[2019] IEHC 888

THE HIGH COURT
COMMERCIAL

[2019 No. 63 J.R.]

BETWEEN
SLIABH LUACHRA AGAINST BALLYDESMOND WINDFARM COMMITTEE
APPLICANT

AND
AN BORD PLEANÁLA
RESPONDENT

AND
SILVERBIRCH RENEWABLES LIMITED AND KERRY COUNTY COUNCIL
NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 20th December, 2019

Table of Contents

Introduction

1. In these proceedings the applicant seeks to challenge a decision of the respondent dated 27th November, 2018 granting planning permission for the construction of a windfarm and associated works on elevated ground between the villages of Gneeveguilla, County Kerry and Ballydesmond, County Cork. The application for permission for the proposed windfarm development envisaged the erection of fourteen turbines with a rotor diameter up to 120m and a blade tip height of up to 150m above ground level, two permanent meteorological masts, two medium voltage substations, one high voltage substation, thirteen site entrances comprising seven new site entrances and six upgraded site entrances, three barrow pits and adjacent repositories, the provision of new and upgraded internal site service roads and surface water management measures, temporary site compounds, underground cabling and associated infrastructure necessary to construct the development. The respondent, in its decision to grant permission, reduced the number of turbines from fourteen to twelve. As described in more detail below, the exclusion of two of the turbines from the development was largely prompted by concerns about the impact of those particular turbines on the hen harrier.

2. If allowed to proceed, the proposed development will span an area of approximately 96 hectares and will extend across 15 individual land holdings. The site is located to the west of and sloping towards the upper reaches of the Blackwater river valley. The southwestern extent of the proposed site is located close to the watershed between the Blackwater river and Laune river catchments. The site is drained by a number of tributaries of the river Blackwater including the Tooreengarriv/Carhoonoe, Mountinfant and Reansup streams. Although the site is located close to the watershed between the Blackwater and Laune catchments, all drainage serving the proposed infrastructure will be designed to discharge via the Blackwater catchment with one minor exception which is not relevant for present purposes.

3. The developer is the first named notice party namely Silverbirch Renewables Ltd *("Silverbirch").* Its application for planning permission for the proposed development was rejected by the County Council (the second named notice party) *("the County Council")* on 30 May, 2017 for the following reasons:-

   (a) In the first place, having regard to the extent, size and scale of the turbines the County Council considered that the development would create a significant visual intrusion in the landscape by reason of the height and spatial extent of the proposed turbines which would be excessively dominant and visually intrusive. The County Council took the view that the development would therefore seriously injure the residential amenity and visual amenities of the area and would, *inter alia,* contravene Objective ZL-1 of the Kerry County Development Plan, 2015-2021:

(b) Secondly, noting that the site is located within the catchment of the Blackwater river which provides a home to the endangered freshwater pearl mussel, the County Council was not satisfied that the construction would not cause pollution of local water courses;

(c) Thirdly, the County Council took the view that two of the turbines (namely T8 and T9) are located within an area known as Barna Bog used by hunting hen harriers which may breed in the nearby Stacks Mullaghareirk Mountains, West Limerick hills and Mount Eagle Special Protection Area *("The Stacks SPA").* In particular, the County Council considered that the proposed development would cause the loss of hen harrier hunting habitat which would have a significant adverse effect on the Stacks SPA.

4. Silverbirch appealed the refusal of Kerry County Council to the respondent. In turn, the respondent appointed an inspector to review the matter and prepare a report with recommendations. The inspector conducted an analysis of the proposed development and reported with a recommendation that planning permission might be granted by the respondent for a development comprising twelve of the proposed turbines but excluding turbines T8 and T9. Thereafter on 23rd November, 2018 the respondent, by direction of that date, decided to grant permission. The relevant decision to grant subsequently issued on 27th November, 2018.

The grounds of challenge

5. The applicant seeks to challenge the decision of the respondent to grant permission for the development on the following grounds:-

(a) The principal ground on which the applicant seeks to challenge the decision of the respondent is that there was a failure to carry out and record any Appropriate Assessment in accordance with national and European law. In making this case, the applicant has raised concerns in relation to both the hen harrier and the freshwater pearl mussel;

(b) Next, the applicant makes the case that there is nothing to suggest that the respondent carried out an Environmental Impact Assessment ("*EIA*"). In this context, although the issue is addressed in the report of the inspector appointed by the respondent, neither the direction nor the decision of the respondent record that the respondent carried out an EIA;

(c) Thirdly, the applicant contends that, in granting permission for the proposed development, the respondent has contravened s. 37 (2) of the Planning and Development Act, 2000 *("the 2000 Act")* in circumstances where (so the applicant contends) the proposed development materially contravenes the Kerry County Development Plan *("the development plan").*

6. In circumstances where the third of those issues is very net and can be disposed of briefly, I propose to deal with that issue first. Thereafter, I will address the first and second issues listed in para. 5 above.

Material contravention of the development plan

7. As noted above, one of the three grounds on which the County Council refused permission for the proposed development was that it would contravene Objective ZL-1 of the development plan. According to that plan, the purpose of Objective ZL-1 is to protect the landscape of County Kerry as a major economic asset and an invaluable amenity which contributes to the quality of peoples' lives. The applicant contends that the decision of the respondent to grant permission contravenes s. 37 (2) of the 2000 Act. Under s. 37, the respondent may only grant permission for a development which materially contravenes a development plan where certain conditions (described in para. 9 below) are met.

8. It is important to note that, in its decision, the council did not specifically state that the development materially contravened the development plan. That is the language which is used in the 2000 Act. Section 37 (2) (a) of the 2000 Act provides as follows:-

> *"(2) (a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates."*

9. The power given to the respondent by s. 37 (2) (a) is significantly qualified by the provisions of s. 37 (2) (b) which are in the following terms:-

> *"(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—*
>
> *(i) the proposed development is of strategic or national importance,*
>
> *(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or*
>
> *(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or*
>
> *(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."*

10. It will be seen from the language of s. 37 (2) (a) and (b) that the provisions are concerned with material contravention of a development plan. As noted in para. 8 above, that is not the language which the County Council used in its decision of 30th May, 2017 to refuse permission. The relevant reference to the County Development Plan is in fact rolled up with a number of other considerations. The relevant reason is in the following terms:-

> *"Having regard to the spatial extent, size and scale of the proposed turbines relative to the nature of the receiving environment of hilly and flat farmlands and transitional marginal landscapes, it is considered that a windfarm development of the scale proposed would create a significant visual intrusion in this landscape by reason of the height and spatial extent of the proposed turbines which would be excessively dominant and visually obtrusive when viewed from the surrounding countryside and villages. The proposed wind farm would have a significant impact on the value and character of the landscapes in the area and would seriously injure the amenity and quality of life of communities and individuals who dwell in the area. The proposed development would, therefore, seriously injure the residential amenities and visual amenities of the area, would be contrary to the provisions of the Wind Energy Guidelines… and Section 7.4.5.15 of the Renewable Energy Strategy 2012, would contravene Objective ZL-1 of the Kerry County Development Plan… and would be contrary to the proper planning and sustainable development of the area".*

11. In my view, s. 37 (2) is not engaged in the present case. This is for the simple reason that, as the text of the reason relied on by the County Council makes very clear, the decision to refuse permission was not stated to be on the basis that the development would materially contravene the development plan. I can therefore see no basis to distinguish the present case from the circumstances addressed by Haughton J. in *People Over Wind v. An Bord Pleanála* [2015] IEHC 271. In that case, Haughton J. dealt with the issue as follows at para. 270:-

> *"270. In refusing to grant permission, the planning authority did not use the phrase 'materially contravene' when outlining that the development would breach objective NH13/001 of the Laois County Development Plan … - it merely refers to 'contravene'. This important distinction was recognised by O'Malley J in Nee v. An Bord Pleanála [2012] IEHC 532 - a case in which the Court came to the conclusion that the omission of the word 'material' must have been a deliberate choice on the part of the Council. No evidence has been put before this Court to suggest that, by the wording it adopted, Laois County Council intended to refer to a material contravention."*

12. The approach taken by Haughton J. is consistent with the views previously expressed by O'Malley J. in *Nee v. An Bord Pleanála* [2012] IEHC 532 (to which Haughton J. referred in the course of his judgment in *People Over Wind v. An Bord Pleanála*). In *Nee*, at para. 40 of her judgment, O'Malley J. stated:-

> *"…The section relied on specifically provides that the Board may grant permission 'even if' the refusal is for a material contravention. That would make little sense if every refusal by a Planning Authority for contravention of a Plan was to be deemed to be for a material contravention. It would also have the effect of very significantly reducing, if not abolishing, the jurisdiction of the board in cases not coming within the excepted categories. I do not believe that to be the intent of the section".*

13. As noted above, I can see no point of distinction between the present case and the facts considered by Haughton J. in *People Over Wind*. In the present case, there is nothing in the materials before the court to support the suggestion that it had been the intention of the County Council to conclude that the development constituted a material contravention of the Development Plan.

14. Moreover, this is not a case where the respondent has itself purported to grant permission in material contravention of the Development Plan. The impact of the proposed development on the landscape is addressed extensively in paras. 8.12.1 to 8.12.8 of the inspector's report. Having carefully considered the issue, the inspector came to the conclusion that he was satisfied that the overall visual impact of the development on the area would be "*within acceptable limits*". In turn, the respondent, in its direction of 23rd November, 2018 expressly decided to grant permission in accordance with the inspector's recommendation. In doing so, the respondent stated that it had taken into account the policies of the County Council as set out in the Development Plan. Having considered, *inter alia*, the Development Plan, the character of the landscape and the topography surrounding the site, the characteristics of the site and of the general vicinity, the pattern of existing and permitted development in the area, the distances from the proposed development to dwellings or other sensitive receptors, and the report of the inspector, the respondent considered that the development would not have a significant adverse effect on the landscape or the visual or residential amenities of the area. Thus, in deciding to grant permission, there is nothing to suggest that the respondent (who, in accordance with the provisions of the 2000 Act conducts a *de novo* assessment of the application) was exercising any jurisdiction under s. 37 (2) (a). It only exercises such a jurisdiction where there is a material contravention. Based on the extensive analysis carried out by the inspector in relation to this issue, and based on the reasons set out in the Board direction (summarised above) it is clear that the respondent took the view that the proposed development was acceptable in terms of landscape and visual amenity.

15. Accordingly, in circumstances where there is nothing to suggest that the County Council refused permission on the grounds that the development would materially contravene the Development Plan and in circumstances where the decision of the respondent was not taken in exercise of its jurisdiction under s. 37 (2) (a), it follows that this ground of challenge to the decision of the respondent fails.

The legal requirements for appropriate assessment

16. The provisions of Article 6 of the Habitats Directive are well known and do not require to be set out here. No issue arises in relation to the language used in Article 6. Nor does

any issue arise in relation to the provisions of the 2000 Act implementing Article 6. It is not, therefore necessary, to set out the relevant statutory provisions which apply.

17. It is clear from the report of the inspector in this case that, although the proposed development site is not located within any Natura 2000 designation, there are a number of protected sites in the wider area including the Stacks SPA and the Blackwater River Special Area of Conservation *("the Blackwater SAC"*). In light of the potential for the development to have adverse impacts on the integrity of those Natura 2000 sites, the inspector stated as follows at p. 112 of his report:-

> *"… any development likely to have a serious adverse effect on a Natura 2000 site would not normally be permitted and… any development proposal in the vicinity of, or affecting in any way, a designated site should be accompanied by such sufficient information as to show how the proposal will impact on the designated site. Therefore, a proposed development may only be authorised after it has been established that the development will not have a negative impact on the fauna, flora or habitat being protected through an Appropriate Assessment pursuant to Article 6 of the Habitats Directive. Accordingly, it is necessary to screen the subject proposal for the purposes of 'appropriate assessment'"*

18. Having carried out a screening exercise, the inspector concluded that the development had the potential to have an adverse impact upon, *inter alia*, the Stacks SPA and the Blackwater SAC. Insofar as those two sites are concerned, the inspector recognised, in particular, that the development could have a potential impact on the roosting, breeding, and foraging habits of the hen harrier but it also had potential implications for downstream protected habitats and species within the Blackwater SAC. These include the freshwater pearl mussel.

19. Accordingly, it was necessary to carry out a stage 2 appropriate assessment. It is now well established that there are quite stringent requirements that must be complied with where a stage 2 appropriate assessment is carried out. Those requirements have been the subject of a number of decisions of the CJEU which, in turn, have been applied in Ireland in *Kelly v. An Bord Pleanála* [2014] IEHC 400 and in *Connelly v. An Bord Pleanála* [2018] IESC 31. It is clear from the judgment of Finlay Geoghegan J. in *Kelly* and from the judgment of Clarke C.J. in *Connelly* that there are four requirements which must be satisfied namely:-

    (a) In the first place, the appropriate assessment must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which have the potential, either as a consequence of the development itself or in combination with other plans or projects to affect the European site in the light of its conservation objectives;

    (b) Secondly, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any European site. This requires findings to be made following appropriate analysis and evaluation each in

the light of the best scientific knowledge in the field. The findings and conclusions cannot have any *lacunae* or gaps;

(c) Thirdly, on the basis of those findings and conclusions, the planning authority, if it is to grant permission for the development, must be able to determine that no reasonable scientific doubt remains as to the absence of the identified potential effects. It is clear from the decision of Finlay Geoghegan J. in *Kelly* (in para. 48 of her judgment) that these findings must be appropriately recorded. In particular, Finlay Geoghegan J. said:-

> *"In accordance with the CJEU decision in Sweetman, it is for the national court to determine whether the appropriate assessment (including the determination) was lawfully carried out or reached, and to do so, it appears to me that the reasons given for the Board's determination in an appropriate assessment must include the complete, precise and definitive findings and conclusions relied upon by the Board as the basis for its determination. They must also include the main rationale or reason for which the Board considered those findings and conclusions capable of removing all scientific doubt as the effects of the proposed development on the European site concerned in the light of … its conservation objectives. In the absence of such reasons, it would not be possible for a court to decide whether the appropriate assessment was lawfully concluded or whether the determination meets the legal test required by the judgments of the CJEU"; and*

(d) Fourthly, where these requirements are satisfied, the planning authority may determine that the proposed development will not adversely affect the integrity of any relevant European site and will not be prevented from granting permission on Article 6 grounds.

The statement of grounds

20. In the statement of grounds, the applicant complains that the respondent failed to carry out an appropriate assessment. The case made overlaps with the applicant's complaints in relation to EIA and, for that reason, it may be convenient, at this point, to summarise both elements of the applicant's case. In making that case, the applicant has made the following points:-

(a) In para. 4 of the statement of grounds it is alleged (in quite general terms) that there was a failure to carry out and record any or any adequate EIA in respect of the proposed development.

(b) In para. 9 of the statement of grounds, it is alleged that the respondent has failed to engage with its obligation to maintain and restore the habitat of the freshwater pearl mussel. It is alleged that the respondent has taken an entirely different approach in this case to the mitigation measures (necessary to ensure that there are no adverse effects on the mussel) to the approach taken in other cases where it is alleged more extensive measures were required to be put in place. In this

context, the applicant contends that the mitigation measures which the respondent has found to be satisfactory in this case are *"different and significantly less advanced than those considered (and indeed considered insufficient) in other cases. Reference is made to the refusal by the respondent in respect of an appeal in respect of a wind farm in Doonbeg and to the decision of the Board the subject of the proceedings in People Over Wind v. An Bord Pleanála [2014] IEHC 487*". In particular, the applicant points to the conditions imposed in the *People Over Wind* case that the mitigation measures should ensure that there would be zero silt emissions from the development. It should be noted that silt emissions are particularly deleterious to the freshwater pearl mussel and to the salmonids which are so essential for the successful reproduction of the mussel;

(c) It is also alleged that the assessment was conducted on the basis of inadequate information and inadequate surveys of the receiving environment. Having regard to the deficiencies and uncertainties identified in the objections to the application for planning permission made to the County Council, and the further deficiencies identified by the observers to the appeal, it is alleged that it was not possible for the respondent to conduct any proper or lawful appropriate assessment. In support of this contention in the Statement of Grounds, Mr. Fred O'Sullivan (who swore the verifying affidavit on behalf of the applicant) explained in para. 9 of that affidavit that a large number of observations were made to the respondent. These included observations from local individuals, An Taisce, Birdwatch Ireland, Raptor LIFE Project, Towercorn Ltd, Duhallow Environment Working Group and the Irish Raptor Study Group. For example, in the submission made by the Irish Raptor Study Group (authored by Dr. Allan Mee together with two others) reference was made to the fact that in 2017 a second breeding pair of hen harriers was identified within the proposed windfarm area on Barna Bog (which had not been identified in the material submitted by Silverbirch). Furthermore, in the submission made by the Duhallow Environment Working Group, attention was drawn to the proximity of the proposed development to the Blackwater SAC. The submission referred to silt entering the river from another windfarm then under construction and it highlighted the danger to the freshwater pearl mussel which, the submission explained are *"highly endangered and require clean water [to] survive".*

(d) It is also alleged that the respondent, in adopting the report of its inspector, did not carry out any adequate appropriate assessment. It is alleged that the report is "*wholly deficient*" and that it fails to provide any complete, precise and definitive findings in the context of appropriate assessment. Complaint is made, in particular, that the inspector, in purporting to carry out an appropriate assessment, appears to have relied significantly (if not entirely) on the EIA carried out (which is recorded in the same report). The applicant makes the point that an EIA and an appropriate assessment are conducted to a different standard and necessarily have a different focus. It was accordingly submitted in the course of the hearing that the inspector (and therefore the respondent itself) had applied the wrong standard in purporting to carry out the appropriate assessment.

(e) As pleaded in paras. 13 and 15 of the Statement of Grounds, the applicant makes the case that the conclusion of the inspector (and thus of the respondent itself) in respect of the hen harrier focussed entirely on the omission of turbines T8 and T9. This point is made both in respect of the appropriate assessment issue and in relation to the EIA issue. In particular, it is alleged that the inspector offered no assessment at all of the effects of the remaining twelve turbines on the hen harrier. The case made by the applicant is that no assessment whatever was made of the development of twelve turbines and related infrastructure for which permission was granted by the respondent.

(f) Again, with respect to the hen harrier, it is contended that the language used by the inspector (and thus by the respondent itself) is vague and uncertain and that this is not appropriate in the context of appropriate assessment. It is alleged that there are no actual findings, let alone complete findings. In this context, the applicant draws attention, for example, to the observation made by the inspector, in the course of his report, that he was "*inclined to conclude that the Barna area is of local importance to the hen harrier*".

(g) With regard to the hydrological and hydrogeological impacts of the development, it is alleged that the assessment of the inspector at p. 122 of his report is utterly inadequate. It is alleged that the report does not deal at all with any of the species for which the Blackwater SAC was designated. In particular, it is alleged that, notwithstanding the view of the County Council that the mitigation measures proposed were unsatisfactory, the inspector (and thus the respondent) did not even set out what the mitigation measures are. It is also alleged, accordingly, that it is not clear on what basis the inspector could be said to be satisfied beyond a reasonable scientific doubt that the mitigation measures will be effective.

(h) It is also alleged that the mitigation measures themselves are unclear and uncertain and that most of them have been left over to be agreed post consent. In the particular context of the freshwater pearl mussel it is alleged that it is entirely unclear how the mitigation measures will operate to protect the species (which, as noted above, is highly sensitive to waterborne sediment and siltation). The case is made that condition 17 in particular imposes no more than a requirement to follow generic construction techniques and that the condition is contrary to law having regard to the provisions of the Habitats Directives and the decision of the CJEU in Case C-416/17 *Holohan*. It is alleged that the condition does not prescribe any specific level of sediment; nor does it prescribe any actual mitigation.

The challenge to the late delivery of expert evidence by the applicant

21. As noted in para. 20 (b) above, the Statement of Grounds was verified and supported by an affidavit sworn by Fred O'Sullivan on behalf of the applicant on 30th January, 2019. Thereafter, Silverbirch made an application to admit the proceedings into the Commercial List. An order to that effect was made by Haughton J. on 11th March, 2019. In that order, the court, in accordance with an agreed directions timetable, directed that opposition papers should be filed by 15th April, 2019, a replying affidavit on behalf of the

applicant (if required) should be filed by 27th May, 2019 and thereafter any replying affidavits by the respondent or the notice parties should be delivered by 17th June, 2019. There was some slippage in that timetable in that the opposition papers on behalf of the respondent were not filed until 29th April, 2019. As a consequence, the timetable was adjusted. The last adjustment made to the timetable is recorded in an order made by me on 31st July, 2019 which extended the time for filing of the replying affidavit on behalf of the applicant to 7th August, 2019 following which the submissions of the parties were to be exchanged.

22. On 27th August, 2019 two additional affidavits were filed on behalf of the applicant, one was sworn by Dr. Allan Mee (who had been one of the authors of the submission made to the respondent by the Irish Raptor Study Group). Dr. Mee is a zoologist and a professional ornithologist and his affidavit, consisting of 69 paragraphs, deals extensively with the hen harrier and with the impacts of the proposed development on that bird. The affidavit also raised issues in relation to merlins, bats, woodcock, red grouse and the short-eared owl. He also raised issues in relation to cumulative impacts of the development along with other windfarm developments in the vicinity. The affidavit also contains a number of criticisms of the approach taken by the inspector and the respondent.

23. The second affidavit was sworn by Darren Reidy who is an ecologist with a particular interest in wetland and aquatic habitats. As his affidavit makes clear, Mr. Reidy is associated with the Duhallow Environment Working Group (which also made submissions to the respondent in the course of the appeal). His affidavit, comprising 59 paragraphs, deals extensively with the freshwater pearl mussel, the proximity of the known populations of the mussel to the proposed windfarm, and the threats facing the long-term survival of the mussel. He highlights that the national population of the mussel is in decline as a result of eutrophication and sedimentation of habitat. As I understand it, eutrophication arises as a consequence of algal growth which uses up oxygen in the water. The affidavit also contains a critique of the approach taken by the respondent and Mr. Reidy also addresses and takes issue with the extent of the mitigation measures proposed. In common with Dr. Mee, Mr. Reidy also raises issues in relation to cumulative impacts. He also raises questions in relation to impacts on salmon, lamprey, plant surveys and flora assessment (specifically Japanese knotweed and giant rhubarb).

24. Neither of these new affidavits could, by any stretch, be considered to be by way of a reply to the affidavits sworn on behalf of the respondent and Silverbirch. In substance and in form, they do not even purport to respond to the averments made by Mr. Pierce Dillon in his affidavit sworn on behalf of the respondent or to the averments made by Mr. Damien Courtney in his affidavit sworn on behalf of Silverbirch. They also canvass a number of issues which are not raised in the Statement of Grounds at all. In this context, in the course of the hearing before me, counsel for the applicant very properly acknowledged that the applicant is not entitled to advance a case which is not pleaded in the Statement of Grounds. In their written submissions delivered in advance of the hearing and in the course of oral argument at the hearing, both the respondent and

Silverbirch have strongly objected to the admission of the affidavits sworn by Dr. Mee and Mr. Reidy.

25. Counsel for the applicant submitted that there is no obligation on a party in the applicant's position to file all of the evidence to support the case made within the relevant eight-week period allowed for the bringing of judicial review proceedings. Counsel argued that an applicant cannot be expected to source and engage experts in that timeframe. He also suggested (although there was no affidavit evidence on behalf of the applicant in these proceedings to this effect) that an applicant seeking judicial review can have great difficulty in sourcing an appropriate expert and persuading that expert to provide expert opinion evidence. Some latitude should be allowed for that purpose. Counsel also suggested that there was no prejudice to the respondent or to Silverbirch.

26. In my view, there may well be cases where there is a genuine difficulty in obtaining evidence from an appropriate expert within the relatively short period of time allowed for a challenge to a decision of the respondent. Where that occurs and where such expert evidence is necessary, one would expect that an applicant would, at the very least, make clear in the Statement of Grounds and verifying affidavit that it is intended to support the case by reference to expert evidence. In such circumstances, both the court and the relevant respondent and notice party would be put on notice of the applicant's intention and would have an opportunity to address, by means of appropriate directions, a timeline for the delivery of such evidence and any necessary response from the respondent and notice party. However, that is not what occurred here. There was no suggestion made at any point prior to August 2019 that stand-alone expert evidence would be adduced on behalf of the applicant. The directions given by the court (on the basis of an agreement between the parties) merely envisaged the delivery of a replying affidavit. As noted above, the affidavits of Dr. Mee and Mr. Reidy are not by way of reply to the opposition papers and verifying affidavits filed on behalf of the respondent and Silverbirch. In truth, both affidavits are stand-alone affidavits which make no attempt to address what was said in the opposition papers.

27. Moreover, it is manifest from the affidavits of Dr. Mee and Mr. Reidy that they were both associated with groups who participated in the appeal process before the respondent and made submissions to the respondent. In circumstances where both the Irish Raptor Study Group and the Duhallow Environment Working Group had participated in the appeal, they were already fully familiar with the documents filed in the course of the appeal and in particular were familiar with the nature of the proposed development and the Natura 2000 interests which they believed could be adversely affected by the proposed development. No explanation has been furnished as to why, in those circumstances, it was not possible to obtain affidavits from Dr. Mee and Mr. Reidy at the outset or, at the very least, at an early stage in these proceedings.

28. With regard to the suggestion made by counsel for the applicant that no prejudice has been suffered by the respondent and Silverbirch, it is important to bear in mind that, as counsel for the respondent highlighted, in the course of her submissions, the affidavits

(comprising 128 paragraphs in total) were delivered in the middle of the long vacation in relation to a Commercial Court case which was due to commence on the second day of term. The arguments made in both affidavits are extensive. As counsel said they are "*roving*". I believe counsel was correct to suggest that they bear all the hallmarks of authorship by someone who has taken a microscope to try and find any point that could possibly be made and then to cover those points *in extenso* in the affidavits. Notwithstanding the very proper confirmation by counsel for the applicant that the applicant cannot go beyond the case made in the Statement of Grounds, no attempt is made in the affidavits by either deponent to confine themselves to the matters complained of in the Statement of Grounds.

29. In my view, there is significant force in the point made by counsel for the respondent about the timing of the delivery of the affidavits. They were delivered at a time which made it virtually impossible to respond to them while, at the same time being in a position to maintain the hearing date of 8th October, 2019 (namely the second day of Michaelmas term). In this context, it seems to me that, contrary to the submissions made by counsel for the applicant, there is a real prejudice to the respondent and the notice party by reason of the late delivery of affidavits of this kind. The nature of this prejudice was described by Clarke J. (as he then was) in *Woori Bank v. KDB (Ireland) Ltd* [2006] IEHC 156 as "*logistical prejudice*". That observation was made in the context of an application to amend a pleading. It is generally accepted that a relatively liberal approach should be taken to such applications (as the judgment of the Supreme Court in *Croke v. Waterford Crystal* [2005] 2 I.R. 283 makes clear). However, notwithstanding this liberal approach, Clarke J. identified that such an application could be refused in circumstances where prejudice (including "*logistical prejudice*" as explained by him in his judgment) would be caused to the opposing party. At para. 4.2 of his judgment in that case, Clarke J. explained the position as follows:-

> *"4.2 a party may be able to persuade the court that what I might call logistical prejudice would occur if the amendment is allowed. This will particularly be the case where the amendment is sought at a very late stage and could have the effect of significantly disrupting the intended proceedings. In such cases it may be that an amendment which could properly have been made at an earlier stage might be refused because to permit the amendment would have the effect of so altering an imminent trial as to require a significant adjournment to the prejudice of the party against whom the amendment is sought. It may well be that in the context of modern case management and the undoubted intention of the rules applicable to the Commercial Court (which rules are obviously predicated on an efficient and managed pre-trial process coupled with an early trial of the issues) that such logistical prejudice may loom larger in the considerations of the court.*
>
> *The effectiveness of case management can be significantly reduced if parties who do not comply with the directions of the court can escape the consequences of such failure without significant adverse results. Similarly belated applications to amend (after, for example, the parties have filed witness statements and the like) can*

have a significant effect on the ability to conduct a trial in a timely and orderly fashion. In that context it should also be noted that the nature of the relief sought can be a material factor in assessing the adverse consequences of a delay in trial. For example, claims for a specific performance or other similar proceedings (whose existence can have an effect on the ability of parties to deal in a commercial fashion with their assets) should be disposed of as quickly as possible and amendments which could have the effect of significantly delaying such proceedings can, in an appropriate case, give rise to a significant degree of what I have described as logistical prejudice".

30. Although those observations were made in the context of an application to amend, it seems to me that very similar considerations arise here where, without any prior warning, expert evidence (particularly extensive expert evidence of the kind set out in the affidavits of Dr. Mee and Mr. Reidy) is delivered at a very late stage in the proceedings when a trial is imminent and when the opposing parties would have no ability to respond to those affidavits without putting the trial date in jeopardy. As noted previously, there is no basis on which it could plausibly be suggested (and counsel for the applicant very wisely did not make the suggestion) that the affidavits are in the nature of a reply to the case made by the respondent and Silverbirch in their respective opposition papers.

31. The loss of a date for a trial is a significant prejudice in the context of proceedings of this kind. Trial dates are allocated well in advance of a trial. If a trial cannot proceed on the date allocated to it, it may take many months before the court is in a position to allocate a new trial date. In this case, the trial date was fixed in March 2019 on the basis of the directions (agreed between the parties at that time) recorded in the order of Haughton J. I have no doubt that, in March 2019, there were ample trial dates available in Michaelmas term 2019. However, by the time these affidavits were delivered in August 2019, the trial dates for Michaelmas term were already fully allocated. It would not have been possible to secure a new trial date for a four day hearing before Hilary term 2020 at the very earliest. This would be a particular prejudice in a case of this kind in circumstances where, as the relatively short timeframe for challenge provided by the 2000 Act demonstrates, the underlying legislative intention is that challenges of this kind should be dealt with promptly.

32. The observations of Clarke J. apply with even added force in the context of proceedings which are brought pursuant to such statutory provisions and against a backdrop where the Commercial Court has already been persuaded that the proceedings are of sufficient urgency to merit entry into the Commercial List and case management by the judge in charge of that list. In para. 13 of the affidavit of Damien Courtney grounding the application for admission of the proceedings into the Commercial List, Mr. Courtney stated:-

"13. Given the importance of the Silverbirch Windfarm to meeting the State's targets for greenhouse gas emission reduction and renewable energy sources, the capital expenditure incurred to date, the further expenditure to complete the project, the

long delay in the planning process already in the proposed new [Renewable Electricity Support Scheme], the awaited decision on connections after ECP-1 and the deadlines for lease options, Silverbirch is very anxious to have the within challenge to the permission granted dealt with as expeditiously as possible. Having the within proceedings case managed within the Commercial List … is, I say and believe, the most effective way in which to achieve this outcome".

33. Against that backdrop, it is striking that the affidavits of Dr. Mee and Mr. Reidy were delivered nine months after the decision of the respondent which is now the subject of the challenge in these proceedings. In my view, the delay in this case is such and the timing of delivery of the affidavits is such that it was incumbent on the applicant, if it wished to be in a position to rely on such affidavits, to fully explain and justify their delivery at such a late (and crucial) stage of the proceedings. No satisfactory explanation or reason has been put forward to justify the late delivery of these affidavits. The timing of the delivery of the affidavits is not addressed anywhere on oath by the applicant. In light of the failure to properly explain and justify the delivery of these affidavits, I am left with no alternative but to exclude them from consideration. In the absence of an objectively justifiable explanation for their late delivery, the logistical prejudice to the respondent and Silverbirch is such that the affidavits must be excluded.

34. If I have correctly understood the submissions of counsel for the applicant, there appears to have been an apprehension that, without expert evidence, the applicant could find itself without any evidence to support the case made in the Statement of Grounds. This concern appears to have arisen as a consequence of the approach taken by White J. in *An Taisce v. An Bord Pleanála* [2015] IEHC 633 and by O'Neill J. in *Harrington v. An Bord Pleanála* [2014] IEHC 232. In both of those judgments, judicial review proceedings were dismissed on the grounds that the relevant applicant had failed to prove the case made by it in its Statement of Grounds. In *Harrington*, the applicant failed to provide any evidence to support her contention that the site in question was a priority habitat. In *An Taisce*, the relevant applicant (Friends of the Irish Environment) had failed to provide any evidence to substantiate a bald assertion on affidavit that the extraction of peat on bogs supplying the Edenderry Power Plant is likely to have significant effects on the River Barrow and River Nore SAC. However, if there was such a concern in this case, it existed at the outset of these proceedings. On the facts, there is no reason to suppose that such a concern could not have been addressed by filing affidavits from Dr. Mee and Mr. Reidy in early course. Moreover, it is difficult to see that such a concern could be said to arise in this case. It is clear from the entire process that took place in the course of the appeal before the respondent and from the approach taken both by the respondent and Silverbirch in these proceedings that it was acknowledged that the position of the hen harrier and the freshwater pearl mussel would have to be considered and that a Stage 2 appropriate assessment would have to be carried out which involved the requirement that the respondent be satisfied beyond any reasonable scientific doubt that the development will not adversely affect either of these endangered species. The concerns in relation to both species were specifically raised by a number of participants in the process. There was no dispute between the parties that the hen harrier is a special conservation interest

for the purposes of Stacks SPA or that the development site lies adjacent to part of the boundary of the SPA. Likewise, there was no dispute between the parties in this case about the fact that the proposed site is hydrologically connected to the Blackwater River and that the potential exists for indirect impacts on the Blackwater SAC and on the freshwater pearl mussel in particular. Accordingly, I can see no basis for the apprehension voiced by counsel for the applicant that, without expert evidence, the applicant could find itself unable to advance the case made in its statement of grounds.

35. In the circumstances, it is unnecessary to consider the further arguments advanced by the respondent and Silverbirch in relation to the admissibility of the affidavits of Dr. Mee and Mr. Reidy. For completeness, it should be noted that it was strongly urged by the respondent, as an additional basis for contesting the admissibility of the late affidavits, that the affidavits contained material which had never been placed before the respondent in the course of the appeal. Reliance was placed on the decision of Murphy J. in *Hennessy v. An Bord Pleanála* [2018] IEHC 678 and the decision of Haughton J. in *People Over Wind v. An Bord Pleanála* [2015] IEHC 271. In both of those cases the court took the view that any affidavit evidence containing new material which was not before the respondent could not be considered by the court in a judicial review challenge to a decision of the respondent. It is true that in the latter case, the court granted the applicant leave to appeal to the Court of Appeal on a number of questions pursuant to s. 50A (7) of the 2000 Act including a question as to whether, in reviewing the decision of the respondent, in respect of appropriate assessment, the court was confined to a consideration of matters that were before the respondent. In *People Over Wind v. An Bord Pleanála* [2015] IECA 272 the Court of Appeal did not consider it necessary to determine that question. In those circumstances, counsel for the applicant contended that the question remained open. However, as matters currently stand and, in the absence of any decision of the Court of Appeal or the Supreme Court to the contrary, the legal position is as set out in the judgments of Murphy J. and Haughton J. and, accordingly, if it were necessary to decide this issue, I would be compelled, in accordance with the principles set out in *Re Worldport Ireland Ltd (in liquidation*) [2015] IEHC 189 to take the same approach here. In light, however, of my view that the affidavits are not admissible in any event, it does not seem to me to be necessary to make any formal determination in relation to this aspect of the objection raised by the respondent and Silverbirch to the admission of the late affidavit. I merely observe that, as a High Court judge, I am obliged to follow decisions of my colleagues in the High Court, in particular, decisions of such recent vintage which were arrived at following a careful consideration of the issues. For completeness, I should also make clear that I entirely agree with the views expressed by Murphy J. and Haughton J. in those cases. For the court to entertain material that was not placed before the respondent runs the risk of subverting the role of the court in proceedings of this kind. The court is not engaged in a *de novo* hearing. The court does not itself carry out an appropriate assessment. That is a matter entirely for the respondent. It is not for the court to conduct an appropriate assessment on different material to what was before the respondent in order to reach a different conclusion. The task of the court is to assess whether the respondent, in purporting to carry out an

appropriate assessment, has complied with the requirements summarised in para. 19 above.

36. In light of the conclusions which I have reached in paras 29 to 35 above, I must consider the case on the basis of the Statement of Grounds and the affidavit of Mr. O'Sullivan together with the affidavits and materials placed before the court by the respondent and Silverbirch. I do not propose to consider the affidavits of Dr. Mee or Mr. Reidy save to observe that, while the affidavits go beyond the Statement of Grounds in a number of respects, there are significant parts of the affidavits which are consistent with the Statement of Grounds. In circumstances where, it will be necessary, in any event, to address the Statement of Grounds, the applicant can therefore be assured that the case which it makes will still be determined notwithstanding the exclusion of these two affidavits. Given that counsel for the applicant has, as previously noted, very properly conceded that the applicant is confined to the case made in the Statement of Grounds, I do not believe that the applicant is, in truth, disadvantaged by the exclusion of these affidavits.

Some subsidiary issues raised by the applicant in relation to the assessment carried out by the respondent

37. It is next necessary to consider, in the context of the case made in the Statement of Grounds, whether the assessment carried out by the respondent complies with the requirements summarised in para. 19 above. Before doing so, it may be helpful, at this point, to dispose of one aspect of the case made by the applicant. This relates to an aspect of the case summarised in para. 20 (c) above. During the course of the hearing, it was suggested by counsel for the applicant that the respondent had failed to take into account the submissions made by some of the observers who participated in the course of the appeal including the Irish Raptor Study Group and Duhallow Environment Working Group. In this context, I note the submission made by counsel for the respondent that the task facing the respondent carrying out an appropriate assessment in an appeal of this kind is not to address submissions as such but the specific issues that arise in the context of the Habitats Directive. Counsel for the respondent referred to the decision of Costello J. in *O'Brien v. An Bord Pleanála* [2017] IEHC 773. In that case, the issue arose in the context of an EIA rather than in the context of appropriate assessment. However, it was submitted by counsel for the respondent that similar considerations apply in the context of appropriate assessment where the focus of the planning authority will be on the qualifying interests in the protected site and the potential impacts of the development on those interests. In *O'Brien*, Costello J. said at paras. 44-45:-

> *"44. The implications of the submissions of the applicants in this case are that the Inspector and the Board must examine, analyse and evaluate each of the submissions or observations validly made to the Board. This is not what is required by either the EIA Directive or the Act of 2000, which simply requires that the direct and indirect effects of a proposed development be so assessed, not the submissions or observations. The arguments advanced by the applicants leads to a result which would render the provision of s. 172(1J) (c) effectively otiose. Why would the Oireachtas stipulate that the planning authority or the Board had an obligation to*

consider the submissions and observations submitted by third parties before the planning authority or the Board informed the public of the main reasons and considerations for their decision, if they were already obliged to examine, analyse and evaluate the individual submissions and observations and make that assessment available to the public under the provisions of s. 172(1J) (b)?

45. In my judgment it was not necessary for the Board (or the Inspector) to examine, analyse or evaluate the Bowdler Report or the points made in the report or the experience of the applicants (or their neighbours) in relation to noise in order to carry out a lawful EIA. It is sufficient that there is an examination, analysis and evaluation of the direct and indirect effects (including the noise implications) of the proposed development on the environment as set out in … the Inspector's report."

38. In my view, the approach outlined in *O'Brien* must now be treated with some caution in light of the very recent decision of the Supreme Court in *Balz v. An Bord Pleanála* [2019] IESC 90 where O'Donnell J. (albeit not specifically in the context of either EIA or appropriate assessment) observed at para. 57:-

"57. … the submission was rejected in limine on the basis of a determination that the matters contained therein were irrelevant. It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in cases, they may profoundly disagree, and with whose consequences they may have to live. …" (emphasis added).

I do not, however, believe that this always requires that every submission made to the respondent should be individually addressed in a decision of the respondent or in a report of an inspector which precedes such a decision. What seems to me to be crucial is that the points made in submissions should be addressed. In circumstances where there will frequently be an overlap between submissions made by one observer and another, it seems to me that it would not be necessary to address every submission by name so long as the substantive points made in the submissions are each appropriately addressed. As noted in para. 19 above, it is a crucial part of the exercise which the respondent is obliged to carry out, in the context of appropriate assessment, that there should be complete, precise and definitive findings and conclusions regarding any identified potential effects on the qualifying interests of any European site.

39. For completeness, it should be noted that the inspector, at pp. 46-49 of his report, noted the 28 observations that had been received from interested parties during the course of the appeal and summarised the principal points made. Among the points highlighted by the inspector in this section of the report included concerns in relation to the hen harrier, the potential loss of breeding and foraging habitat for hen harriers, displacement and disturbance during both construction and operational phases and collision risk; the

inspector also highlighted concerns with regard to the potential for landslides and peat slippage and the associated ecological pollution; and the inspector also drew attention to the concerns that had been expressed that construction of the development would likely have a detrimental effect on water quality and the hydrological regime of the area with adverse downstream impacts on aquatic habitats including the Blackwater SAC which supports a population of freshwater pearl mussel.

40. It may also be convenient at this point to address a further concern that was highlighted, in particular, during the course of the submissions made by counsel for the applicant. This relates to the case made by the applicant that none of the concerns of the County Council in relation to appropriate assessment are addressed in the inspector's report. This submission needs to be put in context. It is clear from a consideration of the report that the inspector carefully summarised the planning history and the particular history of the unsuccessful application to the County Council for permission which led to the appeal. Section 4 of the inspector's report addresses the process before the County Council in some detail summarising, *inter alia*, the decision of the County Council and the reasons for it and also summarising the reports of the County Council planning department (including the report relating to the environment which considers the freshwater pearl mussel) and the report of the biodiversity officer of the County Council that addresses both the impact on the Blackwater SAC and the impact on the Stacks SPA. However, counsel for the applicant submitted that, thereafter, when the inspector came to carry out the assessment for the purposes of Article 6 of the Habitats Directive, there was no reference back to the concerns of the County Council in relation to the impact of the development on the freshwater pearl mussel and the loss of hen harrier hunting habitat.

41. In my view, this submission on behalf of the applicant is mistaken. It is clear from a consideration of s. 37 (1) (b) of the 2000 Act that an appeal to the respondent requires the respondent to treat the appeal as though it were an application that had been made to it in the first instance. Insofar as relevant, s. 37 (1) (b) provides as follows:-

> *"…where an appeal is brought against a decision of a planning authority…, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given …".*

42. While the analogy is not perfect, the position of the respondent on an appeal from a planning authority is not unlike the position of the High Court on an appeal from the Circuit Court under s. 38 (2) of the Courts of Justice Act, 1936 (save to the extent that the High Court, on such an appeal, is confined to hearing from the same witnesses in relation to the same subject matter as gave evidence in the Circuit Court). The High Court hears such appeals without any reference to the decision actually made by the Circuit Court and reaches its own decision on the evidence heard afresh by it. If anything, the position of the respondent on an appeal from a planning authority is even broader than the position of the High Court on an appeal from the Circuit Court. In the

case of the respondent, it can entertain observations from persons and bodies who did not participate in the original application before the planning authority.

43. It is therefore unsurprising that the inspector, in his report dealing with appropriate assessment, would not refer back to the decision of the County Council or the approach taken by the County Council. It is, in any event, clear from a consideration of the report of the inspector that he did, as part of his assessment, have regard to the concerns that were voiced in relation to the freshwater pearl mussel and the hen harrier. The question is whether the assessment carried out by the inspector (and by extension the respondent) complied with the requirements summarised in para. 19 above. It is to that issue to which I now turn.

The assessment carried out by the inspector and the respondent

44. As noted in para. 19 above, there are four requirements which must be satisfied for the purposes of carrying out a valid appropriate assessment. As highlighted by Clarke C.J. in *Connelly* at para. 8.16, a valid appropriate assessment decision is a necessary pre-condition to a planning consent in cases where appropriate assessment is required. It is therefore necessary, in the present case, to consider each of the requirements summarised in para. 19 above. I deal below with each of those requirements in turn.

Did the assessment identify, in the light of the best scientific knowledge, all aspects of the development which could adversely affect the hen harrier or the freshwater pearl mussel?

45. In light of the case made in the statement of grounds, it seems to me that this question arises solely in relation to the hen harrier and freshwater pearl mussel since they are the relevant interests, the subject of the Stacks SPA and the Blackwater SAC respectively, which are in issue in these proceedings. It is clear from the report of the inspector in this case that these interests were at the forefront of his consideration of the application.

Potential impacts on the hen harrier

46. With regard to the hen harrier, the inspector noted that, in common with other protected species under the Birds Directive, the likely potential impacts on bird populations within the development site area would typically include:-

(a) The disturbance of bird communities within the site and the surrounding area which may lead to the desertion of nest sites during the breeding season or avoidance of the site by new and returning birds for breeding purposes;

(b) The direct loss of habitat from the construction of the turbine bases and hard standing area;

(c) The indirect habitat loss through site development works near the turbine locations and on access tracks to the site which may reduce the extent of suitable habitat locations;

(d) The risk of collisions with turbine blades.

47. It is important, in this context, to note that these impacts are discussed in relation to the site area as a whole. The observations are not confined to the area in the immediate vicinity of turbines T8 and T9 located on or near Barna Bog. Thereafter, at p.p. 81-85 of the report, the inspector addresses the potential impacts on the hen harrier in more detail. He deals, first, with direct disturbance of nesting birds. The inspector notes that it is acknowledged in the EIS that breeding hen harriers could be disturbed if turbines were to be constructed in close proximity to nesting territories. The inspector records that surveys carried out in 2016 and 2017 identified the presence of one territorial pair of hen harriers within the Barna Bog area approximately 700 metres northwest of the nearest proposed turbine which successfully raised two juveniles. While the applicant draws attention to the fact that the observations made by the Irish Raptor Study Group identified one additional breeding pair in this area, I do not believe that this is material in the context of the identification of the impacts of the development. The key point is that the inspector identified the potential impact of the development on breeding pairs. Whether that is one pair or two pairs is not material. The potential for adverse impacts is the same whether one is dealing with one or more pairs of hen harrier. The inspector noted that it was in this context that the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs ("*the department*") submitted that, in light of this information, turbines T8 and T9 should be omitted. The inspector recorded that the department had made this submission in circumstances where those turbines were located within 1km of the SPA in an area used regularly by hunting hen harriers and that the loss of hunting habitat due to disturbance/displacement and mortality attributable to collision are significant risks which cannot be ruled out.

48. The inspector also identified on p. 82 that the availability of prey for hunting hen harriers could be reduced as a result of habitat loss following construction or through disturbance during the construction phase. The inspector noted in particular that three bird species (which make up a substantial proportion of the hen harriers' diet) have been recorded breeding within the proposed development site. This observation was made by the inspector in respect of the entire site and is not confined to the immediate area around turbines T8 and T9. In this context, the inspector, at p. 83, said that he would "*reiterate the concerns raised by the Department…that hen harriers will be displaced from hunting habitat within 250m of operational wind turbines".*

49. The inspector next dealt with mortality due to collision with turbines. The inspector noted that a submission had been made that the hen harriers are well known to fly at lower elevations (below ten metres in height) when hunting and flights at higher elevations will usually only occur when the birds are returning to the nest, performing display flights, or simply when flying from one location to another. However, the inspector noted in particular that juvenile hen harriers are initially quite clumsy and unskilled in the air and thus would be at a greater risk of collision. The inspector also noted that the majority of hen harrier flying activity recorded within both the development site itself and the 2016 study area was below 30 metres in height. The inspector explained that this had led to a submission being made that the risk of collision with the proposed turbines is considered to be low. However, the inspector added the observation that the collision risk for

juvenile birds from a nest within 500 metres of a turbine "*could be much higher".* The inspector also noted the submission made by the department that there was evidence in the previous two-year period of hen harrier mortality within the Stacks SPA due to collisions with turbine blades and that, as a consequence, the risk of collision may have been underestimated in previous studies.

50. At p. 84, the inspector addressed the issue of site avoidance by foraging harriers leading to habitat loss. He referred to a number of studies which gave rise to mixed results which suggested that in some cases there was avoidance of an area of least 250m from a turbine while in other instances birds had been noted hunting within 50-100 metres of turbines. The inspector noted that the department had rejected the suggestion made by the applicant that hen harriers would continue to hunt and had advised that hen harriers *"will be displaced from using hunting habitat within 250m of operational wind turbines (which would seem to correspond with the UK study referenced in the EIS)*". These observations by the inspector must be read in conjunction with his observations in relation to the availability of prey for hunting (summarised in para. 48 above). As noted in para. 48, three bird species (which are an important source of prey for the hen harrier) have been recorded breeding on the development site.

51. At p.p. 84-85, the inspector then sets out his conclusions as to the actual impact of the development on the hen harrier albeit that the applicant contends that this assessment is manifestly insufficient and, in particular, does not address anything other than the immediate area of Barna Bog and turbines T8 and T9. That is an issue that I will address when I come to consider the next element of the Article 6 (3) requirements. At this point, I will confine my consideration to the first element of those requirements.

52. I should also make clear that p.p. 81-85 of the inspector's report is in the immediate context of the EIA carried by the inspector. However, on p. 118 of his report, the inspector expressly refers back to this section of the report for the purposes of identifying, in the context of appropriate assessment, the potential impacts of the development on the hen harrier. I do not believe that the inspector can be faulted for taking that course. It is an entirely logical and sensible course to adopt once all relevant potential impacts for the purposes of appropriate assessment have been identified.

53. In my view, the inspector has very comprehensively and fairly identified the potential impacts that arise for the hen harrier and, in the course of the hearing before me, no one has identified a potential impact which has been omitted or overlooked.

The potential impacts on the freshwater pearl mussel

54. Insofar as the freshwater pearl mussel is concerned, the potential impacts on it are addressed at p.p. 87-90 of the inspector's report. The inspector considers a number of surveys of the River Blackwater dealing with the presence of the pearl mussel. The inspector highlights, in particular, the additional impact assessment appended to the grounds of appeal which had clarified that, while previously, the nearest recorded freshwater pearl mussel in the River Blackwater were at or near Lisheen Bridge, a population of 21 mussels had been observed close to Scrahan approximately 2.6km

hydrologically downstream of the site boundary (and closer than those previously recorded at Lisheen Bridge). The inspector then draws attention to the susceptibility of the freshwater pearl mussel to changes in water quality, the requirement for very high-quality rivers with clean river beds and waters with very low levels of nutrients. The inspector also noted the fact that the population of the freshwater pearl mussel in the Blackwater is currently at an unfavourable conservation status. The inspector then highlighted that, in these circumstances, it is clear that any further deterioration in surface water quality within the tributaries and watercourses draining to the River Blackwater consequent on the development could potentially have a significant indirect impact on the freshwater pearl mussel.

55. The potentially negative impacts identified by the inspector are set out at p.p. 88-89, p.p. 91-92 and also at p.p. 97-98. The potential negative impacts are not confined to the construction phase but the inspector also said that potential negative impacts might arise at the operational stage. The potential impacts comprise:-

(a) The pollution of watercourses with suspended solids due to run off of soil from construction and clear-felled areas due to disturbance of fine subsurface substrates in the course of construction and excavations at and adjacent to watercourse crossings. At p. 98, the inspector specifically refers to the potential for sediment release during clear-felling and construction phase earthworks and the danger of the discharge of water with high concentrations of sediment to water courses due to the dewatering of the excavations required for the turbine and meteorological mast foundations;

(b) At p.p. 91-92 of his report, the inspector identifies that one of the most significant potential impacts arising as a direct result of the construction of the proposed development is the possibility of bog failure/slippage given the peaty subsoil conditions on site. While this section of his report is not concerned directly with the issue of the freshwater pearl mussel, peat slippage would have obvious consequences for the freshwater pearl mussel if peat fragments were to enter the watercourses leading to the River Blackwater thereby increasing the level of sediment. In the course of his oral argument, counsel for the applicant placed some emphasis on the possibility of peat slippage. While I do not believe that this forms part of the applicant's pleaded case (and therefore is not an issue that the applicant is entitled to pursue) I will, nonetheless, for completeness and without prejudice to any pleading point that may arise, briefly consider the arguments that were made during the course of the hearing in relation to peat slippage;

(c) The contamination of surface waters during construction (and operational works) through the accidental release or discharge of hydrocarbons or other contaminated site run-off. At p. 98, the inspector notes that this could include the risk of sewage pollution from temporary toilet facilities on site;

(d) Changes to the hydrological regime of the area through the alteration of the flow rates of streams and rivers; and

(e) The creation of preferential flow paths for surface water resulting in a significant increase in the volume of water entering local watercourses which could interfere with the sustained flow of water particularly during dry weather.

56. In addition, at p. 90, the inspector acknowledges the concerns raised by the department with regard to previous experience of construction projects in the vicinity of the Blackwater SAC impacting on downstream water quality. While the inspector does not regard an anecdotal report of serious siltation (raised by the department) as sufficiently robust evidence, it is clear from p. 90 of the report that the inspector identified that siltation or pollution of a watercourse is a potential impact of a development of this kind. This is reinforced by what is said by the inspector at p.p. 118-119 of his report where he draws attention to the potential for the pollution of watercourses through the release of suspended solids.

57. Again, as in the case of the hen harrier, while p.p. 88-90 of the inspector's report deals with EIA issues, the inspector, when he came to address the appropriate assessment issues, specifically referred back (at p.p. 118-119 of his report) to the section dealing with EIA. With regard to the Blackwater SAC, he also stated at p.p. 119-120:-

> *"Potential pathways for impact have been identified in the form of a hydrological connection from the proposed windfarm development site to the SAC, in particular during the groundworks phase of the construction of the turbines and associated roadways etc. (such as by way of sedimentation, the accidental release of pollutants and the risk of landslide). In the absence of more detailed consideration of mitigation measures (e.g. site management and drainage design measures), there is the potential for adverse effects on the European Site which will require further assessment by way of Natura Impact Statement".*

58. While the inspector does not refer, at p.p. 119-120 to the possibility for adverse effects arising from the operational stage of the proposed development, this is something which, as noted above, he expressly identified at p. 88 of his report. It seems to me that the passage quoted above which highlights the construction phase does not exclude what had previously been said by the inspector at p.p. 88-89. It should be noted that the reference to "*the groundworks phase of the construction…*" is prefaced by the words "*in particular".*

59. It seems to me that the inspector has identified the aspects of the development project which have the potential to affect the freshwater pearl mussel. In this context, it is clear from the material available to the respondent during the course of the appeal and in particular from the expert report of Dr. William O'Connor submitted with the appeal that the principal aspects of the development which have the potential to have an impact on the freshwater pearl mussel will arise during the construction phase. At s. 2.1 of Mr. O'Connor's report, he identifies that, during the construction phase, the most likely potential impact of the proposed development is the release of silt laden runoff into watercourses and subsequent transport of that material to downstream locations with negative impacts on the freshwater pearl mussel. The potential impacts on water quality identified by Mr. O'Connor are consistent with the impacts identified by the inspector at

p.p. 88-89 of his report. It should be noted that, at one point in the hearing, it was suggested by counsel for the applicant that Dr. O'Connor's report predated the appeal and provided no new information that was not already available to the County Council. However, in the course of the hearing, it was confirmed that Dr. O'Connor's report was prepared for the purposes of the appeal. It is dated June 2017 and therefore post-dates the decision of the County Council in May 2017.

60. At p.p. 16-17 of his report, Mr. O'Connor also identifies the potential impacts from the operational phase of the development. He explains that the main risk would arise from maintenance of the facility when oils and lubricants may be used on site. Again, this is consistent with what is said by the inspector at p.p. 88-89 of his report.

61. In these circumstances, it seems to me that the inspector has sufficiently identified the aspects of the development which have the potential to adversely affect the freshwater pearl mussel in the Blackwater SAC. As the respondent has adopted the inspector's report, I can find no fault with the manner in which the respondent has conducted the first element of the Article 6 (3) appropriate assessment exercise. The stage 1 screening exercise carried out by the respondent appears to me to have been conducted wholly lawfully.

Have the necessary complete precise and definitive findings and conclusions been made?

62. It is now necessary to consider whether appropriately complete, precise and definitive findings were made to the requisite standard regarding the identified potential effects on the hen harrier and the freshwater pearl mussel. As noted in para. 19 above, if planning consent is to be given for the proposed development, the findings must have no *lacunae* or gaps and the respondent must have been able to determine that no reasonable scientific doubt remains that the development will not have an adverse impact upon the hen harrier and the freshwater pearl mussel. I deal below, in turn, with the hen harrier and the mussel.

The hen harrier

63. The conclusions of the inspector with regard to the hen harrier are set out at p.p. 85-86 of his report and at p.p. 121-122. As noted previously, there is a crossover between what is said in the report about the hen harrier in the context of EIA and in the context of appropriate assessment. At p. 122 (in the section dealing with appropriate assessment) the inspector expressly refers the respondent to his earlier comments in the context of EIA. It is therefore necessary to consider what is said by the inspector in both sections of his report.

64. At p.p. 85-86, the inspector states:-

> *"On balance, given the inclusion of the hen harrier within Annex I of the E.U. Birds Directive and the protection afforded to same, the overall suitability of the Barna/Barna Bog area for hen harrier breeding and foraging activities as established by historical records and more recent survey work, the proximity of the Barna lands to the … [Stacks SPA] …, and the availability/potential usage of the*

said lands by hen harrier from within the SPA, I am inclined to conclude that the Barna area is of local importance to hen harrier and that the proposed development of turbine Nos. T8 & T9 within same would be likely to have an unacceptable environmental impact on the hen harrier in the locality given the consequential loss/disturbance of suitable habitat and the potential risk of collision. Moreover, for the purposes of appropriate assessment, and having regard to the precautionary principle, it is my opinion that it cannot be definitively established that the development of turbines (Nos. T8 & T9) within the Barna area would not have an adverse impact on hen harrier. Accordingly, in the event of a grant of permission, I would recommend the emission of Turbine Nos. T8 & T9.

(N.B. in support of the omission of Turbine No. 9, I would refer the Board to the 'High' risk weighting applied to the construction of that turbine in the 'Peat stability Hazard Ranking Assessment.' Furthermore, the associated omission of the road/service infrastructure serving Turbine No. T9 would negate any requirement for a new crossing of the Carhoonoe Stream thereby addressing the concerns of the Department…as regards same)".

65. In the course of his submissions, counsel for the applicant criticised the somewhat equivocal language used in the passage quoted above. In particular, the use of the words: "*on balance*" and "*I am inclined to conclude…".* Some criticism is also made of the formula of words used later in the same extract where the inspector said that: "*it is my opinion that it cannot be definitively established that the development of turbines…T8 & T9 …would not have an adverse impact on hen harrier*". I do not believe, however, that the language used by the inspector warrants criticism. As counsel for the respondent made clear, in the course of her submissions, this finding by the inspector in this section of his report is a finding that the development of the windfarm (by the construction of turbines T8 and T9) in the Barna Bog area would give rise to an unacceptable impact on the hen harrier given "*the consequential loss/disturbance of suitable habitat and the potential risk of collision"*. As counsel for the respondent noted, there is no requirement that the inspector has to be satisfied that this risk exists beyond a reasonable scientific doubt. On the contrary, a precautionary approach must be taken in the context of the Habitats Directive. Thus, the inspector (and, in turn, the respondent) only has to be satisfied that the risk cannot be excluded. In my view, this submission of counsel for the respondent is entirely correct.

66. However, counsel for the applicant makes a more fundamental point that, in this section of the inspector's report, the inspector concentrates on the Barna Bog area and does not address the remainder of the development (i.e. other than turbines T8 and T9). Counsel stressed that this was particularly important given the recognition in the report that the development had the potential for adverse effects on hen harriers within the Stacks SPA. It should be recalled that, as noted in paras. 46 to 50 above, the inspector had previously identified a number of potential impacts on the hen harrier:-

(a) Mortality due to collision with turbines;

(b) Site avoidance by foraging birds. As noted in para. 48 above, the inspector had noted in particular that three bird species (which make up a proportion of the hen harriers' diet) have been recorded breeding within the proposed development site. The inspector did not suggest that this was solely within the area of Barna Bog.

(c) Habitat loss and displacement. In this context, it should be noted that, at p. 79 of his report, the inspector identified that there were "*notable levels of activity within Reaboy in the vicinity of Turbine Nos. T5, T6 & T7"*. This is also potentially relevant to the issue of mortality risk;

(d) Disturbance of nesting birds. However, the only evidence of nesting birds was in the vicinity of Barna Bog.

67. Accordingly, it is very important to consider what is said by the inspector subsequently at p.p. 121-122 where, referring back to the potential impacts of the hen harrier which he had identified in the course of his Stage 1 appropriate assessment, the inspector continued as follows:-

> *"The NIS has subsequently concluded that, subject to adherence of a series of specified mitigation measures, there would be [no] adverse effects on the integrity of the identified Natura 2000 sites as a result of the proposed development.*
>
> *In order to avoid unnecessary repetition, I would refer the Board to my earlier comments with regard to the implications of the proposed development for the hen harrier as set out in my environment impact assessment ….I would reiterate my opinion that given the inclusion of the hen harrier within Annex 1 of the E.U. Birds Directive…, the overall suitability of the Barna/Barna Bog area for hen harrier breeding and foraging activities as established by historical records and more recent survey work, and the proximity of the Barna lands to the [Stacks SPA] and the availability/potential usage of the said lands by hen harrier from within the SPA, I am inclined to include that the Barna area is of local importance to hen harrier and that the proposed development of Turbine Nos. T8 & T9 within same would be likely to have an unacceptable environmental impact on hen harrier in the locality given the consequential loss/disturbance of suitable habitat and the potential risk of collision. Therefore, for the purposes of appropriate assessment, and having regard to the precautionary principle, it is my opinion that it cannot be definitively established that the development of Turbines Nos. T8 & T9 within the Barna area would not have an adverse impact on hen harriers. Accordingly, in order to ensure that the proposed development will not adversely affect the integrity of the SPA or undermine/conflict with the Conservation objectives applicable to same, I would recommend the omission of Turbine Nos. T8 & T9 by way of mitigation".*

68. It will be seen that this is largely a repetition of what was said by the inspector at p.p. 85-86 (quoted in para. 64 above). The only other relevant observation of the inspector in this section of his report is at p. 123 where he says (having previously dealt with cumulative impacts):-

"Therefore, I consider it reasonable to conclude, on the basis of the information available, that the proposed development, when taken individually and in combination with other plans or projects, will not adversely affect the integrity of the [Stacks SPA] …".

69. In her submissions, counsel for the respondent submitted that the inspector's report contained complete precise and definitive findings and conclusions in relation to the entire development and that the inspector was, in substance, confirming that there were no issues with the balance of the development over and above turbines T8 and T9. She also carried out a careful analysis of the submission made to the respondent by the Irish Raptor Study Group and suggested that the points made by the study group in respect of adverse impacts for the hen harrier did not withstand scrutiny. Counsel accepted that the points raised by the study group in relation to the alleged inadequacy of the surveys conducted was not specifically addressed by the inspector but she submitted that the criticisms of the surveys were so "*manifestly wrong that it's not something that needs to be addressed…*".

70. Counsel for the respondent may well be correct that all of the points raised by the Irish Raptor Study Group do not withstand scrutiny. She may also be correct in her submission that there was sufficient material available to allow him to be satisfied that the development (other than turbines T8 and T9) would not have an adverse impact on the hen harrier. Given the role of the court in proceedings of this kind, it would not be appropriate for me to express any view on that issue. However, I cannot accept that the conclusion articulated by the inspector and adopted by the respondent satisfies the requirements summarised in para. 19 (b) above namely the obligation to make complete, precise and definitive findings and conclusions regarding the identified potential effects on the hen harrier, following appropriate analysis and evaluation in light of the best scientific knowledge. In my view, there is nothing in the report of the inspector to explain how the development other than turbines T8 and T9 will not have an adverse impact on the hen harrier. The material just quoted focusses solely on the Barna Bog and turbines T8 and T9. It is clear from the earlier sections of the inspector's report that, as noted in paras. 46-47 above, the potential impacts listed in para. 46 arose in relation to the site area as a whole. They were not confined to the area in the immediate vicinity of turbines T8 and T9 located on or near Barna Bog. Accordingly, if the proposed development other than turbines T8 and T9 was to pass an appropriate assessment (insofar as potential impacts on the hen harrier is concerned) there would have to be a conclusion reached as to how it was that the potential impacts previously identified would not, in fact, arise if the remaining turbines (and associated infrastructure) were to be constructed and operated.

71. Furthermore, it is clear from the decisions in *Kelly* and *Connelly* that there should be appropriate analysis and evaluation. While there is, very clearly, analysis and evaluation in the inspector's report of turbines T8 and T9, there is no equivalent evaluation and analysis of the remainder of the site. In reaching a conclusion in relation to the balance of the development, the inspector may have had regard to the material contained in the Natura Impact Study ("NIS"). In this context, it appears to follow from the decision in

Connelly that a person in the position of the inspector is entitled to rely on other materials for the purposes of providing reasons for findings. This appears to be so even where no express reference is made by the decision maker to those materials so long as it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contained in the materials in question formed part of the reasoning for the relevant decision. At para. 9.2 of his judgment in that case, Clarke C.J. said:-

> *"The test is, in my view, that identified in Christian. Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned. In that regard, it seems to me that the trial judge has, put the matter much too far. The trial judge was clearly correct to state that a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear."*

72. However, it is crucially important to bear in mind that the NIS predated the submission made by the Irish Raptor Study Group in the course of the appeal and it seems to me to have been incumbent on the inspector in those circumstances to address the substantive points raised by the Irish Raptor Study Group so as to explain how he came to the conclusion that the points raised by them did not alter the conclusions reached in the NIS. In my view, that required the inspector, at minimum, to identify where in the NIS the relevant analysis is contained which satisfied him that the development (other than turbines T8 and T9) would not have an adverse impact on the hen harrier. It also seems to me to have been incumbent on the inspector to explain why he was not persuaded by the substantive points made by the Irish Raptor Study Group. As noted in paras. 37-38 above, I do not believe that it was necessary for the inspector to address every individual submission that was made to the respondent so long as the substantive points relevant to the hen harrier were addressed. There will often be an overlap between the submissions of one observer and another. The crucial requirement is that the points should be addressed. If the points are without merit, then that should be stated and the basis for that view should be explained.

73. In addition, it seems to me that the inspector should also have identified by reference to the NIS where, in his view, it provides an appropriate level of assurance that the potential effects previously described by the inspector at an earlier point in his report will not give rise to the adverse effects which were identified as potential impacts at the stage 1 screening stage. In particular, there would need to be an answer to the concerns expressed about the loss of foraging for the hen harrier given the fact recorded in the inspector's report that the entire site was frequented by three important species of bird

favoured by the hen harrier as prey. It also seems to me that the inspector should have explained how he came to the conclusion that, notwithstanding what he had said (as noted in para. 66(c) above) about the level of hen harrier activity in Reaboy in the vicinity of turbines T5, T6 and T7, the development of those turbines and related infrastructure could safely proceed.

74. It also seems to me that the inspector was required to explain, either in the text of the report itself or by reference to specific sections of the NIS, why he was satisfied that the concerns outlined by him at p. 83 of his report about collision risk (in particular for juvenile hen harriers, as summarised in para. 49 above) have been satisfactorily resolved. It seems to me that the inspector should, at minimum, have identified where in the NIS there is material which explains to the requisite standard (i.e. to the extent that there be no reasonable scientific doubt) that the development other than T8 and T9 will not give rise to a material risk of collision.

75. In the absence of an appropriate explanation in the report, any person reading the inspector's report will be left at a loss to understand how the potential impacts identified in the report can be said to have been addressed to the extent necessary to enable a conclusion to be reached, following appropriate analysis and evaluation, that the adverse impacts previously identified at the screening stage will not arise.

76. Accordingly, I have come to the conclusion that the report of the inspector does not comply with the requirements summarised in para. 19 (b) above. As a consequence, it seems to me to follow that the third requirement (summarised in para. 19 (c) above) is also incapable of being satisfied on the basis of the material currently contained in the inspector's report. It follows that the decision of the respondent must be quashed on this ground. As the decision in *Connelly* makes clear, a failure to comply with the Article 6 (3) requirements goes to jurisdiction and invalidates a decision taken by the respondent in breach of those requirements. The only order that can be made in the circumstances is an order quashing the decision. I am, however, conscious that there may well be sufficient materials before the respondent which would enable the respondent to make complete precise and definitive findings and conclusions regarding the previously identified potential effects on the hen harrier as outlined in the inspector's report. There may well therefore be a basis to remit the matter to the respondent for a further determination. I will, however, postpone making any order to that effect pending further submissions from the parties.

The freshwater pearl mussel

77. The potentially negative impacts identified by the inspector have already been summarised at para. 55 – 58. It is now necessary to consider whether the Inspector (and, in turn, the respondent) have made complete, precise and definitive findings and conclusions regarding the previously identified potential effects on the freshwater pearl mussel. This is addressed, in the first instance, at pp. 89-90 of the inspector's report where he says:-

"In order to minimise the potential constructional and operational impacts on the aquatic environment attributable to the proposed development, it is intended to implement a series of mitigation measures as set out in Section 5.8 of the EIS, although regard should also be had to the measures contained in Chapter 6: 'Soil and Geology' and Chapter 7: 'Hydrology' of the EIS (as supplemented by the associated appendices and the additional information provided with the grounds of appeal). Of particular relevance of the context of preserving downstream water quality during the construction stage is the proposal to implement a spoil management strategy in conjunction with a surface water management plan in order to prevent sediment-laden surface water runoff from the earth works entering water courses. It is also proposed to prepare a detailed Construction and Environmental Management Plan for the project which will include Construction Method Statements and a Construction Stage Surface Water Management Plan that will incorporate various erosion and sediment control measures including the installation of drainage of runoff controls prior to the commencement of site development and clearance works; the minimisation of the area of exposed ground; the prevention of runoff entering the site from adjacent grounds; the provision of appropriate control and containment measures on site; the monitoring and maintenance of erosion and sediment controls throughout the project; and establishing vegetation as soon as practical on all areas where soil has been exposed. These measures are to be further supplemented by a Habitat Management Plan, the inclusion of an emergency erosion and soil control response plan as a contingency measure in the Surface Water Management Plan, the implementation of a water sampling programme both before and during construction, and the adoption of best practice techniques including the installation of interceptor drains, silt fences, check dams, silt traps and settlement/siltation ponds etc.

It is also proposed to implement an Operational Phase Environmental Management Plan for the monitoring of wildlife for the efficacy of the mitigation measures to be undertaken both during and post construction.

Whilst I would acknowledge that concerns have been raised by the Department … as regards previous experience of construction projects impacting on downstream water quality … and that reference has been made to an anecdotal report of serious siltation of an upper Blackwater Watercourse being attributable to the construction of a windfarm with general mitigation measures similar to those cited in the submitted EIS, in my opinion, this does not form a sufficiently robust basis on which to refuse permission for the subject proposal. In the event that any siltation or pollution of a watercourse could be attributed to a particular development project, I would suggest that it would be necessary in the first instance to definitively ascertain the actual cause of the pollution event. For example, it is unclear whether or not the occurrence of any such situation would be attributable to a deficiency in the overall design of the project or the mitigation measures

proposed or whether it arose from a failure by the developer/contractor to adequately adhere to the prescribed programme of mitigation.

Accordingly, having reviewed the submitted information, including the measures to be implemented with respect to drainage design and site management during the construction and operational phases of the proposed development, in addition to the proposal to conduct water quality monitoring during all phases of the project which would allow for the opportunity to review and revise measures as appropriate, it is my opinion that the risk of a detrimental impact on downstream water quality and the consequence of same on aquatic ecological considerations can be satisfactorily mitigated both through the nature/design of the works proposed and the implementation of an appropriate programme of pollution control measures which are linked to good construction and site management best practice."

78. The passage quoted above is in the section of the inspector's report dealing with EIA issues. However, in common with the hen harrier, the inspector effectively adopts this section of his report when he comes to address the appropriate assessment issues. A number of criticisms were made by counsel for the applicant of this passage. In support of the case made in the statement of grounds (summarised in para. 20(g) above), counsel emphasised that the Construction and Environmental Management Plan ("*CEMP*") is not yet in existence and therefore could not be assessed by the inspector. He also drew attention to what he described as the "*vague*" and "*aspirational*" nature of the Surface Water Management Plan ("SWMP").

79. With regard to the concerns expressed by the department (as recorded by the inspector), counsel criticised the approach taken by the inspector on the basis that the inspector did not satisfy himself as to what happened in relation to the unnamed development mentioned in the anecdotal report. However, that is not part of the case made in the statement of grounds and I therefore do not believe that it is something that I should address in this judgment. Moreover, the failure of another developer to take appropriate steps to prevent ecological damage would not, in any event, have entitled the inspector to take an adverse view in respect of the development proposed by Silverbirch.

80. Counsel also criticised what he characterised as the "*failure*" of the inspector to specifically address the concerns expressed by the Duhallow Environment Working Group. I cannot accept that this criticism is valid. The submissions made by that group do not appear to me to raise any issue which is not addressed by the inspector. I therefore do not propose to consider this criticism further in this judgment. As noted in para. 38 above, I do not believe that it is necessary that every individual submission should be identified by name so long as the relevant substantive points made in the submission are appropriately addressed.

81. Counsel for the applicant strongly argued that the concluding part of the passage quoted in para. 77 above suggests that the assessment carried out by the inspector was done to an EIA standard even though the stage 2 appropriate assessment requires a much higher standard. Counsel also argued that this section of the inspector's report does not engage

with the essential elements of the Article 6(3) test and he highlighted in particular that there is no finding in this section of the inspector's report that the development will not adversely affect the integrity of the Blackwater SAC and the freshwater pearl mussel in particular.

82. However, the inspector returns to the subject of the Blackwater SAC when he purports, at a later stage in his report, to carry out a stage 2 appropriate assessment. As noted above in the context of the hen harrier, the inspector, at p. 121 of his report, draws attention to the NIS which he suggests has concluded that "*subject to adherence to a series of specified mitigation measures, there would be [no] adverse effects on the integrity of the identified Natura 2000 sites as a result of the proposed development*".

83. He then refers to the section in his report dealing with EIA and continues, with regard to the Blackwater SAC, at p. 122 as follows: -

> *"Similarly, I would refer the Board to my earlier comments with regard to the hydrological implications of the proposed development as set out in my environmental impact assessment of the subject application. In my opinion, this outlines how the design of the proposed development, when taken in combination with specified mitigation measures, will not adversely impact on the integrity of the Blackwater … [SAC] and thus will not compromise its qualifying interests …*
>
> *Therefore, I consider it reasonable to conclude, on the basis of the information available, that the proposed development, when taken individually and in combination with other plans or projects, will not adversely affect the integrity of … the Blackwater … SAC in view of the sites conservation objectives".*

84. Again, counsel for the applicant strongly criticised this section of the report and said that it contains no analysis or evaluation of the mitigation measures and that it does not explain how the inspector came to the conclusion that the mitigation measures were sufficient to allow a conclusion to be reached, capable of removing any scientific doubt, that the freshwater pearl mussel would not be adversely affected by the proposed development. In addition, counsel emphasised the points made in the statement of grounds summarised in para. 20(a), (f) and (g) above. Counsel also criticised the report because it does not set out what the mitigation measures are. While I agree that it would be preferable that the mitigation measures should have been set out, it is nonetheless clear from the decision of the Supreme Court in *Connelly* that a party in the position of the respondent (and this applies equally to an inspector of the respondent) is entitled to rely on other documents submitted in the course of the appeal if it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the material contained in those documents actually formed part of the reasoning relied on for the purposes of making the relevant decision. Thus, it will be necessary to consider the relevant material before the board to ascertain whether it would be sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the inspector had a proper basis to form the view that the proposed development would not have an adverse impact on the

freshwater pearl mussel. The material available to the respondent is considered in paras. 86 to 93 below.

85. Before addressing the material available to the respondent, I should also, for completeness, address the inspector's assessment of the issue relating to peat stability. As noted in para. 55 above, the inspector identified that the most significant potential impact arising as a direct result of the construction of the proposed development is the possibility of bog failure/slippage given the peaty subsoil conditions on site. While issues relating to peat stability do not appear to me to form part of the applicant's pleaded case, it should be noted that at p.p. 93-97 of his report, the inspector carries out a careful review of the information in relation to peat slippage. The inspector identified a number of discrepancies in the peat stability assessment submitted on behalf of Silverbirch. In particular, he recalculated the relevant factors of safety in respect of the turbines and also in respect of the proposed Ballynahulla substation. At p. 96 the inspector identified that the approach taken in the EIS in relation to historical peat failures in the area was to apply the precautionary principle. Having regard to that principle, Silverbirch, in the EIS utilised a conservative risk allocation for historical failure. While a peat slide had occurred in the Sliabh Luachra area in 1896, there were a number of factors which justified a risk ranking for the affected areas of the site as "*very low"* or "*low*". In this context, a number of factors were considered including the fact that significant peat extraction had taken place in the intervening 121 years. There was also now the presence of extensive man-made and natural drainage channels which serve to limit the presence of water on the affected slopes. At p. 97, the inspector came to the conclusion that the peat stability analysis, notwithstanding certain discrepancies in the material submitted by Silverbirch (which he effectively corrected himself through the analysis undertaken by him) established that the proposed development can safely proceed without giving rise to peat slippage. This is subject to the implementation of a series of mitigation measures. It seems to me, on the basis of the extensive analysis undertaken by the inspector in relation to the peat slippage issue, the inspector has arrived at a decision (following evaluation and analysis) which meets the requirements of the case law, in particular the decision of the High Court in *Kelly* and of the Supreme Court in *Connelly*.

86. As noted in para. 84 above, it is next necessary, having regard to the approach taken in *Connelly*, to consider the material available to the respondent in relation to the freshwater pearl mussel. In this regard, very extensive material was placed before the respondent by Silverbirch to address the concerns in relation to the Blackwater SAC and the freshwater pearl mussel in particular. At s. 5.1.1 of the EIS, it was acknowledged that particular care is required with regard to the Blackwater and its feeder streams that drain the proposed development. The EIS stated that protection of these water courses "*will be imperative in preventing water quality deterioration downstream".* The EIS also stated that best practice pollution control measures (which are described in detail elsewhere) will be employed during the construction phase to prevent the transport of deleterious substances to the Blackwater SAC. In this context, it was specifically stated:

"release of suspended solids to all surface waters will be controlled by interception (E.G. Silt Traps) and management of site runoff. Any surface water run-off must be treated to ensure that it is free from suspended solids, oil or any other polluting materials".

87. Counsel for Silverbirch acknowledged in the course of the hearing that this requirement is caught by condition 2 of the conditions imposed by the respondent in its decision to grant permission. Condition 2 requires that all of the environmental, construction and ecological mitigation measures set out in the EIS, the NIS and the other particulars submitted with the application (expressly including the report of Dr. William O'Connor discussed further below) should be implemented by Silverbirch. Counsel for Silverbirch submitted (correctly in my view) that the passage quoted above, although it does not say so in terms, amounts to a "*zero silt requirement*" equivalent in its effect to the express condition contained in the decision of the respondent in the *People Over Wind Case*. I should also make clear that, in my view, condition 2 goes significantly further than what was described by counsel for the applicant, during the course of the hearing, as the standard or "*generic*" condition requiring that all environmental and ecological mitigation measures should be implemented. Condition 2 specifically addresses the mitigation measures in respect of the freshwater pearl mussel since it refers, in terms, to the pearl mussel impact assessment (i.e. the report of Dr. O'Connor).

88. Counsel for Silverbirch, in his submissions, drew attention to the underlying rationale of the mitigation measures which are proposed to be used in this case. He explained that the drainage from the windfarm development will be kept separate from the natural drainage on the site and that the drainage from the development site will not discharge directly to water courses but instead will be discharged over land through the use of level spreaders after any siltation has settled out in settlement ponds. He drew attention to the objective of the SWMP which is to ensure that the drainage network for the development does not impact on the existing natural drainage network on the subject site. Thus, at s. 3.1 of the SWMP it is specifically stated that it is a fundamental principle of the drainage design that: -

"… clean water flowing in the upstream catchment, including overland flow and flow in existing drains, is allowed to bypass the works areas without being contaminated by silt from the works. This will be achieved by intercepting the clean water and conveying it to the downstream side of the works areas either by piping it or diverting it by means of new drains or earth mounds. In the same section of the SWMP, it is explained that the mitigation measures proposed are designed to the standard recommended in a 2006 study of freshwater pearl mussel populations in the Lutter River in Germany by Altmuller & Dettmer. The significance of this is that the measures described in Altmuller & Dettmer are specifically referred to in the sub Basin Management Plan for the Blackwater as the appropriate standard of sediment control for construction projects within the sub basin. The Altmuller & Dettmer study describes a two phase treatment system comprising a sediment trap and plant filtration bed. Water from construction works first enters the sediment

traps and then flows through the plant filtration bed. There is a secondary vegetative system which attenuates and absorbs the residual particles which do not settle in the sediment trap. According to the SWMP this two phase system has proven to be successful in the protection and influential in the restoration of the resident freshwater pearl mussel pollution in the Lutter river in Germany. However, as the SWMP makes clear, the system which is to be put in place here adds a further phase to the Altmuller & Dettmer system. This will involve a secondary treatment system in the form of a graded gravel filter bed through which water from the ponds will pass before being dispersed across a wide area of vegetation".

89. Individual settlement ponds will be designed for every single turbine or hardstand area and for every 1.2 km area of internal access road ensuring that each item of windfarm infrastructure will have its own individual three tier treatment system including settlement pond and vegetative filter. In addition to this system, the SWMP describes additional measures to minimise sediment and erosion at source by minimising exposed areas, establishing vegetation, road cleaning, silt fences, check dams, wheel washes, and the avoidance of works in or near water courses.

90. The treatment process summarised above is dealt with in detail in s. 4.2 and 4.3 of the SWMP. A detailed description of the settlement pond design is contained in s. 4.5. Detailed descriptions of the attenuation design are contained in s. 4.6. In s. 4.3.11, a commitment is given that the drainage and treatment system will be managed and monitored at all times particularly after heavy rainfall events during the construction phase. The drainage and treatment system will be regularly inspected and maintained to ensure that any failures are quickly identified and repaired so as to prevent water pollution. Similarly, s. 4.3.1.3.1 requires that continuous turbidity monitors will be installed upstream and downstream of the site in the river Blackwater which will relay real-time information and can trigger an alarm if limit values are being approached. This will give advance warning of a potential difficulty. The relevant limits in this regard are set out in Dr. O'Connor's report at p. 7. These limits are in accordance with the recommendations in the Freshwater Pearl Mussel Conservation Status Assessment Report published by the National Parks & Wildlife Service ("*NPWS*") in 2015. It is confirmed on p. 20 of Dr. O'Connor's report that, prior to construction, the aquatic monitoring programme will be agreed in consultation with NPWS and Inland Fisheries Ireland ("*IFI*"). In addition, a weekly monitoring report will be forwarded to (among others) NPWS and IFI. Crucially, all of these commitments are caught by condition 2 attached to the respondent's decision and will therefore be fully enforceable.

91. The SWMP deals not only with the construction phase but also the operational phase. In s. 4.4, it provides that, following construction, runoff on the roads, hardstands and other work areas will continue to be directed to the outfall weirs. The check dams within the drainage channels will remain in place to ensure that runoff continues to be attenuated and dispersed across existing vegetation. Water monitoring will continue during years one and two of the operational phase, commencing after the complement of construction. The sediment ponds will be kept *in situ* once construction has been completed.

92. During the course of the hearing, counsel for the applicant suggested, by reference to an earlier version of the SWMP, that its terms were vague and uncertain; that the mitigation measures were generic and were not specifically designed with the Freshwater Pearl Mussel in mind. It is unnecessary to form any view as to whether those criticisms were well founded with regard to the first version of the SWMP. However, in light of the very considerable detail that is contained in the SWMP which was before the respondent and in light of the standard by which the mitigation measures were to be applied (namely the Altmuller & Dettmer report), I do not believe that these criticisms are justified in the case of the SWMP which was considered by the inspector and the respondent. Moreover, the SWMP must also be read in conjunction with the report of Dr. O'Connor. In that report, Dr. O'Connor reviews the SWMP and he expresses the view that the highest standards of surface water quality management and pollution control will be employed during the construction of the development. Among the features which he highlighted was the use of sedimats which will be used in water courses draining the site. Dr. O'Connor explained that these sedimats have been successfully used downstream of drainage maintenance works on the River Nore in Co. Laois upstream of the location of a population of Nore pearl mussels (which are a particularly rare species of freshwater pearl mussel). Dr. O'Connor also draws attention to the use of continuous turbidity monitors which will provide real-time information and can trigger an alarm if limit values are being approached. Dr. O'Connor expresses the view that, because the development has taken on board key elements and the recommendations of the Blackwater sub-basin management plan, it will be part of the solution rather than the problem for the Blackwater catchment. Crucially, having reviewed the mitigation measures and the proposed monitoring Dr. O'Connor expresses the following view in relation to predicted impacts: -

> *"the developers demonstrated via a detailed surface water management plan (including erosion and sediment control details) the intention and ability to protect water quality. With agreement of method statements and a monitoring programme with IFI and NPWS, implementation of mitigation measures proposed and due to the considerable distance upstream of the nearest FPM population, no impacts on FPM are predicted to occur as a result of the proposed development. The mitigation measures are also considered to be sufficient to protect aquatic species such as salmon and trout which are present in the streams on and near sites. The measures will be more than sufficient to protect the nearest FPM population which occurs c.2.6 downstream of the boundary of the site and both distance and water dilution will provide further significant protection to this mussel population".*

93. The material summarised in paras. 88-92 above is both very comprehensive and impressive. Given the approach taken by the Supreme Court in *Connelly*, it seems to me that the SWMP and the report of Dr. O'Connor in this case provide extensive analysis and evaluation which assist in understanding the conclusion reached by the inspector and subsequently, by the respondent that the proposed development will not have an adverse impact on the freshwater pearl mussel in the Blackwater SAC.

94. Before reaching any final conclusion on this issue, I should consider two further aspects of the case made by the applicant at the hearing before me:-

(a) In the course of opening the report of Dr. O'Connor to the court, counsel for the applicant drew attention to the manner in which Dr. O'Connor dealt with the potential for a landslide or a peat slide. In this context, it should be noted that Sliabh Luachra was the scene of a natural disaster in 1896 when a moving bog caused a number of fatalities in the area. As noted above, a concern in relation to peat slippage does not appear to me to be part of the case made in the statement of grounds and to the extent that I address it below, I do so for completeness and without prejudice to the fact that this case has not been pleaded.

(b) Secondly, as summarised in para. 20 above, the applicant contends that the conditions attached to the decision of the respondent impermissibly leave over for consideration to a later stage, the construction-stage details of proposals for the management of surface water through a Construction Stage SWMP. It might also appear from the passage of the inspector's report quoted in para. 77 above that a CEMP of any kind has yet to be prepared.

Peat slippage

95. Insofar as the potential for landslide or peat slippage is concerned, the relevant passage in the report of Dr. O'Connor notes as follows:-

> *"The risk of a potential bogburst or landslide occurring on the site as a consequence of the works required to facilitate construction of the windfarm is negligible. Therefore, the risk of serious pollution or siltation of the watercourses occurring as a consequence of such an incident is negligible subject to the appropriate mitigation measures outlined… in the EIS*". (emphasis added).

96. Counsel for the applicant submitted that to assess risk as "*negligible*" was to apply entirely the wrong standard. He argued that it was clear that this fell far short of the "*reasonable scientific doubt*" standard. However, in response, counsel for the respondent strongly urged that a negligible risk of an adverse impact was not sufficient to warrant refusal of a planning consent. She argued that Article 6(3) does not require that the risk of adverse effects should be ruled out to the standard of absolute certainty. She relied, in this context, on the judgment of the CJEU in Case C-236/01 *Monsanto* [2003] ECR I-8166. That case was concerned with novel food ingredients which are regulated by Regulation (EC) No. 258/97 ("The Novel Foods Regulation"). Under the *Novel Foods Regulation*, novel foods cannot be placed on the market for human use without first giving notice to the EU Commission. However, there is an accelerated and simplified procedure for the authorised use of such foods where, on the basis of scientific evidence, the novel foods are substantially equivalent to existing foods or food ingredients as regards their composition, nutritional value, metabolism, intended use and the level of undesirable ingredients. In that case, the simplified procedure was used by Monsanto in order to place on the market novel foods derived from maize. The Italian Health Ministry alleged that the use of the simplified procedure was improper. The Ministry was concerned that

the proposed product contained a number of transgenic ingredients. The Italian Ministry expressed concern that the product would be a danger to human health. However, the Commission consulted the EU Scientific Committee for Food which expressed the view that the information presented by the Italian Ministry did not provide specific scientific grounds for considering that the use of the novel foods at issue endangered human health. Nonetheless, the Italian authorities issued a decree prohibiting the sale of the product. This was challenged by Monsanto. While the facts of this case are very different from the present case, counsel for the respondent argued that the approach taken by the CJEU is instructive given that, in common with Article 6(3) of the Habitats Directive, the Novel Foods Regulation proceeds on the basis of the precautionary principle. Counsel also highlighted the fact that the decision of the CJEU in Monsanto was subsequently cited by the CJEU in its seminal decision in the context of Article 6(3) in Case C-127/02 *Waddenzee* [2004] ECR I-7448 at para. 59. Crucially, *Monsanto* was cited in the context of reasonable scientific doubt (as para. 59 of the judgment in *Waddenzee* makes clear).

97. In the course of its judgment in *Monsanto*, the CJEU said at para. 106:-

> *"If the twofold objective of [the Novel Foods Regulation], namely ensuring the functioning of the internal market in novel foods and protecting public health against the risks to which those foods may give rise, is not to be adversely affected, protective measures adopted under the safeguard clause may not properly be based on a purely hypothetical approach to risk, founded on mere suppositions which are not yet scientifically verified*". (emphasis added).

98. The approach taken in *Monsanto* is also reflected, subsequently, in *Waddenzee*. In that case, Advocate General Kokott expressed the view that absolute certainty is not required under Article 6(3). At paras. 107-108 of her opinion, she said:-

> *"107. However, the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of Article 6(3)… that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.*
>
> *108. Such a conclusion of the assessment is tenable only where the deciding authorities at least are satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned. As in the case of a preliminary assessment – provided for in the first sentence of Article 6(3)… – to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring on the extent and nature of the anticipated harm. Measures to minimise and avoid harm can also be of relevance. Precisely where scientific uncertainty exists, it is possible to gain further*

knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly".

99. Although absolute certainty is not required, it is clear from the judgment of the CJEU in the same case that the Article 6(3) standard is a stringent one. As all of the case law makes clear, planning consent can only be granted where the deciding authority is satisfied that there is no reasonable doubt as to the absence of adverse effects on the relevant protected interest. However, it is striking that in para. 59 of its judgment, the CJEU expressly cited the *Monsanto* decision in the context of reasonable scientific doubt. At para. 59, the CJEU said:-

> *"59. Therefore, pursuant to Article 6(3)…, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of [the relevant development] 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 (see, by analogy, Case C-236/01 Monsanto…, para. 106 and 113)".*

100. It should be recalled, at this point, that para. 106 of the judgment in *Monsanto* (quoted in para. 97 above) is the paragraph which expressly says that decisions should not be made on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified. Thus, although the CJEU, in para. 59 of its judgment in *Waddenzee* refers to the planning authority having "*made certain that [the development] will not adversely affect the integrity of that site*", the CJEU was clearly not intending to override or reverse the approach taken previously in *Monsanto*. On the contrary, the CJEU was reiterating the approach taken in para. 106 of *Monsanto*. In the circumstances, it seems to me that the submission of counsel for the respondent is correct. As an expert body, the respondent is in a much better position than the court to form a view as to whether a risk which was described by an expert as no more than "*negligible*", is sufficiently remote to be discounted in the context of an Article 6 (3) appropriate assessment of risk. In my view, having regard to the approach taken in *Monsanto*, the respondent was not required to be absolutely certain that a bog movement or landslide would never occur in the future. The relevant standard is reasonable doubt.

Post consent conditions

101. As noted in para. 20 above, the applicant makes a number of complaints in relation to the conditions imposed by the respondent and contends in particular that the conditions leave over a number of matters for consideration at a later stage, post consent. The applicant submits that this is contrary to the approach taken by the CJEU in *Holohan*. The applicant also contends that condition 17 imposes no more than generic construction techniques and does not include a zero silt requirement such as the condition imposed in the *People Over Wind case*.

102. In *Holohan*, the CJEU made clear that a planning authority may only leave matters over for future determination where the authority is certain that the planning consent

establishes sufficiently strict conditions to guarantee that the integrity of the Natura site will not be adversely affected. At para. 47 of its judgment in *Holohan*, the CJEU said:-

> *" … Article 6(3) … must be interpreted as meaning that the competent authority is permitted to grant to a plan or project development consent which leaves the developer free to determine later certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site."*

103. If condition 16 were to be read on its own, one might form the impression that the respondent had left over for future determination the details of the CEMP relating to the method statements for construction, the location of the site and material compound and the other elements of the construction required for the development to be carried. One might also get a similar impression from what is said by the inspector at p.p. 89-90 of his report (quoted in para. 77 above) where he speaks of the proposal to prepare a detailed CEMP and a construction stage SWMP. However, condition 16 and the relevant section of the inspector's report must both be read in context. In particular, they must be read in the context of condition 2 and the detailed mitigation measures which are required to be put in place as a condition of the grant of permission. Under condition 2, Silverbirch is required to implement all of the environmental, construction and ecological mitigation measures set out in the EIS, the NIS and the other particulars furnished in the course of the planning appeal process including Dr. O'Connor's report. These include, insofar as condition 16 is concerned, all of the material set out in Chapter 2 of the EIS dealing with the construction of turbine foundations, associated crane hardstanding areas, drainage infrastructure, borrow pits/repositories, windfarm entrances and access roads which are described at p.p. 657-662 of the EIS. They also include the detail in relation to construction materials, tree felling, forestry replanting works, site establishment (including temporary site facilities and access) at p.p. 678-679 of the EIS. In addition, further details are given in relation to crane hardstanding area construction, turbine foundation construction and drainage construction and borrow pits at p.p. 680-683 of the EIS. Thus, it is clear that the matters listed in condition 16 are already addressed in detail in the material which must be read with condition 16. The CEMP required under condition 16 is necessary so that the local planning authority will be in a position to maintain oversight and control during the construction phase. As counsel for the respondent said, in the course of oral submissions, condition 16 is not, as contended by the applicant, a licence to agree terms and conditions in the future. It must be seen against the framework of what has been already been addressed in detail in the EIS. To paraphrase what has been said by the CJEU in *Holohan*, the decision of the respondent contains conditions in condition 1 and condition 2 that are, when read with the underlying documents, detailed enough and strict enough to ensure that the parameters of condition 16 will not adversely affect the Blackwater SAC or the freshwater pearl mussel in particular.

104. Insofar as condition 17 is concerned, it provides that, prior to commencement of construction, construction-stage details of proposals for the management of surface water by means of a construction SWMP must be submitted to and agreed with the planning authority. Again, if one read condition 17 on its own, one might form the impression that, contrary to *Holohan*, the decision of the respondent left over important matters to be agreed in the future. However, as in the case of condition 16, it is clear that the parameters of the SWMP have already been addressed in detail in the material filed during the course of the appeal, in particular in the SWMP described in paras. 88 to 90 above. By virtue of conditions 1 and, in particular, condition 2, Silverbirch is obliged to carry out surface water management measures in accordance with the existing SWMP. The purpose of condition 17 is to ensure that the local planning authority will be in a position to oversee and monitor the carrying out of those surface water management measures in accordance with the criteria set out in the SWMP which has already been reviewed and accepted by the respondent. In those circumstances, I cannot see how there is any breach of the principles laid down by the CJEU in *Holohan* insofar as condition 17 is concerned.

105. As noted in para. 20 (g) above, the case is also made that condition 17 imposes no more than a requirement to follow generic construction techniques and that the condition fails to impose a zero silt limit such as that imposed in the *People Over Wind* case. However, as discussed in paras. 86-87 above, there is, in substance but not in name, a zero silt requirement in this case as a consequence of the commitment made by Silverbirch that any surface water run-off must be treated to ensure that it is free from suspended solids oils or any other polluting material. Furthermore, there are a suite of very specific measures which Silverbirch is required to take in this case (as outlined in paras. 88 to 91 above) which are very clearly designed to ensure that sediment is not released into any watercourse. Very specific measures are to be put in place which are designed to protect the freshwater pearl mussel. The measures in question are detailed and impressive and I do not believe that one can dismiss them as being merely "*generic*".

106. With regard to condition 18, it provides for a number of measures in order to protect water quality and aquatic ecology including the freshwater pearl mussel. Condition 18 requires that the water quality downstream should not materially deteriorate as a result of felling or construction. It also requires that proposals for a detailed programme of water quality monitoring throughout the construction period should be submitted to and agreed with the planning authorities. Finally, it requires that continuous turbidity monitors should be installed upstream and downstream of the site during any felling activities and construction. Similar issues arise in relation to condition 18. The applicant argues that condition 18 is not sufficiently precise. The case is also made that it leaves over matters for agreement with the planning authority. There is also a contention that the relevant standard to which monitoring is to take place is not specified anywhere in the condition.

107. I take a similar view in relation to condition 18 as I did with regard to conditions 16 and 17. While condition 18, on its face, might appear to be imprecise and contrary to the

Holohan principle, it must also be read in context. In particular, it must be read with condition 2 and with all of the material that was placed before the respondent which Silverbirch is now required to implement in order to protect the freshwater pearl mussel. This includes all of the measures previously discussed in paras. 88 to 91 above and the measures in the report of Dr. O'Connor. That report also provides the relevant limits against which the requirements of condition 18 are to be assessed. Insofar as matters are left over for agreement with the local planning authority, it is clear that the measures in question have already been prescribed in the EIS and the SWMP which were before the respondent and which are now enforceable pursuant to conditions 1 and 2. It is important that the local planning authority should have oversight and control over the carrying out of the measures (the parameters of which are already set out in the material furnished to the respondent) so as to ensure that Silverbirch and any contractor retained by it should fully implement the measures concerned.

Conclusions in relation to appropriate assessment

108. For the reasons discussed in paras. 101 to 107 above, I am of opinion that the case made by the applicant in relation to conditions 16, 17 and 18 must fail. It also seems to me that the balance of the applicant's complaints in relation to appropriate assessment, insofar as the freshwater pearl mussel is concerned, has not been made out. The only element of the applicant's case that succeeds in relation to appropriate assessment is in relation to the hen harrier to the extent that it is unclear from the inspector's report how a conclusion could have been reached that all of the potential impacts on the hen harrier had been satisfactorily resolved at the stage 2 appropriate assessment.

EIA

109. It is fair to say that, save for the issue addressed in para. 110 below, there was very little discussion at the hearing (or in the written submissions of the parties) of EIA issues. The principal argument made on behalf of the applicant was that there was no evidence that any EIA had been carried out by the respondent. This was on the basis that there is an absence of any reference to the carrying out of an EIA in the board direction issued by the respondent or in the decision ultimately made by the respondent. Nonetheless, the applicant also made a case (as recorded in para. 20 above) that there had been no satisfactory analysis, evaluation or assessment of the direct and indirect effects and impacts of the proposed development on the receiving environment contrary to ss. 171A and 172 of the 2000 Act and Article 3 of the EIA Directive (Directive 2014/52/EU). The case was also made that the only EIA carried out was in respect of turbines 8 and 9 and that no assessment of the remaining turbines had been carried out. To that extent, there was an overlap between the case made in relation to appropriate assessment and in relation to EIA.

110. The first issue to be addressed is whether, having regard to the absence of any reference to an EIA in the board direction and decision of the respondent, it can be said that an EIA was carried out by it. In this context it is clear from the board direction dated 23rd November, 2018 that the decision of the respondent to grant permission for the development was significantly based on the inspector's report and recommendations. The second paragraph of the board direction expressly states that the respondent:

"…decided to grant permission generally in accordance with the Inspector's recommendation …".

The board direction also refers to the EIS submitted by Silverbirch.

111. In its subsequent decision of 27th November, 2018 the respondent explicitly had regard to, *inter alia*, the EIS the submissions and observations made in connection with the planning application and appeal (including the observations and submissions made in relation to the environmental and Natura impacts of the proposed development), and the inspector's report. The decision also expressly states that the respondent accepted and adopted the appropriate assessment carried out in the Inspector's report in respect of the potential effects of the proposed development on the conservation objectives of, *inter alia*, the Stacks SPA and the Blackwater SAC. It will be recalled that the inspector, in his report, expressly adopted, as part of his appropriate assessment, the assessment previously described in the EIA exercise carried out by him. That said, it is striking that there is no express adoption by the respondent of the EIA carried out by the inspector.

112. The relevant legal principles are very usefully summarised and considered in the judgment of Cregan J. in *Buckley v. An Bord Pleanála* [2015] IEHC 572. In that case, there was a sentence in the decision of the respondent in relation to EIA in which the respondent stated that it noted the inspector's report. The question which arose for consideration was whether that was sufficient to establish that the board had adopted the inspector's report (which contained a very full EIA). The applicant in that case argued that there had been no adoption of the inspector's report as required by s. 172 (1H) of the 2000 Act under which it is provided that, in carrying out an EIA, a planning authority or the respondent may have regard to and adopt in whole or in part any reports prepared by officials, consultants, experts or other advisors.

113. In his judgment, Cregan J. reviewed the relevant case law including the decision of the Supreme Court in *Ní Eili v. EPA* (Supreme Court, unreported, 30th July, 1999, Murphy J.), the decision of Clarke J. (as he then was) in *Maxol v. An Bord Pleanála* [2011] IEHC 537, the decision of Finnegan J. (as he then was) in *Fairyhouse Club Ltd v. An Bord Pleanála* (High Court, unreported, 18th July, 2001), the decision of Kelly J. (as he then was) in *Cork City Council v. An Bord Pleanála* [2007] 1 I.R. 761 and the decision of Baker J. in *Ogalas v. An Bord Pleanála* [2015] IEHC 205. Those decisions demonstrate very clearly that it is not necessary that the respondent should expressly adopt the report of an inspector where it is reasonable to conclude that the respondent adopted the reasoning of the inspector in arriving at its decision. Cregan J. also cited, in this context, the observations of McCarthy J. in the Supreme Court in Re. *XJS Investments Ltd* [1986] I.R. 750 where McCarthy J., at p. 756, stressed that planning documents are not to be read in the same way as legislation emanating from skilled draftsmen. They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training. Cregan J. also referred to the judgment of Haughton J. in *Ratheniska Timahoe and Spink Substation Action Group v. An Bord Pleanála* [2015] IEHC 18. At para. 117 of his judgment, Cregan J. came to the following conclusion:-

"117. On the facts of the present case, it is clear that the inspector carried out an [EIA]. Indeed the Applicant accepts that were this 'adopted' by the Board then its argument would fall away. In circumstances however, where the Board in its decision, at the very outset, stated that it decided to grant permission 'generally in accordance with the inspector's recommendations for the following reasons and considerations and subject to the following conditions' and that it had regard to 'the report of the inspector' and that it adopted all 25 conditions in the Inspector's Report, I am of the view that it is clear that the Board did 'adopt' the Inspector's Report and carry out an appropriate EIA in accordance with its statutory obligations."

114. The present case is not quite on all fours with the facts which were considered by Cregan J. in *Buckley*. Nonetheless, it seems to me that, applying the principles set out in the judgment of Cregan J. and the further case law analysed by him, the result must be the same. In this case, the respondent expressly stated in the board direction drawn up on the date of the meeting at which the respondent considered the appeal that it decided to grant permission generally in accordance with the recommendations of the inspector. In addition, as noted in the decision itself, the respondent expressly states, as part of its reasons and considerations, that it has had regard to the report of the inspector. Furthermore, in common with the facts considered by Cregan J. in Buckley, the conditions attached to the respondent's decision are precisely those which were recommended by the inspector. In those circumstances, it seems to me to be reasonable to conclude that the respondent adopted the report of the inspector for the purposes of arriving at its decision. Thus, if the inspector carried out an EIA which meets the requirements of s. 171A of the 2000 Act and of the EIA Directive, it follows that this has been adopted by the respondent. In such circumstances, there is no substance to the complaint made by the applicant that the respondent failed to carry out an EIA.

115. It is therefore necessary to consider (to the extent that this arises on the basis of the statement of grounds) whether the EIA carried out by the inspector satisfies the requirements of s. 171A of the 2000 Act and the EIA Directive. In this context, it is important to bear in mind that the focus of the applicant's case has been the hen harrier and the freshwater pearl mussel. While that case was principally made in the context of appropriate assessment, this overlapped with the case made in respect of EIA. The applicant contended that there had been a failure to examine, analyse and evaluate the direct and indirect effects of the proposed development on the hen harrier and the freshwater pearl mussel. There was no attack on the EIA in other respects. This is unsurprising given the very extensive material contained in the report of the inspector in relation to EIA. The inspector's report runs to 137 pages in total. 61 of those pages are taken up with the very detailed EIA carried out by the inspector which, subject to what I say below in respect of the hen harrier, assesses the direct and indirect effects of the proposed development on each of the interests identified in s. 171A (1) of the 2000 Act.

116. Insofar as the hen harrier and the freshwater mussel are concerned, I have already explained in paras. 46-61 above that the inspector has identified all of the potential

effects on both species in his report. Furthermore, having regard to my finding that precise and definite conclusions have been reached as to the absence of adverse impacts on the freshwater pearl mussel, it must follow, in my view, that, for the purposes of EIA, this amounts, in substance, to a finding that there will be no direct or indirect effects on the mussel.

117. The position is, however, different insofar as the hen harrier is concerned. I have already drawn attention in paras. 72 - 74 above to the fact that the report is silent in relation to the effects on the hen harrier in respect of those elements of the development other than turbines T8 and T9. It seems to me to follow that the report is insufficiently complete to form the view that the inspector has identified all of the actual effects (whether direct or indirect) of the development on the hen harrier. As noted in para. 76 above, it may well be the case that the inspector was in a position to form the view that the development (other than turbines T8 and T9) would not have an effect on the hen harrier. However, as the report does not, in my view, rule out the possibility that such effects might occur, I am compelled to conclude that there was no sufficient evidence that an EIA was completed in respect of the effects of the development (other than turbines T8 and T9) on the hen harrier. It seems to me to follow that, accordingly, the decision of the respondent must be quashed on the grounds that there is insufficient evidence to conclude that an EIA was completed in respect of the effects of the development on the hen harrier. However, there may well be a basis to remit the matter to the respondent for further determination. I will, however, postpone making any order to that effect pending further submissions from the parties.

Overall Conclusion

118. For the reasons outlined above, I have come to the conclusion that the decision of the respondent must be quashed on the grounds set out in paras. 76 and 117 above. I find against the applicant in relation to the balance of the claim made by it. I will hear the parties in due course in relation to any consequential orders that should follow. I will also hear the parties in relation to whether or not the matter should be remitted to the respondent.