the turbines is the key matter.
>
> 49. A typical wind turbine elevation is shown on Drawing KWF-PA1-05, submitted with the planning application. I beg to refer to a copy of the aforesaid drawing which is at Tab 4 of the Book of Exhibits. The drawing shows a turbine with an

> overall height of 126.6 metres i.e. a rotor blade length of 45 metres and a hub height of 81.6 metres. The drawing notes that "Within the 126.6m uppermost tip height, the rotor diameter and hub height measurements shown may vary". Condition 5 of the grant of permission expressly provides that the turbine shall have a maximum tip height of 126 metres and requires the details of the turbine design and height to be submitted and agreed with the planning authority prior to the commencement of the development."

39. In her further affidavit sworn on 12th June, 2017, Ms. Mulcrone does not engage with or contest any of the matters raised by Ms. Kenealy. I am therefore satisfied that there is no factual basis made out for suggesting that the site notice exhibited by Ms. Mulcrone as "AM 9" was a photograph of the original site notice, that that photograph was taken on site, or that there was a "false" site notice, or that the site notices were other than the one version produced by Ecopower and submitted to Council as exhibited at "AM 11". It follows that the public were correctly informed that the turbines would be of an "overall height up to 126.6 metres".

40. I also accept that there is no requirement under the 2000 Act or the Planning Regulations to state in the site notice the blade length and rotor diameter. The most important physical feature is the overall height of the proposed structure. This was correctly stated, and would have alerted members of the public to the nature of the proposed development. Beyond this the details of the planning application, including the drawings showing a sample turbine with a height of 126.6 metres made up of rotor blade length of 45 metres and with a hub height of 81.6 metres could be inspected on line or at the local planning authority offices. Further there was no evidence whatsoever to suggest that the applicants or any members of the public were under any misapprehension as to the overall height of the turbines or the maximum height of the component parts. This ground of challenge therefore cannot succeed.

Disregard of the decision of the County Council
41. The applicants claim that the Board did not give sufficient regard to the decision of the County Council to refuse planning permission and their reasoning for same.

42. The respondent submits that s.37(1)(b) of the 2000 Act allows the Board hearing an appeal to do so on a *de novo* basis. This section states: "…where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance…" It is submitted that although the Board had regard to the decision of the County Council, there was no obligation for them to give "special status or weight" to it. Similarly, in the Inspectors initial report he responds to a submission by the Alen-Buckley's by stating "I do not concur with this position. The Board's role is to undertake a '*de novo*' assessment of the proposal, and is not bound by the findings of the planning authority".

43. This ground was not pursued at any great length during the course of the hearing, however for the sake of completeness I find that the duty of the Board in the course of the appeal process is to undertake a full *de novo* assessment of the application before them. They are not bound by the decision or reasoning of the planning authority. Furthermore, the Board considered the Inspector's very thorough report, and his addendum report, in which he gives a detailed analysis of all issues before him, including those contained in Waterford City and County Council's initial refusal. There is nothing on my reading of those reports to suggest that proper regard was not had to the decision of the County Council and the applicants have not put forward any specific examples of this to ground their complaint. A different finding by the Board is not sufficient to ground such a complaint.

Material contravention, the Waterford City and County Development Plan and "Visual impact"
44. The applicants submitted that the Board *in granting planning permission for the grid connection* failed to have any or any adequate regard to the Development Plan, which seeks to minimise the length of grid connections. In ground 5 (xxxvi) they alleged that this "would materially contravene Development Plan policy" and was a "material contravention of the Development Plan" . This court has now confirmed that the Board did not grant permission for the grid connection, so this complaint falls away.

45. In the Outline of Applicant's Case this submission was altered to a submission that the Board "erred in law and acted contrary to the [2000 Act], (including s.37(2) of the PDA 2000) in its assessment of the visual impacts by preferring the Wind Energy Guidelines [2006] over the relevant provisions applicable to the Development Plan." The applicants relied *inter alia* on grounds 5(xxv) and (xxxvi) to pursue this complaint. Neither of these grounds utilise the term "material contravention" or allege invalidity by reason of failure to comply with s.37(2), the subsection that deals with the powers of the Board if granting a permission that "contravenes materially the development plan". Objection was taken by counsel for the Board to the applicants pursuing this "material contravention" argument on the basis that leave was not granted and it was not pleaded in the Statement of Grounds. In my view this is based on an unduly restrictive reading of the Statement of Grounds, and I consider that it is covered by another ground, at para. 5(xxxv). Although this does not specifically mention s.37(2) it does plead that Waterford City and County Council's reasons for refusal included "…that the proposed development would contravene the provisions of the Development Plan by virtue of its impact on a scenic area designated in the Plan" and that in such circumstances the Board did not direct its mind to its "obligations". This complaint will therefore be addressed.

46. In response to this issue counsel for the respondent submitted that on interpretation of the County Development Plan no issue of material contravention arose as the zoning of the area concerned was "agricultural" and under the appended Wind Energy Strategy was "suitable for wind energy". There was no material contravention of the Development Plan. It was further submitted that consideration of the Development Plan and its policy on visual impacts, and reconciliation of such plan with the facts of a given application, are a matter for the Board, as they are the body with the necessary competence and expertise in this specialist area and that the resolution of conflict between the various factors concerning visual impact referenced by Ms. Mulcrone in her affidavits is something for the Board to consider and make a decision upon in exercise of its statutory duties and discretion.

47. As to the material contravention issue, it is a matter for the court to interpret the County Development Plan, and in so doing to apply the test set out by McCarthy J. in XJS, namely that planning documents are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning.

48. First mention should be made of reasons given by Waterford City and County Council for refusing permission at first instance, because the provisions of S.37(2) of the 2000 Act are only engaged if the decision of the local planning authority has refused permission on the grounds that "a proposed development materially contravenes a development plan", and the Board has decided to grant permission notwithstanding such material contravention.

49. Waterford City and County Council's gave two reasons for refusal. The first reason given concerned deficiencies in the EIS which do not concern us here. The second reason states:

> "2. Notwithstanding the site location in a strategic area for wind energy in the Development Plan, taking cognisance of the nature, scale and location of the proposed development on an elevated, visually vulnerable and sensitive site set

within a rural landscape which contains a significant number of built and natural heritage assets of special interest it is considered that the development, taken in combination with the adjacent wind farm and the ancillary connections to the national grid, would detract from the visual and rural landscape amenity of the area. The development would therefore contravene the policies of the development plan and be contrary to the proper planning and sustainable development of the area".

Reason 2 does not state that the proposed development would be a *material* contravention of the County Development Plan. It only goes so far as to say it would contravene *policies*. There is no suggestion in the reason given that the development would contravene the zoning provisions of the County Development Plan. There is also no statement in the Board's Direction or decision to suggest that it considered the grant of permission would constitute a "material contravention" of the county development plan. On this basis I am of the view that s.37(2) is not engaged.

50. Even if this conclusion is wrong, in construing the terms of Waterford County Development Plan 2011-2017 ("the Plan"), I am satisfied the Board's decision to grant permission was not a material contravention of that Plan. This is apparent from the materials set out and analysed in the Inspector's first report, with whose interpretation of the Development Plan I respectfully agree.

51. At section 7.2 he refers to the Windfarm Development: Guidelines for Planning Authorities, 2006, which refer to the need to identify suitable areas in development plans, citing the importance of visual impact, environmental impact etc. These are general guidelines with which Waterford City and County Council has complied by adopting a wind energy strategy and identifying suitable areas for considering the location of windfarms. In section 7.4 the Inspector addresses the Waterford County Development Plan 2011-2017. As the proposed development area consists of land outside of designated settlements and land zoning maps, it is zoned as "Agriculture A", the objective for which "is to provide for the development of agriculture and to protect and improve rural amenity". Land uses for areas zoned "Agriculture A" set out in Table 10.10 and 10.11 of the Plan do not list wind energy developments or infrastructure, but critically Note 4 to Table 11 states: "Uses not covered in the Land Use Matrix above may be allowed in accordance with the written provisions of the County Development Plan".

52. The location of the proposed development is then identified in the Waterford County Wind Energy Strategy ("WES"), which is incorporated into the Plan in Appendix 8. It is contained within a 'Strategic Area' defined as follows:

> "These key areas are deemed entirely suitable for wind farm development and should be reserved for such purpose." As to the visual aspect, the Inspector refers in section 7.4.1 of his first report to Volume 2 of the Plan which contains zoning and objective maps for settlements in the county, including neighbouring Aglish and Villierstown, noting:
>
> > "Villierstown includes two 'Scenic Views', the first is southwest along the road called 'The Green', and the second is the view northwest through the town towards the old gates of Villierstown House and the start of Dromana Drive. There are no 'Scenic Views' designated in the Aglish plan."

In section 7.4.3 the Inspector refers to Appendix 9 of the Plan, 'Scenic Landscape Evaluation', which identifies the lands within the proposed site as being both visually vulnerable and sensitive, with a number of roads in the vicinity designated as 'scenic routes'.

53. In section 11.5 the Inspector undertakes analysis under the heading "Principle of Development and Policy Context". He has regard to the Wind Energy Guidelines 2006 as the "primary national policy on wind energy developments". He refers at 11.5.18 onwards to the WES, and states at 11.5.21 "The subject site falls within one of only two top-tier 'Strategic blocks'". He undertakes comparative analysis of the other strategic areas, and comments at 11.5.25 :

> "As such, and without prejudice to the site specific assessment of the subject proposal to follow, and without prejudice to any future applications elsewhere in the county, the subject site is by far the most viable contiguous site within the 'top tier' designated lands in the county."

54. In section 11.5.28 the Inspector notes that the local planning officer reporting to Waterford City and County Council considered that wind energy development was incompatible with the default agriculture zoning, and that the latter should take precedence. The Inspector then proceeds under the heading "County Development Plan - Reconciliation of WES and zoning":

> "11.5.30 The planning officer's position is well reasoned and follows a clear logic. However, it is just one potential resolution of the apparent conflict between the zoning matrix and the WES. It is worth considering the implications of this logic being applied in all instances. In my opinion, it would effectively make the policies of the WES redundant and would amount in practice to a total prohibition of wind energy development in the county. Viewing the policies of the County Development Plan in their totality, it is clear that this is not the intended effect.
>
> 11.5.31 I consider a reasonable interpretation of the plan in broad terms is that wind energy developments would be permitted within the county subject to the scheme's favourable performance in respect of environmental impacts, impacts on residential amenity, and other relevant factors, and that the WES is a valid and useful tool in guiding the process of site selection in the first instance."

55. In my view the local planning officer fell into error in failing to have sufficient regard to the WES and reaching an interpretation of the Plan that rendered the policy in the WES ineffective. By contrast the Inspector's analysis, as outlined above, adopts the correct approach and had regard to the Plan in its entirety, including the appended WES, and came to the correct conclusion.

56. There is therefore no basis for an argument that the Board's decision constitutes a material contravention of the county development plan. It follows that there is no basis for an argument that the Board 'preferred' the Wind Energy Guidelines over the county development plan – the Board had regard to the Guidelines but also granted a permission that comes within the parameters of the Plan.

57. Provided this court is satisfied that the Board had regard to the Plan then it is not the function of this court in judicial review proceedings to review the substance of the Board's decision which was that the proposed development of 9 no. turbines, if carried out in accordance with the conditions, "would not be unduly visually dominant and would be acceptable in this landscape." It is clear from the face of the Board's Direction that it had regard to "(d) the policies of the planning authority as set out in the Waterford County Development Plan 2011-2017", and in addition "(h) the nature and scale of the proposed development and the content of the [EIS]…", "(m) the submissions made in the course of the planning application and appeal" and "(n) [the] inspector's reports", all of which dealt with visual impact. There is also no basis for suggesting that the legal status of guidance on visual impact in a county development plan is such that the Board could not differ, or that the Board was not entitled to prefer the assessment and recommendation of its Inspector who took the view that the EIS presented "a robust analysis of the proposed development's likely

visual impact" (para. 11.14.22, Inspector's first report).

58. The most that can be said is that the Plan, of which the WES is an integral part, contains potentially conflicting or contradictory objectives or policies when applied to a proposed development. It was entirely appropriate that the Inspector and the Board should seek to reconcile these conflicts in investigating and deciding the appeal. *In Navan Co-Ownership v. An Bord Pleanála* [2016] IEHC 181, McGovern J. accepted the established jurisprudence that the interpretation of a development plan is a matter for the court, but also cited with approval the following qualification enunciated by Lang J. in *William Davis Limited v. Secretary of State for Communities and Local Governments* [2013] EWHC 3058 (Admin):

> "The task of reconciling different strands of planning policy on the facts of a particular case has been entrusted to the planning decision-maker. Such planning judgments will only be subject to review by this court on very limited grounds." Noting that s.34(2)(a) of the 2000 Act restricts a planning authority to considering the "proper planning and sustainable development of the area, regard being had to [inter alia] ...(i) the provisions of the development plan...",

McGovern J. concluded:

> "Section 37 applies this statutory restriction equally to the respondent when determining a planning appeal. Whether a particular development is in accordance with proper planning and sustainable development is a matter within the particular competence and expertise of the planning authority, or, as the case may be, An Bord Pleanála, a specialist body established by statute. Such an assessment would only be subject to very limited review on the grounds of unreasonableness or irrationality following *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and *Meadows v. Minister for Justice and Equality* [2010] 2 I.R. 201".

59. I accept these statements of law as correct. Reconciling potentially conflicting policy on wind energy strategy and visual impact in the Plan was a matter for the Board to consider, with the benefit of the Inspector's reports, in the context of the facts arising from the proposed development and what would be proper planning and sustainable development in the area.

60. The applicant's complaints of failure to have any or any sufficient regard to the local planning authorities' refusal at first instance, or of material contravention of the county development plan, or non-compliance with s.37(2), must fail.

Improper derogation of responsibility to the Planning Authority and general validity of conditions

61. The applicants take issue with a number of conditions attached to the planning permission, such as Condition 10 which derogates the agreement of certain details to the Planning Authority and Developer at some unspecified future date. The applicants submit that this derogation excludes the public from making any contributions in relation to these matters, in direct breach of the EIA Directive. The applicants also argue that any conditions which relate to third party lands and land in or over which the developer has no interest or authority are invalid. These include the lands where the proposed haul route and grid connection works would take place. In written submissions, it is contended that s.34(4) of the 2000 Act provides only that land under the control of the applicant for planning permission (in this case Ecopower) may have conditions attached to it and therefore the Board is not entitled to attach conditions to land over which is does not have an interest.

62. In response to this allegation, Ecopower state that section 34(5) of the 2000 Act specifically provides that certain conditions may be imposed on a planning permission whose details may be agreed between the developer and the planning authority. Section 34(5) of the 2000 Act states:

> "The conditions under subsection (1) may provide that points of detail relating to a grant of planning permission may be agreed between the planning authority and the person to whom the permission is granted and that in default of agreement the matter is to be referred to the Board for determination."

63. The respondent also submits that the Board had an obligation arising from the *O'Grianna* judgment to assess the cumulative effects of the development, including any damage which could occur to roads whilst transporting the turbines. After this assessment, it was incumbent on the Board to impose mitigating conditions in order to minimise the environmental impact of the development. Furthermore, the respondent submits that a similar condition was attached to a development the subject of *Keane v An Bord Pleanála* [2012] IEHC 324. There, conditions which left over the issue of agreement on certain details relating to road and bridge surveys were argued to be in violation of the EIA Directive. However, this argument was rejected by Hogan J. who stated:

> "The Board clearly thought – and was entitled to think – that it had sufficiently anticipated the range of adverse consequences which might be presented in the present case, even if the very worst were to befall the project and, furthermore, it had sought to take appropriate ameliorative and risk mitigation measures in the process."

64. It is clear that the Board may generally attach conditions to planning permission, as provided for in s.34(1) of the 2000 Act. The opening wording in section 34(4) provides –

> "(4) Conditions under subsection (1) may, without prejudice to the generality of that subsection, include any of the foregoing -…"

Sub-section (4) goes on to list a number of conditions which *may* be attached; however this provision specifically states that these conditions *include* all or any of those listed, indicating that this is not, as the applicants seem to suggest, an exhaustive list.

This Court in People Over Wind v An Bord Pleanála [2015] IEHC 271 found conditions such as the requirement to submit a Construction Management Plan as being valid, notwithstanding that this involved leaving matters over to be finalised by agreement between the Developer and the Planning Authority.

65. In that case certain mitigating conditions were imposed which were very onerous to the point where the applicants argued they would be near impossible to fulfil. In response to that argument I found: "…it may be that Coillte will be unable to carry out the proposed development pursuant to the permission granted by the Board. That however is not the concern of the Court." The same reasoning applies in the present case. If the Developer is unable to obtain the consent of the third parties whose lands will be affected by the additional mitigation works, if they are unable to obtain planning permission for the grid connection, or if they are unable to obtain the appropriate licenses for the road works, this simply means that the permission as granted cannot be implemented. It does not make such conditions or the planning permission to which they attach invalid.

66. The matter of leaving over certain mitigation measures for subsequent agreement between the developer and the local planning

authority is a point which is long settled – see Murphy J. in *Houlihan v An Bord Pleanála* (unreported High Court, 4 October, 1993) and the Supreme Court in *Boland v An Bord Pleanála* [1996] 3 IR 435. In summarising the position set out in *Boland* in *People Over Wind*, I stated:

> "The Supreme Court decided that the matters stipulated in the conditions were essentially technical matters or matters of detail and that the respondent had not improperly abdicated its statutory duties to the planning authorities."

I also noted:

> "Furthermore, the applicants have not been able to point to any particular aspect left over to subsequent agreement which could be regarded as central or of such importance or magnitude that it would be an abdication of the Board's functions under the PDA 2000."

The decision in *People Over Wind* on this point was approved on appeal by the Court of Appeal [2015] IECA 272 in the judgment of Hogan J, paragraphs 57-61.

67. It is clear from this jurisprudence that the Board is entitled to leave certain matters over for agreement between the developer and planning authority to some future date. In order for this derogation to be "impermissible", as the applicants submit, such matters would need to be of such central importance or magnitude so as to be an abdication of the Board's statutory duties. Such a submission is not put forward by the applicants in this case. In fact, the only matter complained of is the exclusion of the public from such future agreements.

68. In summary it is clear that the Board is entitled to impose conditions and to leave matters over for future agreement between the developer and the planning authority and any challenge to such derogation would need to be based on an alleged abdication of statutory functions of the Board – an allegation which is not made in the present case. Furthermore, for the most part this argument appeared to be based on the false premise that planning permission was granted by the Board for the grid connection/haul route works, which I have already found was not the case. In any event, the point seems to be moot in that the sole complaint related to impermissible delegation relates to public participation. In circumstances where the public have actively participated in the current development process, and have appropriate opportunities to participate in any existing or future applications for planning permission for the grid connection and haul route works, it seems to me that the submission of public exclusion from the planning process is not borne out.

Test Applicable to Appropriate Assessment

69. The applicants submitted that in screening the development for Appropriate Assessment ("Stage 1 AA"), the correct test which the Board should have applied was whether there was a *possibility* that the development could affect a European site. They submitted that this test was approved in *Kelly v An Bord Pleanála* [2014] IEHC 400 by Finlay Geoghegan J. and only requires the possibility of an effect to trigger Stage 2 AA. They submitted that the Board and the Inspectors' findings and recommendations, (which in this respect were followed by the Board), conflated the two processes and after finding that there was a hydrological connection between the development site and the River Blackwater SAC, the Board incorrectly concluded that the development was "not likely to have significant effects on European sites including the Blackwater River… in view of their conservation objectives…"

70. The applicants also state that the Board decided not to proceed to Stage 2 AA in circumstances where the Developer carried out its own inspection and decided to proceed to Stage 2 AA. The applicants submit that the same information resulted in these two separate outcomes because the Board used the incorrect test in assessing the development site.

71. The applicants also submit that due to the conditional nature of the permission granted, that is the leaving over of certain matters to be decided between the planning authority and the developer such as plans relating to the drainage systems, it would be impossible to conclude that as a matter of scientific certainty any significant effect on the site could be ruled out. They submit that the uncertainty created by these conditions leads to a lacuna which is such "as to be incapable of allowing for a concluded determination certainly at the stage 1 assessment." (Page 39 of the Applicants' submissions).

72. The applicants argue that as the Board applied an incorrect test and proceeded to conclude that Stage 2 AA was not necessary, on a development which incurred such uncertainty due to its conditional nature, this decision constituted a fundamental error of law and is thereby invalid and contrary to Council Directive 92/43/EEC.

73. In response, counsel for Ecopower submitted that the test for AA contained in Article 6(3) of the Habitats Directive is two-pronged; it requires an initial screening and then a full AA. Stage 1 is a screening process whereby the development must be assessed in terms of the likely significant effect the development will have on a European site and protected species. If upon completion of this screening process it is found that such a significant effect is likely, the Board should proceed to Stage 2 AA. Stage 2 AA involves a lower threshold and is a determination as to whether or not a development will adversely affect the integrity of a European site. It is the respondent's and Ecopower's submission that as a Stage 1 screening was completed, and the Inspector found that it was not likely that there would be a significant effect on the environment or any protected species, there was no need to progress to Stage 2 AA.

74. In her affidavit, Ms Mulcrone on behalf of the applicants states that the test applicable to AA is whether or not the development is capable of affecting the integrity of the site. In response to this, Ms Kenealy in her affidavit of the 27 April, 2017, states that this is the test applicable to Stage 2 AA and not the test applicable to the Stage 1 screening process. This is the position taken by the Board and Ecopower. In addition to this, Ecopower object that the submission now made on behalf of the applicants was not pleaded in the Statement of Grounds. Without prejudice to this, Ecopower also submits that the Board is the competent authority to carry out the AA (and hence to decide if Stage 2 AA is required at all) and so the fact that Ecopower decided to proceed to Stage 2 AA is irrelevant. Furthermore, in relation to the drainage system design, Ecopower submits that this was part of the original EIS and the subsequent appeal and the conditions which the applicants claim imply that this is yet to be agreed have not been identified.

75. The Inspector's first report includes screening for appropriate assessment in section 12. The wording of this screening and the test applied is found in the various "steps" used by the Inspector. These steps are:

> "Step 1: Identify European sites which could potentially be affected…
>
> …
>
> Step 3: Identify the potential a) likely and b) significant effects of the project with reference to the site's conservation

objectives.

…

Step 6: Determine whether or not likely significant effects, individual or in combination with other plans or projects on the European sites, can be reasonably ruled out on the basis of objective scientific information."

Under the Step 6 heading, the Inspector at para. 12.11.1 states:

"In my opinion, likely significant effects, either individually or in combination with other plans or projects, on the European sites, can be reasonably ruled out on the basis of objective scientific information. The Proposed development is not likely to have significant effects on any European Site in light of its conservation objectives".

In his Addendum Report following receipt of further information, the Inspector undertakes a further Stage 1 screening using the same methodology, and at para.12.12.1 reaches the same conclusion, and adopts identical wording.

It appears that from this that the test adopted by the Inspector was to consider potential impacts and whether it was likely that there would be any significant effect on any European sites or protected species as a result of the development.

76. Article 6(3) of the Habitats Directive relating to protected European sites states:

"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."

77. This was adopted into Irish Law in the Planning and Development Act, 2000. Section 177U, as amended, relates to screening for appropriate assessment:

"(1) A screening for appropriate assessment of a draft Land use plan or application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site."

If the competent authority decides that the development is likely to have a significant effect then a stage two AA must take place.

78. These provisions have been discussed at length both by EU and national courts and have been distilled into a two-step process cited time and again in such planning matters. It is appropriate at this juncture to set out the key cases in this area.

79. In *Sweetman* (Case C-258/11), cited by the applicants in support of their position, a preliminary ruling was sought in relation to the correct interpretation of Article 6 of the Habitats Directive (Directive 92/43/EEC). The ECJ adopted much of the opinion of Advocate General Sharpston and conducted a thorough examination of Article 6 and the duties of Member States and bodies responsible for the protection and conservation of European sites. In relation to sub-article 3 in particular, the Court stated:

"That provision [Art 6(3)] thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site…

The second stage, which is envisaged…allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned…"

The analysis here was reaffirmed in *Waddenzee* (Case C-127/02), though much of the focus of the interpretation of Article 6(3) in that case shifted to the "significant effect" of the site being linked to the sites conservation objectives. Nonetheless, the "likely to have a significant effect" text was cited as being correct.

80. In *Kelly v An Bord Pleanála* [2014] IEHC 400, Finlay Geoghegan J. conducted a thorough examination of appropriate assessment as a whole, discussing the Habitats Directive, the 2000 Act and the *Sweetman* case. At para 25 she states: "As appears Article 6(3) envisages a two-stage process which is implemented in greater detail by ss177U and 177V of the PDA [Planning and Development Act]". She goes on to discuss Case C-258/11 at para 26, stating:

"There is agreement on the nature and purpose of the screening process which is well explained by Advocate General Sharpston…at paras 47-49:

"47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may* be such an effect.

48. The requirement that the effect in question be significant exists in order to lay down a *de minimis* threshold…If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill."

81. The applicants submit that the above is authority for the proposition that the correct test to be applied at the screening stage of AA is that there is a possibility of a significant effect on the European site. However this is to ignore the clear and unambiguous language used in Article 6(3) and in the Opinion itself. The line "It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment" cannot be read in isolation. The remainder of that paragraph makes it clear that the point Advocate General Sharpston was seeking to make was merely that the "likely significant effect" did not have to be proved, it just had to be a possibility. This is clear from the line "There is no need to *establish* such an effect" and from the manner in

which the words 'possibility', 'establish' and 'may' are italicised.

82. Furthermore, the preceding paragraph of the Advocate General Sharpston's Opinion states:

> "I would pause here to note that, although the words 'likely to have an effect' used in the English language version of the text may immediately bring to mind the need to establish a degree of probability - that is to say that they may appear to require an immediate, and quite possibly detailed determination of the impact that the plan or project in question might have on the site – the expression used in other language versions is weaker…Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project concerned is capable of having an effect. It is in that sense that the English 'likely to' should be understood."

83. It is very clear from this passage that Advocate General Sharpston was not proposing a higher standard for Stage 1 than that which was set out in the legislation but was in fact defining the existing standard as being lower than the general definition of 'likely'. Upon reading the Opinion as a whole, it is clear that Advocate General Sharpston was of the view that the test to be applied at the screening stage is whether there is likely to be a significant effect, that the word "likely" should be read as being less than a balance of probabilities standard and that there need not be any hard and fast evidence that such a significant effect was likely, it merely had to be a possibility that this significant effect was likely.

84. The judgment in *Kelly* when read as a whole clearly supports this view as at para 40, Finlay Geoghegan J. states:

> "It must be recalled that the appropriate assessment, or a stage two assessment, will only arise where, in the stage one screening process, it has been determined (or it has been implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site."

This reaffirms that the test being applied by Finlay Geoghegan J. was that which was used by the Inspector in the present case. This is reinforced by reference to the wording used by the Inspector to describe Step 3 where he seeks to "Identify the *potential* a) *likely* and b) significant effects of the project with reference to the site's conservation objectives." The inspector was not applying a threshold of probability – rather he was, correctly, seeking to identify potential likely effects/significant effects; he was thus screening the capacity of the project to have likely effect/significant effect, which is in line with Advocate General Sharpston's interpretation of Article 6(3).

Any argument on behalf of the applicants that a different test with a lower threshold, based on mere possibility of significant effect and without reference to any likelihood, was established or applied in *Kelly* is unsustainable in the light of the above. Furthermore, the applicants have not presented to the Court any case law which suggests any deviation from the present legal position. It appears that their entire submission in this regard is based on a misinterpretation of Advocate General Sharpston's judgment in *Sweetman*.

85. For these reasons I find that the Inspector applied the correct test at the Stage 1 screening and as a result his repeated conclusions that it was unnecessary to proceed to Stage 2 AA were legally valid, and ones that the Board was entitled to adopt. It follows that the Board acted lawfully in not proceeding to carry out a Stage 2 AA, notwithstanding that Ecopower did present a Natura 2000 AA. The Inspector comments on this in his first report at 12.11.2 :

> "I would attribute this divergence in approaches to a judgment call on whether the construction methodology proposed forms an integral part of the proposal (my assessment) or mitigation measures (the applicant's approach). I also note that the planning authority proceeded to Stage 2 assessment, and concluded that the proposed development would not adversely affect the integrity of European sites, in light of their conservation objectives."

In his Addendum Report the Inspector repeats these comments at para.12.12.2 and goes on to note that in Volume 4 of the revised EIS Ecopower provided a screening for the whole project, which proceeded to Stage 2 AA, but also provided stand-alone screening for the haul routes and grid connection which 'screened out' for AA and did not proceed to Stage 2 AA.

The Board having conducted its own Stage 1 of the proposed development including the haul routes and grid connection was entitled to adopt these views, and to conclude that Stage 2 AA was not required. The fact that Ecopower carried out a Stage 2 AA of the development proposal, which may have been out of an abundance of caution and was their entitlement and 'judgment call', but cannot effect the validity of the Board's considered decision.

Conclusion

86. The grounds of review raised by the applicants and pursued in argument have not been made out.