[2019] IEHC 929

THE HIGH COURT

[2018 No. 708 JR]

BETWEEN

M28 STEERING GROUP

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice MacGrath delivered on the 20th day of December, 2019.

Introduction

1. The applicant is an unincorporated environmental Non-Governmental Organisation ("*N.G.O*.") and has its office at Rochestown, County Cork.

2. The notice party, Cork County Council ("*the Council")* on behalf of the Roads Authority, proposes to upgrade 12.5 kilometres of the existing N28 national road. Part of this road development is along the line of the existing N28, but a substantial part of it is offline. The scheme is entitled "*The Cork County Council M28 Cork Ringaskiddy Project Motorway Scheme, Protected Road Scheme and Service Area Scheme, 2017*". The scheme was made by the Roads Authority under s. 47 of the Roads Act, 1993 (as amended which includes part XAB of the Planning and Development Acts, 2000-2016 and hereinafter referred to as "*the Act*") and it requires the *approval* of An Bord Pleanála (hereinafter "*the Board*") under s. 49. Before approving the scheme, a public inquiry must be held and objections and observations considered. By virtue of the provisions of s. 51 of the Act, the consent of the Board must be obtained *prior to the carrying out* of the scheme. The submission of an Environmental Impact Statement ("*EIS*") is mandatory by virtue of the provisions of s. 50. The Notice Party sought the consent of the respondent for the proposed development. An EIS was prepared and submitted, together with a Natura Impact Statement ("*NIS*") which was contained in the EIS and was prepared for the purposes of Article 6 of the Habitats Directive.

3. The application for the consent was made on 15th May, 2017. The application pursuant to s. 49 was made on the 2nd June, 2017 and included particulars of compulsory purchase requirements, restrictions of access/egress and rights of way to be extinguished. A mapping error was discovered by the notice party in relation to the proposed extinguishment of certain rights of way and a corrected map/plan was submitted, following re-advertisement, on 6th July, 2017.

4. Part of the land being acquired includes a portion of the existing Raffeen Quarry (hereinafter "*the quarry").* The quarry enjoys the benefit of a planning permission granted in 2008. It is proposed that material from the quarry will be used in the construction of the road. This is controversial as it is contended by the applicant that it will not be possible to extract materials at the required rate without the terms of the quarry planning permission being contravened, that the extraction of the materials at the rate required

has not been the subject of an Appropriate Assessment ("*AA*") and that the environmental impacts of the road and an operational quarry with such levels of extraction require to be considered and assessed as one project, an exercise which has not been carried out. The timing of the application for consent is also controversial, having been made on the eve of the coming into effect of a new 2014 EU Directive, which altered the requirements for such application for consent.

5. The Board appointed an inspector, Ms. Mary Kennelly, to report on the proposed development. Objections were raised by a number of parties, including the applicant. An oral hearing was convened. This took place in November and December, 2017. The Board also appointed a traffic consultant who reported on the 1st May, 2018. The inspector considered the proposed development and recommended that consent be given subject to several conditions. She concluded that subject to the mitigation measures proposed on the conditions attached to the permission, the effects of the proposed road development on the environment would be acceptable.

6. By order dated 29th June, 2018, the Board granted approval and in doing so adopted the recommendations of the inspector, including the proposed conditions. The decision of the Board is challenged in these proceedings.

The Pleadings

7. The applicant, *inter alia*, seeks the following orders:

(1) An order of certiorari quashing the decision of the respondent dated 29th June, 2018;

(2) A declaration that the Board erred in national and EU law in failing to assess the environmental impacts of the proposal as a whole, or cumulatively (or in combination with) other projects. In particular, it is alleged that the respondent failed to properly or at all consider the full effects of the development in terms of the extraction of materials from the quarry required to give effect to the development.

(3) A declaration that the Board erred in law in failing to apply Directive 2014/52/EU ("*the 2014 Directive*") which amended Directive 2011/92/EU ("*the 2011 Directive*"). In the alternative a declaration that the Board erred in law in accepting the application made in respect of s. 51 of the Act on the 15th May, 2017. The application was premature, incomplete and did not meet the requirements of National and European law. As such, the application was invalid and ought to have been rejected by the Board.

(4) In the further alternative, if the application was validly made pursuant to the 2011 Directive, the Board failed to carry out an adequate EIA as required by Article 3 and/or Article 8 of that Directive, on the assessment of the effects of certain public and private projects on the environment ("*The Consolidated Environmental Impact*

Assessment (EIA Directive)") and/or s. 171A of the Planning and Development Act 2000, as amended.

(5) A declaration that the Board erred in law and acted contrary to fair procedures and natural and constitutional justice and acted in breach of EU law and the Aarhus Convention in failing to make available a copy of the planning file pursuant to a request made on the 27th July, 2018 which request was not complied with until the 16th July, 2018. This ground was not particularly advanced at hearing.

8. After the Board had made its decision, the applicant sought a copy of the quarry planning file and this was supplied. An application to amend the pleadings was sought and granted by Barniville J. on 19th September, 2018. In amended statement of grounds the applicant also claims a declaration that the Board failed to properly carry out an AA in respect of the proposed development. This particularly concerns the alleged failure of the respondent to conduct an assessment of the effects of the extraction of materials for the proposed roadworks from the quarry, either as part of the project or in combination therewith.

The Decision of the Board

9. The Board in its decision expressly stated that it had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. These included the submissions and observations received in accordance with statutory provisions. In particular, it states that it had regard to the range of proposed mitigation measures set out in the EIS, the NIS and the schedule of commitments.

10. The Board agreed with the screening assessment and conclusion in the inspector's report that the Cork Harbour Special Protection Area ("*SPA*") and the Great Island Channel Special Area of Conservation ("*SAC*") are European sites for which there is a likelihood of significant effects. The Board stated that it had considered the NIS and the submissions. It confirmed that it carried out an appropriate assessment of the implications of the proposed road development for European sites; and that the information before it was adequate to permit the carry out of that assessment. In completing the assessment, the Board stated that it had considered, in particular, the likely direct and indirect impacts arising from the proposed road development, both individually or in combination with other plans or projects, the mitigation measures which are included as part of the current proposal and the conservation objectives of the European sites. It accepted and adopted the appropriate assessment carried out by the inspector of the potential effects of the proposed road development on European sites, having regard to the sites' conservation objectives. It was satisfied that the proposed road development would not adversely affect the integrity of those sites in view of their conservation objectives.

11. With regard to the environmental impact assessment (hereinafter "*EIA*"), the Board confirmed that it completed an EIA under the provisions of the 2011 Directive taking into account:

i. nature, scale, location and extent of the proposed road development;

ii. the EIS and associated documentation submitted with the planning application;

iii. the submissions;

iv. the responses from the applicant;

v. the mitigation measures proposed; and

vi. the traffic and transport consultation report.

12. The Board was satisfied that the information was adequate to identify and describe the direct and indirect effects of the proposed development. It considered that the EIA of the proposed road development, by itself or in combination with other development in the vicinity, and concluded that, subject to the mitigation measures proposed, and the conditions set out in its decision, the effects of the proposed development on the environment would be acceptable. In doing so it adopted the inspector's report. With regard to the proper planning and sustainable development in the area, it concluded that:-

> *"the proposed development would not have significant negative effects on the community in the vicinity, would not give rise to a risk of pollution, would not give rise to unacceptable visual or landscape impacts, would not have a detrimental impact on archaeological and architectural heritage, would not seriously injure the amenities of the area or of property in the vicinity and would be acceptable in terms of traffic safety and convenience."*

It decided that a number of conditions, including that the proposals, mitigation measures and commitments set out in the EIS and as clarified in the schedule of commitments submitted by the local authority to the oral hearing on 1st December, 2017, must be implemented as part of the development. In passing it is to be observed that one of the conditions required omission of a proposed mitigation measure concerning the erection of an artificial nest box for the peregrine falcon. The flora and fauna of the area, including the quarry, had been much discussed at the hearing. This was because it was proposed to be located in an area which could give rise to conflict with the bird species for the Cork Harbour SPA. A number of other conditions not relevant to the current challenge were also imposed.

The issues

13. Counsel for the applicant, Mr. Collins B.L., submits that this case concerns two issues. Ms. Butler S.C., who represents the respondent, suggests that on closer analysis there are in fact five areas of challenge.

14. The two issues which the applicant states arise for consideration are:

i. The validity of the application for approval made under the Act and specifically whether a valid application was made on or before the 16th May, 2017 or as would

have the effect of taking the matter outside the ambit of the provisions of the 2014 Directive which came into operation on that date. It replaced and amended the earlier 2011 Directive. The affidavit contends that the application ought to be governed by the 2014 Directive and not the 2011 Directive.

ii. The Board failed to take into account all of the effects (direct and indirect) of the proposed development, especially the effect of the extraction of millions of tons of material from the quarry, which the applicant describes as being disused and ecologically significant. Further, it is submitted, that there was a failure by the Board to assess the effects of the development of the quarry to supply the material required to construct the road, either as part of the project itself or as part of the cumulative or in combination effects thereof. It is argued that the Board and the notice party seek to rely on a grant of permission which was obtained by the owners of the quarry, but without reference to its terms or without evidence that those terms were considered in the approval process. It is contended that the quarry does not enjoy a planning permission to operate at the level required to service the road development and will involve a twelve-fold increase in operations. It is claimed that this is not authorised, has never been assessed for environmental impact nor has an appropriate AA been conducted. This contention centres on the interpretation of the quarry permission. Thus, the planning permission in respect of the quarry is described by the applicant as being of key significance and the failure of the Board to concern itself with the terms and extent of that permission is alleged not to be in accordance with its obligations. Particular emphasis is placed on the proper interpretation of this permission in the light of the plans, specifications and information provided at the time of the application for that permission. It is submitted that there is no evidence that the quarry file was considered at any stage of the process. It is contended that this is a fundamentally incorrect approach to the approval and the EIA process and the Board must be satisfied that the development can be lawfully carried out in accordance with the plans and particulars lodged. The quarry permission authorises a continuation of the original pre-1963 established user and while extraction on a campaign basis was envisaged, it does not permit of the extraction of the quarry in a two-year period as, it is claimed, will now occur. It is further claimed that a conflict arises between the two permissions and the fullest assessment has been carried out in accordance with the requirements of *Commission v. Ireland* (C-50/09). An EIA of the quarry extraction is required. It is also claimed that as the road is to be constructed across the quarry the previous restoration conditions attached to that permission are unworkable.

15. The respondent submits that there are five issues:-

i. Whether the quarry should have been part of the road project;

ii. The assertion that the Board did not carry out a cumulative EIA of the road and the quarry;

iii. The alleged lack of AA in respect of the quarry works;

iv. Ecological complaints about a failure to assess the quarry; and

v. Which iteration of the Directive should have been applied to the project?

16. The respondent and notice party maintain that the applicant does not have *locus standi* to raise the issue of the quarry permission, the assessment of the quarry in 2012 or that the project should be regarded as one which involves the road and the quarry, such points not having previously been raised at the Board's inquiry or otherwise. It is contended that the applicant's challenge in this regard amounts to a collateral attack on the quarry permission, in circumstances where the party who has the benefit of the permission is not before the court and was not a party to the application; and is based on an assumption that the terms of that permission will be breached by the third party.

17. On the other hand the applicant maintains that it is not seeking to challenge the quarry permission or the 2012 review which had been conducted in respect of the quarry under s. 261A of the Planning Acts, but it points to the shortcomings of the review observing that, because the screening of the quarry in 2012 took into account the conditions which were imposed and attached in the determination in concluding that an appropriate assessment was not required, this was inadequate in the light of the jurisprudence of the European Court of Justice, and in particular the decision in *Commission v. Ireland*. Further, the applicant maintains that the review looked back, rather than forward, and never considered extraction at what it contends are such increased levels.

18. I address below the contents of the EIS and AA in so far as they are relevant. In the light of the contentions regarding the quarry, something ought to be said of the planning permission attaching to it and also the review which took place, as these were a particular focus of this challenge. First, the relevant evidence on affidavit ought to be considered.

The Evidence

19. The statement of grounds was verified by affidavit sworn on the 27th August, 2018 by Mr. Gerard Harrington, a businessman and a member of the committee of the M28 Steering group. The essential matters outlined in the statement of grounds and as described above were attested to. The grounds were subsequently amended and in a further affidavit sworn on 19th September, 2018, in support of the application to amend, he explains that at the time of the making of the application for leave to seek judicial review before the court on the 27th August, 2018, the applicant had not received a full copy of the Board's file. While the file in relation to the quarry had been sought from the Council, it had not at that stage been received. These documents were not available on line and the full file was delivered to the applicant's solicitors on the 17th September, 2018. It is explained that while the applicant had originally pleaded, in draft proceedings, the failure of the Board to carry out an AA in respect of the application, on the advice of counsel this ground was deleted in advance of filing the statement of grounds as the circumstances surrounding the assessments of the quarry were unknown. When the matter returned to court, counsel explained that there was a likelihood that once the full circumstances were known an application for an amendment would be required.

20. Mr. Harrington avers that on consideration of the quarry planning file and the materials received relating to it, it became apparent that no AA had been conducted in the course of the planning process. It was evident from the file that the site was proximate to, and linked with the Cork Harbour SPA, a European site. Included in the file were details of a screening for assessment which took place in 2012. Mr. Harrington avers that it is apparent from the report that the site was screened out on the basis that Monkstown Creek had not been designated at the time of the application for permission. It was also screened out on the basis that compliance with conditions attached to the permission that the levels of operation, and in particular blasting would be such as would not be likely to have significant effects on the SPA. While screening a development out on this basis is wrong as a matter of law, the level of quarry operation now contemplated as part of the road scheme involving its complete exhaustion in three rather than 30 years, has never been permitted, described or assessed either as part of the road scheme or the quarry permission. The quarry permission granted did not permit this development or any such intensification of user. He asserts that no consideration was given by the Board, in its assessment of the development proposal, to the quarry permission and that the road development is not compatible with such permission. Central to the applicant's argument is that the quarry permission permits a gradual 30 year extraction of the material above the water table and not the extraction of the same quantity of material over three years. He states that the quarry permission and conditions attached thereto were designed to regulate a development to be carried out at a much lower intensity over a greater timespan. A restoration plan was provided as a condition to the quarry permission and the laying of the road itself across the site will effectively mean that such restoration will not be possible.

21. Fundamentally, Mr. Harrington makes the case that as the development of the quarry in this manner is a new development, it forms part of the overall road project and is required to be described and assessed as part of that project as a matter of national and EU law. At minimum, he believes that the development of the quarry required to be assessed as part of the cumulative effects on the project. What is now envisaged is a very different development to that for which permission has been granted. He maintains that consideration of environmental matters against a baseline of a permitted and operating quarry is an incorrect approach in circumstances where the quarry is in fact disused. The proper baseline is that which currently pertains, *i.e*. a non- operating quarry, which will resume operation as a result of the scheme. This is a direct effect of the scheme and all such effects need to be assessed on both macro and micro levels. This has not been assessed. There is no description of the type or quantities of the materials to be used in the road development, no description of their sources other than an assertion that the quarry would supply the materials for the development and there is no assessment of such extraction.

22. While Mr. Harrington was initially critical of the failure of the Board to provide sufficient information for the purpose of consideration of Judicial Review proceedings, on the opening of this application Mr. Collins B.L., while maintaining such criticism, accepts that it is not of practical significance because the proceedings were in time.

23. Dr. Goodyear, an Ecologist, in an affidavit sworn by her in support of the application on 29th January, 2019, avers that she participated in the planning application and attended and gave evidence to the oral hearing. She raised a number of issues concerning the potential impacts on the fauna and flora of the quarry, including and in particular two species, being the peregrine falcon and the pennyroyal plant, which is protected under the Flora Protection Order 2015. It is considered an endangered plant species. She also raises the issue of the hydraulic link between the quarry and the nearby SAC and contends that the extraction at the proposed level has not been properly assessed as part of the road scheme. She avers that the development of the quarry at a massively increased extraction rate required to supply the road is a new development and requires a new application for permission or to have been assessed as part of the road approval scheme. Therefore it is either part of the project or a direct effect of it. In either event, it requires to be assessed in its own right and/or cumulatively in combination with the scheme. She also points out that it is not now possible to carry out the quarry restoration plan. Thus, ecological restoration of the quarry remains unaddressed. It is also unclear as to who is responsible for the quarry restoration.

24. Mr. Kevin Hanley, is also a member of the applicant steering group and resides immediately adjacent to the quarry. In his affidavit sworn on the 17th January, 2019 he echoes many of the concerns expressed by Mr. Harrington. He avers that the quarry has been inactive for over 20 years and as matters exist, he enjoys a quiet and peaceful existence. The quarry has become a wildlife habitat and has returned to nature. He expresses concern at the effect on his quality of life and that of his family in the event of a return to quarrying. His is one of 15 families living in the immediate vicinity of the quarry. There is a Montessori school within 100m of its northern boundary. The impact of the quarry in terms of dust and noise are directly linked to the intensity of the operations and he believes that on a simple analysis, blasting will require to be 12 times more frequent than the permission allows. He refers to an incident of a flying rock when the quarry was operational. Although no one was injured, structural damage was caused to his home and he fears that this will happen again. He is concerned that the complete extraction of the quarry in a three year period will be intolerable and expresses his belief that the 36 year period was calculated on the basis of the length of time it will take to extract the full amount of material from the quarry; and that the time limit was set based on the expected rates, being those undertaken historically. He expresses further concern about an unrestricted quarry activity in terms of hours of operation and truck movements.

25. An affidavit in support of the application was also sworn by Mr. Pat O'Donnell, Chartered Engineer, on 19th February, 2019 in which he addresses the procedures under s. 261 of the Planning and Development Acts, as amended, to which the quarry was subject. These provisions and procedures were enacted for the purposes of regularising the quarry industry. Quarries that had the benefit of pre-1963 user were required to be registered. The court shall address this in greater detail below. He outlines the nature of the application for permission made by the owner of the quarry. The registration document signifies that the quarry was a pre-1963 quarry with an extraction area of 26 ha and level of operation expressed to be 10,000 truck movements per year; which equates to 30/40

truck movements per day, or 15/20 loaded trucks leaving the site per day. This amounts to approximately 100,000 tons of excavated material per annum. He believes that there was no application for permission of an increase over the threshold of 100,000 tons per annum. This conclusion is supported by the EIS which accompanied the application for permission. The environmental impacts are calculated, described and assessed on the basis of existing operations. In his opinion, there is no evidence that an AA had been conducted as part of the s. 261 process and no NIS was submitted with the application. This was not surprising given the application was made in 2006 and the State had not then properly implemented the Habitats Directive. Nevertheless, mitigation was proposed on the basis of a quarry extracting at the level of 100,000 tons a year and employing three or four people. This is a small-scale operation. The environmental impacts of the quarry operations are directly linked with the intensity of operation. Most of the legal authorities on the subject of quarrying concern an increase in the intensity of operations. In this case, intensity of operation will be critical given the quarry's proximity to environmentally sensitive receptors. Mr. O'Donnell highlights a response by the quarry developer to queries raised by Cork County Council when permission was being processed. In one of those responses, the developer clarified that:-

> "*the future operation of the quarry is proposed to be on a 'campaign basis', subject to market demand. The predicted timeframe for the proposed works phasing has been based on current output of volumes and is consistent with the traffic generation figures that have been registered with Cork County Council at section 261 Registration stage."* (emphasis supplied)

26. Mr. O'Donnell avers that there is no doubt but that the quarry was intended to continue operating at its then extraction rates and although the rate may rise and fall with demand, the maximum level was defined in the lifetime of the permission and was set accordingly. The imposed conditions were predicated on such level of operation. Thus, for example, condition number 1 mandates that the development be carried out in accordance with the plans and particulars lodged, including the EIS, RFI and CFI. An appeal was lodged by the developer but only against certain conditions. The Board did not conduct a full EIA of the proposed development. In essence, he maintains that any assessment that was carried out was on the basis of 100,000 tons permitted. On appeal the Board made some minor changes concerning the deletion of traffic conditions but no particular reason was advanced for this. He asserts that it must be presumed that given that the levels of traffic were already set out in the plans and particulars, it was felt unnecessary to impose the secondary hard daily limit. The condition in respect of the blasting limitation remains. Mr. O'Donnell avers to his opinion, that having regard to the terms of the permission and the approval for the road, the proposed extraction of material cannot occur under the terms of the existing planning permission. In his view, extraction of material required at the rates necessary will involve in excess of a tenfold increase in extraction which he describes as a massive intensification of the development of the quarry. There are clear constraints on the operational hours of the quarry. He believes that if the material is extracted mechanically as proposed, the noise levels, dust levels and operating hours will increase exponentially and none of these effects have been

permitted or assessed. It was open to the quarry owners to submit an application for permission to permit extraction of the entire quarry over a two to three-year period but this was not done. An AA was not carried out when the s. 261 procedure was being conducted and he believes that the author of that review, Ms. Casey, was influenced in her conclusion by reason of the conditions which were imposed on the planning permission, which regulate a much lower extraction than is now envisaged.

27. A replying affidavit was sworn on behalf of the respondent by Mr. Chris Clarke, Secretary, An Bord Pleanála. He outlines the chronology of events and exhibits and refers to various documents which accompanied the application on 15th May, 2017, including the EIS and the NIS. The scheme/CPO application for approval was made on 2nd June, 2017. On the 22nd June, 2017, the Board received a letter from the notice party, stating that there was an error in a deposit map drawing which had been submitted with the scheme application. On 26th June, 2017, the Board wrote to the notice party requesting further information in the form of a revised deposit map drawing. The Board required publication of a new notice of the scheme/CPO application and extended the period for public consultation by six weeks. On 6th July, 2017, the notice party submitted the revised map drawing and associated details and on 12th July, 2017 confirmed publication of new notices. Numerous submissions were received including those from the applicant on 16th August, 2017. An oral hearing was convened and held between the 7th and 10th November, 14th and 17th November and 28th November to 1st December, 2017. The Board inspector prepared a report dated 31st May, 2018. The Board considered the applications at meetings on 6th, 13th and 28th June, 2018, and its direction of 29th June, 2018 records the determination of the Board to grant approval in accordance with the terms outlined therein. On 27th July, 2018, the applicant's solicitors requested a copy of the Board's file and Mr. Clarke avers that two discs located on the Board's file were forwarded to the applicant's solicitors in the mistaken belief that they had in fact contained the complete file.

28. By letters dated 3rd and 11th September, 2018, the applicant's solicitors wrote to the Board acknowledging receipt of the discs but requesting a hard copy of the file. That request was refused by the Board on 14th September, 2018. This was because the Board was handling a large volume of similar requests at the time and because it had understood that the applicant had already been furnished with an electronic copy of the complete file. By further email of the 17th September, 2018, the applicant's solicitors indicated that while the discs contained application documentation, the EIS, the NIS, and the submissions made to the Board at the oral hearing, they did not contain internal Board documentation, notes or memoranda. A complete copy of the Board file was provided to the applicant's solicitor by 20th September, 2018.

29. Mr. Bob O'Shea, is an engineer in the National Roads Office of Cork County Council, the notice party. In his affidavit sworn on the 22nd November, 2018 he verifies the contents of the notice party's statement of opposition and outlines the chronology of events. The motorway scheme was submitted for approval to the Board pursuant to s. 49 of the Act. Such schemes deal with matters such as compulsory purchase requirements, restrictions of access/egress to the carriageway and the extinguishment of public and private rights of

ways. No EIS or NIS is required or was submitted in respect of that application. Following the submission of the schemes to the Board, it became apparent to the notice party that there was a mapping error in one of the drawings which had not identified the public and private rights of way proposed to be extinguished. Mr. O'Shea states that it was for this reason that a new map was submitted. This was the sole error of the application. A revised deposit map drawing was prepared, published, made available for inspection in an extended time period and notices were erected in prominent positions at the public rights of way proposed to be extinguished. The revised deposit map drawing was furnished to the Board by letter of 5th July, 2017. On 11th July, 2017, a letter was sent by the notice party to the Board confirming republication in newspapers and other public notices.

30. With regard to the road development application, Mr. O'Shea avers that this was accompanied by an EIS and NIS and was received by the Board on 15th May, 2017. It is therefore contended that it falls to be considered by reference to the requirements of the 2011 Directive. He believes that this position is not altered by reason of the submission of the motorway scheme application on 2nd June, or as a result of re-publication due to the mapping error. It is his belief, and the position of the notice party, that the EIS complied with the requirements for the 2011 Directive including Article 5(2) and Annex IV thereof. Fundamentally, he maintains that the requirement to assess the development of the quarry as part of the cumulative effects of the project was in fact undertaken and that both the EIS and NIS address this. The potential for significant effects on the natural environment were addressed in the EIS. Thus, Mr. O'Shea states that it is acknowledged that the quarrying operations may affect plant species protected under the Flora Protection Order and breeding bird activities upon areas of quarry cliff face, principally through indirect disturbance, which previously supported the breeding peregrine falcon. The EIS also acknowledges that quarrying activities may result in increased release of dust and particulate matter which can reduce photosynthetic potential for plants associated with in situ and adjacent semi-natural habitats. The potential for cumulative effects on sensitive eco systems from dust and particulate matter during the construction and operational phases of the road and quarrying activities are also identified.

31. Mr. O'Shea avers that the whole project in this case is the proposal to construct the road, part of which is through the quarry, on lands acquired under the approved motorway scheme. The impact of the road development on the quarry was fully considered as part of the EIA and AA undertaken by the Board. These assessments took into account the existence of the quarry planning permission following the submission of an EIS by the quarry operator and the carrying out of an EIA by the notice party and the Board. The quarry planning permission exists independently of the road development application. He also contends that neither of the screening determination undertaken under s. 261A(2) nor the quarry permission were challenged by the applicant or any other party. The notice party signalled an intention to use materials extracted from the quarry in the construction of the road and this is referred to in the EIS, Volume 2, s. 17.4.2.1. It was identified in the EIS that the construction of the road will require approximately 2.2 million cubic metres (m3) of fill material. It is anticipated that approximately 1.15 million m3 of useable material will be excavated from the cuttings for the project and that,

therefore, there will be a deficit of material required to construct the project, including the project requirements for higher quality rock material, in the order of 1.05 million m3. It is anticipated that, where possible, the majority of the material will be obtained from the quarry under its current planning permission. The notice party maintains that this has the advantage of maximising the sustainable reuse of materials available close to the site, minimise carbon footprint, noise and air emissions associated with transport and adheres to the principle outlined in the Southern Region Waste Management Plan, 2015 – 2021.

32. Mr. O'Shea maintains that full consideration was given to the direct and indirect cumulative affects associated with quarrying activities. He also maintains that the applicant is incorrect in its assertion that the quarry permission does not permit extraction of material over a three year period and that extraction may occur on an accelerated basis does not amount to an intensification of user. The EIS dealt extensively with the flora and fauna of the quarry in its current condition and was considered extensively at the hearing. He avers that the conditions attached to the quarry permission will have to be adhered to and that it is significant in the context of the 2012 screening report for AA, that the Council was of the view that the quarry permission contained significant safeguards governing extraction activities, including those in relation to the potential for impacts on designated site areas for the purposes of the Habitats Directive. Thus, when the quarry permission was granted, following an appeal to the Board, the permission was restricted to extraction above the water table and measures were put in place in respect of surface water, hydrocarbon interceptors and the requirement to develop and implement environmental and storm water management systems.

33. Chapter 12 of the EIS contains a detailed ecological assessment of the quarry both for the section of the quarry within the CPO line and road footprint and those areas located north of the CPO line, being the entire boundary of the quarry. The EIS addresses the habitats and species found within the quarry. The flora and fauna in the quarry have been assessed in the EIS and the NIS. A detailed survey of the quarry, including a botanical survey and assessment of the wetlands in the quarry was completed by Dr. Cillian Roden. Pennyroyal was discovered in the quarry and translocation was proposed. An area of land was identified for this purpose and was included in the CPO. However, following publication of the EIS and during the course of the oral hearing further discussions with the National Parks and Wildlife Services ("*NPWS*") it was concluded that the pennyroyal in the quarry was in fact of the non-native variant. Mr. O'Shea alludes to this as an example of the detail into which the local authority went to address habitat and ecological issues. Further, throughout the EIA process, open dialogue took place with the NPWS and various specialist botanists/ecologists. The quarry was identified as an ecological receptor and the EIS evaluated it as a habitat complex which is considered to be of county importance ecologically. Habitats and species found within the quarry are described in s. 12.5.2 of the EIS. Table 12.18, identifies the quarry as an ecological receptor within the study area and the EIS addresses the ecological receptors located in the quarry, which are considered to be of county importance. Therefore, he avers that the quarry is not of national or European importance and there will be no direct or indirect impact on any Natura 2000

site as detailed in the NIS. He avers that there are no species within the quarry that are of European importance.

34. Mr. O'Shea also highlights the conditions attached to the consent to the road development. These include certain conditions to mitigate the environmental effects of the development. He disputes Mr. Harrington's averment that the quarry will only reopen as part, or as a result, of the proposed project and states that no evidence of this has been produced by Mr. Harrington. He also states that Mr Harrington's averments do not take into account the existence of the current quarry permission which permits extraction activities up to 2038, an activity which can be undertaken whether or not the road development project proceeds.

35. With regard to the allegation that there will be a tenfold intensification of the development, Mr. O'Shea believes that this is incorrect and takes no account of the fact the quarry operations by their very nature depend on an available market for material extracted. He re-iterates that any extraction of materials to be used in connection with the road development must be in accordance with the terms of the quarry permission and the conditions attached thereto. It is disputed that the quarry permission does not permit extraction of the material over a three year period or that if extraction occurs on an accelerated basis it will amount to intensification so as to require a new planning application. He states that if there was any substance to the contention that extraction was to be gradual over the entire 30 year period, given that ten years has now elapsed a maximum of two-thirds of the originally permitted limit would now be permissible. In his address to the court, Mr. Collins B.L. states that Mr. O'Shea is correct in this regard.

36. Mr. O'Shea also refers to the 2012 review. The primary impacts which could be caused to the Cork Harbour SPA by activities at the quarry relate to water quality and in particular the potential for contaminated runoff to affect habitats upon which species are dependent for feeding and in respect of which the SPA is designated. No potential for impacts on the Cork Harbour SPA were identified in the EIS prepared in connection with the 2008 quarry permission and he believes that this was a reasonable conclusion. The screening report noted the various safeguards contained in the 2008 permission, which govern extraction activities. In addition, he avers that stricter mitigation is proposed in respect of sensitive areas, including the quarry, and that such measures are detailed throughout the EIS. At Table 18.4 in the EIS it is recorded that the literature suggests that the most sensitive species appear to be affected by dust deposition at levels above 1,000 mg/m2/day. Therefore, once dust deposition rates are maintained within the standard guideline for human nuisance being 350 mg/m2/day the impact of construction dust on sensitive ecosystems is considered negligible. The mitigation measures in respect of dust are outlined in chapter 13. Mr. O'Shea also avers that the in-combination affects were considered in the NIS which indicated that quarrying operations would not contribute to a cumulative or in-combination impacts to the Cork Harbour SPA.

37. Mr. O'Shea takes issues with the suggestion that the correct baseline which pertains to the quarry is one based on a quarry which is not operating but will resume operation as a

result of the scheme. The quarry permission permits the resumption of quarrying operations with or without the scheme. The EIS and NIS address the baseline as of 2016, when the quarry was not operating. Thus, the baseline data was representative of conditions which prevailed at that time. He also takes issues with Mr. Harrington's averment that there was no assessment of the extraction. The earthworks quantities and material balances are described in volume two of the EIS in chapters 3, 11 and 17, specifically at ss. 3.13.51 and 17.4.2. Chapter 11 of the EIS, Volume 2, examines the soil's geology and hydrogeology along the proposed road scheme including the quarry.

38. Mr. O'Shea also objects strongly to the raising of issues relating to the AA in these proceedings as they were not raised by the applicant before the Board. The information was known or capable of being known to the applicant when it framed its objection and at the time of the oral hearing. He believes that the seeking and obtaining of the planning file for the quarry after the Board's determination is no answer to the applicant's failure to raise all relevant issues before the Board during its consideration of the road development application. Nevertheless, he avers that the NIS addressed impacts arising from the quarry and concluded that the quarrying operations will not contribute to cumulative or in combination impacts to Cork Harbour SPA. In particular, s. 5.5 of the NIS, entitled *"Conclusion of Impact Assessment*", addresses the potential of in combination effects. All possible sources of effects from the proposed road project, in combination with all other sources in the existing environment, and any other likely effects to arise from the proposed plans or projects were identified. While it is correct to say that the Monkstown Estuary was not part of the Cork Harbour SPA at the time of the quarry planning application, Mr. O'Shea avers that the applicant does not provide any evidence as to how this would alter the findings of the 2012 screening exercise, or indeed the conclusions contained in the NIS which were submitted as part of the road development application.

39. In a further affidavit sworn on 15th February, 2019, Mr O'Shea states the road development was assessed in the light of the existing conditions of the quarry permission, including blasting restrictions of four times per month and the obligation to cease extraction once the groundwater level reached.

The Quarry Permission and the 2012 Review

40. The quarry is owned by John A. Wood and Co. Ltd., which is not a party to the application or to these proceedings. It enjoys the benefit of a permission under planning reference number 06/10037 (hereinafter "*the quarry permission*"). Before this the quarry had the benefit of a pre-1963 use, a use which was accepted by Cork County Council when the quarry was registered under s. 261 of the Planning and Development Act 2000, as amended (hereinafter "*the Planning Acts").* The operators were directed to submit a planning application with an EIS. Planning permission was granted subject to a number of conditions. The conditions were appealed to An Bord Pleanála which modified them.

41. The planning application was submitted on the 29th August, 2006, and the nature and extent of the proposed development was described therein as:-

"Application for continuation of quarrying activities including the processing of aggregates, landscaping, restoration and associated works at the existing registered quarry lands at Raffeen Quarry in accordance with Section 261 of the Planning and Development Act 2000."

At para. 11 of the form, details were sought of any application in respect of a material change of use or retention of a material change of use, to which the answer "*N/A*" was given. At question 12, the applicant was requested to state any special reason for the selection of this particular site, to which was answered "*Limestone quarry in existence prior to 1963. The quarry has been registered under Section 261 of Planning and Development Act 2000*." The application was accompanied by an EIS. At question 29, an estimation of the number of employees and of traffic likely to be generated evoked a reply *"(a) Directly 4 (including one part-time) and (b) 10,000 truck movements per annum when quarry is in operation on a continuous basis*." The applicant places particular emphasis on these queries and replies as being fundamental to the proper manner in which the quarry permission ought to be interpreted. Emphasis was also placed on the EIS which accompanied this application and the reference to the extraction of materials on a campaign basis, based on local market demand and the fact that up to that time production of the quarry was intermittent. The EIS also referred to matters including excavation by excavator only refers to the equipment that might be used such as a loading shovel, mobile crusher and mobile screener.

42. The initial application envisaged that extraction would be completed over five phases to a finished floor level of approximately -20 0D. The operational times of the quarry were specified as between 7a.m. and 8p.m. and not on Sundays. It specified the number of employees. The applicant maintains that such level of employment and activity is inconsistent with and will be unable to accommodate the amount of excavation that will now be required. It is also stated that it is evident from the EIS, under the heading potential impacts that the baseline was its then current level of operations.

43. At para. 4.4 of the EIS it is acknowledged that the continued use of the quarry will have negative effects on the local population, that it will operate under strict guidelines and that current mitigation measures and those proposed in the EIS would ensure that the quarry was operated in such a way as to limit the impact on the surrounding environment. It was also noted that the Glounatouig stream flow through the northern part of the site and into the estuary at Monkstown Creek approximately 900 m downstream of the quarry site. A number of potential impacts were identified and it was stated there would be no direct impacts on any designated sites but that indirect impacts which may potentially occur and cause further deterioration in water quality of the Glounatouig stream. It was noted that there had been no direct discharges to the stream when the quarry was in operation and that assessment of the stream had indicated that the watercourse was moderately polluted in the vicinity of the site. Nevertheless, it was stated in the EIS that the continued use of the quarry should not result in a significant impact on the water environment.

44. A notice requiring further information was raised by the local authority. The developer was requested to advise whether the future operations of the quarry was proposed to be on a campaign basis or ultimately to be a full-time operation. Detailed verification/clarification was sought of (i) the proposed future operation of the site and (ii) the anticipated life of the quarry. The expected duration of each of the five phases was required to be outlined. In response, the predicted timeframe for the first proposed working phase was stated to be 0-36 years. The developer advised that the future operation of the quarry was proposed to be on a campaign basis, subject to market demand. The predicted timeframe for the proposed works phasing was based on current output of volumes and was consistent with the traffic generation figures that were registered with Cork County Council at s. 261 registration stage. Information concerning dust monitoring and the results of such monitoring was also sought. A restoration plan was addressed. Restoration was to be on a phased basis, those relating to phase 1 being primarily of a shrub and tree planting nature. The applicant also refers to a query which was raised concerning a requirement that the landscape/visual impact assessment should be revised to include an assessment from the N28 road improvement scheme.

45. Planning permission was granted by the local authority on 28th August, 2007, subject to 74 separate conditions. Significantly, condition number 43 provided that no quarry activity should take place below the water table. Thus, permission was authorised for the continuation of quarrying only for phase 1 of the proposed extraction plan. The condition provided that at the end of phase 1, *i.e*. when extraction reaches 16m OD or when the water table is encountered, whichever is the sooner, quarrying activities must cease and the site be reinstated, unless planning permission is obtained to continue operations. A condition was imposed regarding the operating hours of the quarry. Conditions were imposed in relation to noise levels, frequency of blasting (not to exceed four per month) and it was also provided that site landscaping and restoration should be in accordance with the plans submitted. Condition number 73 provided that a maximum vehicle movement of 34 vehicles per day should not be exceeded.

46. A number of the conditions attached to the permission were appealed to the Board and certain modifications were made. One such condition related to the frequency of blasting of no more than four times a month on the ground that the condition had the potential to restrict the operations greatly and that there did not appear to be an engineering or environmental reason for this. Messrs John A Wood and Co stated that they regarded this as an example of a new restriction for which they should be entitled to compensation pursuant to s. 261(8)(b) of the Act, if the condition was upheld. An appeal was also made against condition number 43 and it was stated that if the condition was upheld it would force the closure of the quarry. The developer protested that the local authority, in framing this condition, had effectively sought to render unauthorised approximately 76% of the authorised reserves of the site. Again, this suggested that compensation would arise in the event of this condition being maintained.

47. The Board appointed an inspector who visited the site on 2nd April, 2008. A report was prepared on 10th April, 2008. With regard to condition number 43, the inspector reported

that the timespan for phase 1 was estimated as 1-36 years based on what she described as a very low extraction volume of 100,000 tons/year on a campaign basis. She noted that if the rate increased to 300,000 tons/year then phase 1 timespan would decrease to approximately 10-12 years on a full-time basis. She thought that the completion of phase 1 would involve the clearing of the entire section of phase 1 prior to commencing phase 2, which was unrealistic and impractical. Nevertheless, she did not recommend any change to condition number 43. With regard to condition number 73, again no change was recommended. Condition number 24 regarding blasting operations was maintained in the final permission, the inspector having conducted an analysis of the number of dwelling houses in the vicinity and other potential receptors.

48. While the Board removed condition number 43, certain additional conditions were imposed including that the permission was for a period of 30 years from the date of the order and that no quarrying should occur below the groundwater level of 16 m OD. In its decision, the Board stated that it considered that the information set out in the EIS including the pumping tests was insufficient to assess the future impact of pumping in a large area which has an aquifer of extreme vulnerability with karstic features. Without that information the Board was not satisfied that the quarrying operation would not constitute an unacceptable risk to ground and surface water resources. Any development below that level should be subject to a future planning application. Condition number 73 was also removed but without any particular comment.

49. The appellant observes that the Board did not carry out a fresh assessment, rather dealt with particular conditions. The Board imposed a condition, condition number 21, stipulating that noise levels may be exceeded to allow temporary but exceptionally noisy phases in the extraction process or for a short-term construction activity which is required to bring long-term environmental benefits following written consent by the planning authority.

50. Mitigation measures were identified as was a restoration plan. Landscaping was addressed as part of the restoration works, on an as you go basis.

51. In July, 2012, Ms. Sharon Casey conducted a review under s. 261A of the Planning Acts to determine whether an AA was required and, if so, whether this had been completed as part of the planning process. In her review she noted that two Natura sites are located within 15km of the quarry; the Sovereign Island SPA and the Great Island Channel SAC. The potential for the quarry to give rise to environmental impacts on the qualifying features of the Sovereign Island SPA was ruled out on the basis of the scale of the quarry and its distance from the SPA. The potential for quarry activities to give rise to impacts of the Great Island Channel SPA was ruled out having regard to the distance, and its location down channel, from the SAC.

52. It was noted that the quarry is located some 900m west of the Cork Harbour SPA, another Natura 2000 site. The northern boundary of the quarry was described as being adjacent to the Glounatouig Stream which discharges into the Monkstown Creek, a part of the Cork Harbour SPA. Protection under the Natural Habitats Regulations, 1997 applied to

the Cork Harbour SPA, which had been designated for the occurrence of nationally and internationally important species on 21st November, 1994 pursuant to S.I. 349 of 1994. At the time of designation in 1994, the Monkstown Creek did not form part of the SPA. Amendments were made to the boundary of the SPA. Notification was given on the 27th August, 2008 of intention to designate the site under the Habitats Regulations, and Monkstown Creek was included within the SPA from that time. The decision of An Bord Pleanála on the quarry permission was given on the 16th July, 2008, prior to the extension of the boundary of the SPA. Therefore, as Ms. Casey noted, activities which were permitted after the designation of the Cork Harbour SPA required to be screened to determine whether they could be likely to give rise to impacts on the Cork Harbour SPA. Ms. Casey recorded that these included the phased extraction by drilling and blasting of limestone, crushing and screening of material on site and storage of aggregates on site to a finished floor level of approximately -20 OD and landscaping and restoration of the site. She observed that activities in the site had not given rise to any direct loss of habitat within the SPA and considered that the potential for blasting at the site to have caused disturbance to the SPA was low. She stated:-

> "The primary impacts which could be caused to the SPA by activity at this quarry relate to water quality, and in particular the potential for contaminated run off from the quarry to affect habitats upon which species for which the SPA is designated are dependant for feeding."

53. A review was conducted of the EIS, information submitted, the report of the inspector appointed by the Board and the permission conditions as amended. Ms. Casey observed that no potential for impacts were identified on the Cork Harbour SPA in the EIS. She considered this to be a reasonable conclusion having regard to the fact that the downstream estuary was not part of the SPA at the time the planning application was made, and the distance of the quarry from other parts of the SPA. She also observed the following:

(i) that the permission restricted extraction to above the water table;

(ii) the requirement that soiled surface water be directed to settlement tanks prior to discharge to the adjacent stream;

(iii) the requirement to install and monitor a hydrocarbon interceptor;

(iv) the bunding of fuel tanks;

(v) the requirement to develop and implement an environmental and stormwater management system for the site; and

(vi) that hydrocarbon interceptors with silt storage had to be constructed upstream of storm water outfalls.

54. Ms. Casey concluded:-

"Having regard to the conditions which were imposed, and the boundary of the SPA as it exited at the time that authorisation was granted for this development, I consider the potential for this quarry to have given rise to impacts on this site to be low…

… I consider that there was no requirement for development as permitted at this quarry under 06/100037, with conditions amended by PL 04.225610 to have been subject to Appropriate Assessment."

Submissions

55. The applicant contends that the application for approval pursuant to s. 51 of the Act which was submitted on the eve of the coming into force of the 2014 Directive was premature, incomplete, and did not properly describe the proposed development. It did not meet the requirements of either the 2011 or 2014 Directives and is invalid.

56. Under the terms of the 2014 Directive, and in particular Article 3(2) thereof, applications in respect of which the information referred to in Article 5(1) of 2011 Directive was received before the 16th May, 2018 continue to be considered under that Directive. Applications in which such information was received after the 15th May, 2018 fall to be considered under the 2014 Directive. In the instant application it is submitted that the information listed in Article 5(1) was received after the 15th May, 2017. Article 5(1) specifies the making available by the developer of the information specified in Annex IV of the Directive, which in turn requires that the developer make available a description of the project including in particular (but not limited to) a description of the characteristics of the whole project and the land-use requirements thereof during construction and operation. It is submitted that as the full land-use and land take description was not provided until the 22nd June, 2017 the required information was not provided before the transition date.

57. Mr. Collins B.L., on behalf of the applicant, contends that the CPO lines were submitted after the relevant date, particularly the information required under Article 3(2) of the Directive, which refers to the material in Article 5(1) of the 2011 Directive. Having regard to the fact that the quarry was omitted, an estimate of the type, quantity, expected residues, emissions, water and soil pollution, noise vibration, resulting from the proposed project were not submitted. The failure to characterise or describe at all the quarry development permeates all of the assessments. That the land use requirements only become apparent when the lands are identified, the CPO compiled and submitted for approval. The sequencing of the development should be to identify the lands in the first instance and to then conduct an EIS. Thus, the applicant maintains that the Council has reversed the sequencing solely for the purposes of circumventing or avoiding the deadline of the 15th May, 2017.

58. There is no description of the effects of the development on the environment through the extraction of such materials, nor is there any consideration of the use of natural resources. All of this information is required under Annex IV, however, it was not provided before the 15th May, 2018, and still has not been provided.

59. The application for scheme approval pursuant to s. 49 of the Act was not received until the 2nd June, 2017, was incomplete, and was supplemented by plans and particulars received on the 22nd June, 2017. It is submitted that this information was received after the 15th May, 2017, the date the 2014 Directive came into force. Re-advertisement of the application was required. This publication occurred *after* the 15th May, 2017.

60. Counsel places particular emphasis on what is described as the inevitable increased activity on site including blasting, crushing, screening, traffic movements etc. all of which, it is feared, will have additional significant impacts on the environment and that such increased activity has neither been assessed nor is it in accordance with the permission granted. In the quarry EIS it was stated that, in relation to noise that "*predicted that operations at Raffeen quarry will continue at approximately the existing extraction rate depending on market demand locally. There will be no increase in the amount of extraction equipment/plant on site."*

61. The notice party maintains that the motorway/CPO scheme did not constitute an application for development consent so as to engage the provisions of the EIA Directive. Following its submission, the notice party became aware of a mapping error in one of the drawings submitted as part of the application regarding identification of public and private rights of way. The drawing failed to indicate the public and private rights of way to be extinguished. This error was brought to the attention of the Board on the 22nd June, 2017. The submissions of the Board and the notice party are similar on this point. It is submitted that confirmation of the CPO is not in any sense a consent to carry out development on lands and therefore is not an application for development consent within the meaning of Article 2 of the 2011 Directive. Further, the correspondence received by the Board on the 22nd June, 2017 was provided solely in respect of a single mapping error and did not amount to further information.

    The Board did not invoke the provisions of s. 51(4) of the Act of 1993 requiring the furnishing of additional information. But, even if it had, this would not have had the effect of triggering the requirements of the 2014 Directive.

62. The notice party contends that in accordance with the provisions of O. 84, r. 20(3) of the Rules of the Superior Courts, an applicant is required to precisely state the grounds of challenge and it is submitted that insofar as this aspect of the challenge is concerned, there is no precision and that the application is vague.

63. In so far as any further information may have been sought or supplied after the transposition date, the respondent contends that pursuant to Article 5(2) of the Directive further information may be sought even after a scoping opinion has been provided, and this does not remove the application from consideration pursuant to the provisions of the 2011 Directive.

64. The central thrust of the response of the respondents and notice party is that the Directive is concerned with land use, rather than land take, which is the principal focus of the CPO. In any event, the application had been initiated before the 2014 Directive

became operational and therefore the 2011 Directive therefore applies. There was in fact no request for further information made by the Board.

65. The applicant also contends that the road and the quarry should be, and should have been, assessed as part of a single project. Counsel refers to the definition of project in Article 1(2)(a) of the Directive which includes the execution of construction works or of other installations or schemes and other interventions in the natural surroundings and landscape, including those involving the extraction of mineral resources and say that all of the activities that have been carried out fall within that definition. The obligation arises from *Commission v. Ireland* (Case C-50/09), linked to the precautionary principle, that the assessment must be as high as possible in environmental protection. In this regard, the road goes across the quarry. The quarry is of significant ecological importance. The impact of the development are not properly assessed. The assessment is narrow, confined to the area underneath the road in certain locations and is oblivious to the large-scale extraction works that are going to be carried out in the quarry. Mitigation measures in relation to issues such as the peregrine falcon appear to presume that the quarry will remain in its current condition. Far from a complete assessment, there is an absence of an assessment. On the Board's own admission, it does not look beyond the planning permission which the quarry has. It operates on the basis that the quarry may operate in accordance with its permission completely independently of the road and there will be no changed impact on the quarry permission as a result. Instead of contemplating the interactions that will occur in the site as required by European law, fictitious scenarios which can never occur have been in contemplation. This includes that the road is going to be idle in its construction at certain times every year. The manner of the construction, through the winning of materials from the quarry, requires to be assessed. Further, alternatively, the quarry planning permission will not be capable of being complied with in terms of restoration. Mr. Collins B.L. suggests that the notice party takes a different view as to what the quarry permission means because if the arguments before the court made by the respondent are successful, the notice party will still not be able to give effect to the development because they rely on a pre-existing permission as authorising the necessary extraction works. They will have to persuade the owners of the quarry to make a new application. No appropriate assessment was conducted. The test is whether the Board is satisfied that there will not be a significant effect on the integrity of the site. Permissions granted under the old regime have questions attached to them. The s. 261A procedures is also questionable.

66. It is contended by the respondent that the applicant does not seek to impugn the earlier decision. While it criticises the 2012 assessment, it doesn't challenge it. Section 261A concerns past works. The s. 261A scoping exercise is informative but is just a screening exercise. It does not grant anything to the quarry. The s. 261A determination is not concerned with the validity of the permission, rather with whether as a matter of law an appropriate assessment ought to have been carried out.

67. The respondent argues that there is no obligation on the Board to be certain that the development can be carried out in accordance with the plans and particulars lodged

before approval can be granted. The fact that planning permission cannot be implemented does not necessarily invalidate the permission. Planning permissions are frequently granted on the basis of the intentions of a developer, such as for example to obtain consents of third parties. If the third-party consent is not forthcoming, that does not mean that the planning permission is invalid. While the Board does not accept the applicant's interpretation of the planning permission attaching to the quarry, it is submitted that even if that interpretation is correct, it will not have the effect of invalidating the road approval.

68. The respondent also maintains that it was entitled to act on the basis of the validity of the quarry planning permission and it cannot be assumed that the quarry operator will breach the permission and thereby act illegally. Counsel also submits that on a proper interpretation of the planning permission, while there are undoubtedly conditions attached to the permission, none of them impose the restriction contended for by the applicant being 100,000 tonnes per annum. Further, insofar as the timespan is concerned, it is submitted that a proper analysis of the inspector's report shows that it speaks of phase 1 being *between 1 and 36 years*. Insofar as the restorative works are concerned, that condition effectively speaks to the full excavation of the quarry in all of the five originally planned phases. While the respondent accepts that an intensification of use may constitute a material change of use, it is not accepted that there must necessarily be a breach of planning permission which is interpreted by the applicant as imposing absolute limits which it does not in fact impose.

69. It is also submitted that the quarry and the road are legally separate projects, operated or proposed to be operated by separate developers. There is not one single developer, one single site for a phased development as may occur in the case of suggested project splitting. That there may be a linkage between two projects does not mean that they become one project which must be assessed as one. This is not a case of project splitting. The obligation is to look at the interaction between projects in the context of the cumulative assessment, rather than making all such projects part of the single project. With linear developments such as a roadway, linkages with other developments are likely. In this case, the EIS identified a range of projects for the purposes of the cumulative assessment.

70. It is never been the position of the Board that because the quarry had a previous planning permission that the Board did not have to concern itself with the quarry. The Board had before it the nature of the established quarry use, the terms of its planning permission and the information submitted for the quarry planning permission. It was therefore in a position to assess the effects of quarrying cumulatively with the road effects. Nothing which the Board has done in approving the road scheme or project served to vary the rate at which the quarry owner was permitted to quarry. The Board acknowledged that the quarry would be affected by the road development and the potential for cumulative effects was addressed in the EIS and also in the Board's assessment. This was assessed under various headings. Proposed mitigation measures were addressed. Dust and noise were assessed. The quarry was assessed as becoming a source of noise if it is used to

provide material for the road. Potential impacts of quarrying during construction are addressed. Terrestrial ecology was addressed as were issues concerning flora and fauna and the ecology within the quarry is considered in detail in chapter 12. The EIS addressed the question of the potential for indirect cumulative impacts to sensitive receptors, in the event that aggregate materials are extracted from the quarry to facilitate the road.

71. Regarding flora and fauna, it is submitted that the applicant fails to acknowledge that the quarry permission itself acknowledges the potential presence of the peregrine falcon and allows for the imposition of restrictions if quarrying activities disturb its breeding. The underlying expert evidence is that while the road presented a problem for various reasons, the active quarrying itself is not necessarily counter indicative to peregrine nesting. Not only is the quarry not a designated site, but the falcon is not a qualifying interest for any of the adjacent designated sites. Human effects are dealt with topic by topic as they arise, particularly in chapter 18 of the EIS.

72. The notice party argues that an AA was in fact carried out in respect of the road project, following a stage 1 screening process, and that in completing the assessment the Board considered the likely direct and indirect impacts arising from the proposed road development both individually and in combination with other plans or projects. It is further submitted that the in-combination effects were considered in the NIS which indicated that the quarrying operations would not contribute to cumulative or in combination impacts to the Cork Harbour SPA. This is not challenged. The notice party has never denied that the Glounatouig stream is hydrologically linked to the Cork Harbour SPA, it has advanced very definite conclusions that the quarrying operations will not impact on that site. It is submitted that the applicant advances no contrary evidence but makes a bald assertion that extraction will have significant impacts on the environment. Reliance is placed on the decision of Barrett J. in *Friends of the Irish Environment v. Fingal County Council* [2017] IEHC 695, in this regard. The applicant goes no further than to raise the *fact* of the hydrological link between the Raffeen Quarry and the Cork SPA but advances no evidence of any likely effects on the SPA or on any qualifying interests.

73. The notice party also strongly argues that none of the issues in respect of the AA, which are pleaded in the amended statement of grounds, were ever raised by the applicant at the oral hearing. The quarry operations were the subject of screening for AA in 2012 and it was concluded that there were no likely significant effects on the Cork Harbour SPA from the operation of the quarry. The applicant is engaged in an impermissible collateral attack on the quarry permission and/or on the 2012 screening assessment.

74. Counsel for the notice party relies on the decision of Finlay Geoghegan J. in *Friends of the Curragh Environment Limited v. An Bord Pleanala* [2006] IEHC 390 in which it is submitted the court categorically interpreted the Directive as requiring an EIA to be carried out only in respect of the development which was the subject matter of the application. There is a marked distinction between that case and this, because there it was all one project and here there are two discrete projects. Thus, even if the court is

persuaded that there is in reality a larger project present here, then the decision in *Curragh* provides a complete answer.

75. The notice party also submits that the Board had before it adequate material to justify its conclusions on the EIA for the proposed road development, including those concerning cumulative impacts and that it is not appropriate for the court to be asked to substitute its own view for those of the Board, an expert body.

The Role of the Court

76. This is an application for judicial review and it is important to recall the role of this court on such application. In so far as alleged inadequacies in the EIS and AA are concerned, the notice party argues that it is a matter for the first respondent to consider the adequacy of the information included in an EIS. This may, however, be subject to a review in accordance with the principles set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. In *People Over Wind v. An Bord Pleanála* [2015] IEHC 271, Haughton J. stated at para. 98:-

> *"It has been consistently held in the courts that it is for the deciding authority to determine whether the EIS and the information contained therein satisfies the requirements of the Regulations and is adequate."*

He re-emphasised that the standard of review applicable to the Board's decision in that regard was that set out in *O'Keeffe* at para. 101:-

> *"The Court can not interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."*

77. In order to show that the Board has acted irrationally, it is necessary for the applicant to establish that the Board "*had before it no relevant material which would support its decision*". Thus, the court's jurisdiction to intervene is not unlimited.

Failure to particularise the grounds of challenge

78. With regard to the objection of the notice party that the applicant has failed to properly particularise its grounds of challenge as required by O. 84, r. 20(3) of the Rules of the Superior Courts. At para. 6 of the statement of grounds it is pleaded that the application for approval pursuant to s. 51 was premature, incomplete and did not properly describe the proposed development. It is further pleaded at para. 7 that the respondent continued to consider the application which was incomplete and notwithstanding that the scheme approval sought under s. 49 of the Act was not received until 2nd June, 2017. It is pleaded that in turn even this application was incomplete and was supplemented by further plans and particulars on 22nd June, 2017. This information was received after 15th May, 2017 and re-publication and re-advertising occurred after that date.

79. Having considered the pleadings and the submissions of the parties, I am satisfied that the claim made by the applicant with regard to the question of the Directive applicable, has been sufficiently particularised as not to fall foul of the provisions of O. 84.

The approach of the Court to the determination of the issues

80. To some extent the arguments of the applicant on the adequacy of the EIS and AA overlap with the contention that a completed application was not submitted prior to the 15th May, 2017. Nevertheless, it seems to me that as a first step it is appropriate to consider the issue of which iteration of the Directive is applicable *("the Directive issue*"). If the applicant is correct in its contention that the 2014 Directive applies, then it is clear that the provisions of that Directive have not been adhered to and a fresh application will have to be made. The 2011 Directive required the submission of an EIS, whereas the 2014 Directive envisages a procedure whereby an EIA report be submitted. Save to the extent considered below, a determination on this issue in favour of the applicant would render it unnecessary to proceed to consider issues relating to the adequacy of the assessment which was carried out, and in particular with reference to issues concerning the "*quarry*". On the other hand, if the 2011 Directive is applicable then those issue will require consideration as will the issue of the *locus standi* of the applicant to make certain arguments regarding the project and the quarry.

The Directive Issue

81. The inspector addressed this issue in her report. She noted that while the 2014 Directive came into force on 15th May, 2014, with a requirement to be transposed into national legislation by 16th May, 2017, this had not been done. The Department of Housing, Planning, Community and Local Government issued a circular dealing with transitional arrangements and which stated that where an application for planning permission or other development consent with an EIS had been submitted before 16th May, 2017, the relevant provisions of the 2011 Directive must be applied.

82. The inspector noted that the observations and objections raised by the applicant's legal advisers at the oral hearing were that the Act of 1993 required that the scheme approval under s. 49 be sought together with the road development proposal consent; that they both should travel in tandem and that there was no basis in law for the practice of "*putting the s. 51 cart before the s. 49 horse*." It was argued that the scheme approval is a pre-requisite to showing that the Authority will have the legal right to carry out the development. Therefore the two applications should be considered, assessed and decided upon as a unitary project. This would mean that the application ought to be governed by the law in force when the latest of the papers relating to the s. 49 matter were lodged. Her conclusion on this issue is outlined at p. 61 of the report:-

> *"I note that s. 49 of the Roads Act 1993 (as amended) requires the submission by the roads authority of the scheme made by it under section 47…; S. 50 requires the preparation of an EIS and specifies the contents of the EIS; and s.51 requires the road authority to apply for approval and to submit the EIS to the Board, and states that the proposed development shall not be carried out unless it has been approved. S.51(7) (b) requires that where an application under s. 51 and a scheme*

for approval under s.49 relate wholly or partly to the same road development, a decision must be made on the two applications at the same time. However, I can find no reference to any provisions in the Roads Act, 1993 (as amended) to a requirement for the sequencing of the lodgement of the applications. As the application for the proposed road development was submitted to the Board, together with an EIS for the proposed development, on 15 May 2017, it is considered that the relevant provisions of Directive 2011/92/EU apply, as set out in Circular PL 1/2017." (emphasis supplied)

83. Ms. Kennelly also dealt with the submission made by the applicant that even if the s. 51 application was properly before the Board, it could not benefit from the transitional arrangements because the EIS submitted on 15th May, 2017 as it did not meet the mandatory requirements of Article 5(1), (3) and Annex IV of the 2011 Directive. It also had been argued that nothing could be added to the EIS after that date for the purposes of the audit by the Board. As the scheme plans were not before the Board for 2nd June, 2017 and because of other inadequacies in the EIS, it had been submitted that the information required by Article 5 had not been provided before 16th May, 2017 and therefore the 2014 Directive applied. Having considered the Departmental guidelines on EIA's issued in 2013, she commented that the EIS is part of the EIA process, which must be carried out by the Competent Authority and which includes consideration of submissions by the public, prescribed bodies and the applicant. On this, she observed at p. 63:-

> *"It is considered that the submission of the EIS is the starting point and that the information gathered in written submissions and at the oral hearing form part of the EIA process which will ultimately inform the Board decision. It is considered, therefore, that the relevant provisions applicable to the proposed development before the Board are contained in EU 2011 Directive/92/EU, as the application for the proposed development, together with an EIS, was submitted before 16th May 2017, and as such it falls within 'Applications on hand on or before 15th May 2017."*

84. Although a legal matter, she was therefore satisfied that the application was submitted prior to the 16th May 2017, the date for transposition of the 2014 Directive and therefore the 2011 Directive applied.

85. Article 3 of the 2014 Directive provides as follows:-

> *"1. Projects in respect of which the determination referred to in Article 4(2) of Directive 2011/92/EU was initiated before 16 May 2017 shall be subject to the obligations referred to in Article 4 of Directive 2011/92/EU prior to its amendment by this Directive.*
>
> *2. Projects shall be subject to the obligations referred to in Article 3 and Articles 5 to 11 of Directive 2011/92/EU prior to its amendment by this Directive where, before 16 May 2017:*

(a) the procedure regarding the opinion referred to in Article 5(2) of Directive 2011/92/EU was initiated; or (b) the information referred to in Article 5(1) of Directive 2011/92/EU was provided." (emphasis added)

86. Also of relevance is recital 39 of the 2014 Directive, regarding legal certainty:-

> *"In accordance with the principles of legal certainty and proportionality and in order to ensure that the transition from the existing regime, laid down in Directive 2011/92/EU, to the new regime that will result from the amendments contained in this Directive is as smooth as possible, it is appropriate to lay down transitional measures. Those measures should ensure that the regulatory environment in relation to an environmental impact assessment is not altered, with regard to a particular developer, where any procedural steps have already been initiated under the existing regime and a development consent or another binding decision required in order to comply with the aims of this Directive has not yet been granted to the project. Accordingly, the related provisions of Directive 2011/92/EU prior to its amendment by this Directive should apply to projects for which the screening procedure has been initiated, the scoping procedure has been initiated, (where scoping was requested by the developer or required by the competent authority) or the environmental impact assessment report is submitted before the time-limit for transposition."*

87. The statutory regime envisages two applications. One arises under s. 49 in respect of the *approval of the scheme* and the second under s. 51 in respect of the consent to the *carrying out* of the development. By virtue of the provisions of s. 47(2), a scheme must be in the prescribed form and specify certain matters including the land and any rights which it is proposed to compulsorily acquire, or any rights which it is proposed to extinguish. The scheme must also specify any planning permissions intended to be revoked or modified. It also provides at s. 47(2)(b) that the above matters shall, where appropriate, be described by reference to a map or maps. The section also specifies that the lands referred to which are the subject of the acquisition shall include land and rights in respect of land necessary for, or incidental to, the construction or maintenance of the scheme. Therefore, it is necessary that the lands in question be specified by reference to a map or maps.

88. By virtue of the provisions of s. 48, the Authority is obliged to take certain steps before submitting the scheme to the Board for its approval under s. 49, including necessary advertisements and publications and the service on every owner or occupier of any land referred to in the scheme of s. 47 and persons who are affected by proposed revocation or modifications of planning permissions. There is no suggestion in this case, that the mis-description and subsequent re-correction on one map affected any particular landowner or that he/she objected thereto on that ground. It is of note that no particular timeframe is provided in s. 47, which is not surprising as it is an empowering section, as to when it is necessary to apply for approval of the scheme under s. 49. Section 48

provides, however, that certain necessary steps must be taken *before* the scheme is submitted to the Board under s. 49.

89. I can find nothing in ss. 47 to 49 which make reference to particular time limits, or the order in which the applications for approval of the scheme and the consent to the carrying out of the works or development, ought to be made. Section 51 prohibits the *carrying out* of a proposed road development unless the Board has approved it or approved it with modifications. Section 51(2) imposes an obligation on the Authority to apply to the Board for approval and to submit an EIA prepared in respect of the development. It is therefore clear that whatever about the submission of a scheme for approval, that scheme cannot be carried out without obtaining the necessary consent from the Board and that the application for such consent will be invalid unless it is accompanied by an EIS. However, the Act makes provision for the timing of the *decision* in respect of both applications and it is clear from the provisions of s. 51(7) that a contemporaneous *decision* must be made in respect of the approval of the scheme and the approval concerning the carrying out of the works proposed by that scheme. Section 51(7)(b) provides:-

> *"(b) Where an application for approval under this section relates to a proposed road development, and*
>
> *(i) a scheme submitted to the Minister for approval under section 49…*
>
> …relate wholly or partly to the same proposed road development, the Minister shall make a decision on such approval and on the approval of such scheme or the making of such bridge order or the confirmation of such compulsory purchase order at the same time." *(emphasis added)*

90. That this is specifically provided for in respect of the timing of the decision, leads one to conclude that had it been intended that the *applications* be made at the same time, the Act would have so provided. This is the conclusion which, although not expressed as a legal opinion, was arrived at by the inspector and I see little reason to differ from her view in this regard.

91. I also believe that there is merit in counsel for the respondent's submission that the application under s. 49 addresses land take rather than land use, and is more concerned with and focuses on land ownership, rights of way, extinguishment of rights etc. The procedure under s. 49 concerns the acquisition, or extinguishment, of legal title to the land over which the road is going to be built.

92. Section 49 of the Act does not make express reference to the requirement that an application under that section be accompanied by an EIS or AA. It seems to me that if that had been the intention of the Oireachtas, it would have so provided. This fortifies the view that an application under s. 49 is concerned with land take, rather than land use. It seems likely that it is the use to which land is to be put that attracts the requirements of the Directive and the necessity for an EIS and, potentially, an AA.

93. Turning specifically to the issue in this case, the public rights of way and the private rights of way proposed to be extinguished were identified in schedule three of the scheme. The road development application was made on the 15th May, 2017 and was accompanied by the EIS and NIS. The scheme /CPO application was made on the 2nd June, 2017 and shortly thereafter it became clear that there was an error in a deposit map drawing submitted as part of the CPO /scheme. This deposit map drawing (No. M28/MO/02) did not properly identify all the public and private rights of way proposed to be extinguished. However, having considered the scheme as submitted, particularly the contents of schedule 3, parts 1 and 2, I see nothing to suggest that the rights of way were not described appropriately in narrative form. I am satisfied, therefore, that the information was provided in narrative form but was not fully mapped. The error in question had nothing to do with the use to which the land is to be put, rather it was concerned with the mapping of the rights to be extinguished, both public and private. Further, and in any event, necessary corrections were made before the decision was taken in respect of the applications.

94. In all the circumstances, I have come to the conclusion that the Board was correct when it considered the application under s. 51 in the context with the requirements of the 2011 Directive. Further, in my view the transition provisions of the 2014 Directive and in particular the principles of legal certainty enshrined in recital 39 thereof, supports the conclusion of the Board in this regard. Thus, in the event that the EIS and the AA as submitted are in accordance with the requirements of the 2011 Directive, the transition provisions of the 2014 Directive apply. Such assessments as are relied on were completed before the transposition date and it is difficult to envisage circumstances in which it could be said that the process had not been at least initiated in accordance with the provisions of the Directive.

95. I believe this to be consistent with decision of the ECJ in *Commission v. Germany* (Case C-431/92) where the Court observed at para. 32:-

> *"Informal contacts and meetings between the competent authority and the developer, even relating to the content and proposal to lodge an application for consent for a project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. The date when the application for consent was formally lodged thus constitutes the sole criterion which may be used. Such a criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive."*

96. In view of the Court's conclusions on this issue, it is therefore necessary to address the further points raised by the Applicant , with particular regard to the proposed rate of extraction and that the road and the quarry ought to have been considered as one project. Before doing so it is necessary to consider the locus standi of the applicants to raise such grounds of challenge.

Locus Standi

97. The respondent and the notice party object to the applicant raising issues before this court which were not raised before the Board. These include objections to the *locus standi* of the applicant to raise the arguments concerning the assessment of the quarry and the road as one project, that the assessment of the in-combination effects did not take into account what the applicant maintains will be an unlawful and impermissible use of the quarry, and that the assessment exercise conducted in respect of the quarry in 2012 was inadequate and not in accordance with what is required by the law as it has developed since then. As I understand the submissions of the respondent and the notice party, it is not a question of whether the court should, in the exercise of his discretion, refuse to grant the relief sought, rather it is whether the applicant has standing to make the case in the first instance.

98. It is fair to summarise the respondent and notice party's positions as being that while the applicant might enjoy general standing to mount a challenge to the Board's decision, it should not be permitted to raise an issue which was not raised before the Board, as to do so would be fundamentally unfair. If the issue had been raised, the notice party maintains that it would have had the opportunity to deal with it. The court is being requested to adjudicate on a challenge without the decision maker having had the opportunity to consider the matter. Thus an issue based *locus standi* argument arises.

99. Mr. Connolly S.C., counsel for the notice party, submits that while the court may have a discretion to entertain points in relation to the AA or the rate of extraction, if some reason had been given or some excusing factor advanced as to why those points were not addressed, no such reasons or excuse have been advanced in this case. He relies on *Casey v. An Bord Pleanala* [2004] 2 I.L.R.M. 296, where Murphy J. expressed the view that by raising a point before the Board, an applicant allows for the possibility of the Board to consider the points and if appropriate to provide immediate relief. He submits that the decision of the Supreme Court in *Grace and Sweetman v. An Bord Pleanala* [2017] IESC 10, discussed below, does not detract from the proposition which emerges from the earlier decisions of *Lancefort v. An Bord Pleanala* [1998] 2 I.R. 511 and Casey that the failure advance an adequate excuse should constitute a basis for barring him or her from challenging an administrative decision on that ground. The issue is not so much whether such persons are affected, but that they should not now be heard on the points that could or should have been raised in the course of the oral hearing.

100. The applicant maintains that the rules in relation to *locus standi* must be viewed in the light of *Grace and Sweetman*, where applicants who had not participated in the process under review were found to have *locus standi* to maintain a challenge to the Board's decision. Therefore, if such an applicant has *locus standi* in court proceedings, how can a person who has previously participated not enjoy standing to make a particular point that may not have been raised before the Board? It is submitted that the applicant's status as an NGO strengthens its position. But, the question arises, is the position different if a prior participant, including an NGO, fails to raise a *particular* point?

101. Article 11 of 2011 Directive on the assessment of the effects of certain public and private projects on the environment provides:-

> "1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> *(a) having a sufficient interest, or alternatively;*
>
> *(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;*
>
> *have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.*
>
> *2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.*
>
> *3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.*
>
> *4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.*
>
> *Any such procedure shall be fair, equitable, timely and not prohibitively expensive.*
>
> *5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."*

102. In *Grace and Sweetman*, in their joint judgment Clarke J. (as he then was) and O'Malley J., in considering the provisions of Article 11, held that the starting point of any analysis is to determine what national law says about standing. Noting the wording of Article 11, the court stated that there was no reason in principle why the language of Irish environmental judicial review standing law has to use the term "*sufficient interest*" for it to be compatible with EU law. It is open to the Oireachtas to provide for any standing rules considered appropriate provided that those rules, in whatever terms they are defined, meet the broad access to justice requirement. For this reason, the court observed that it was important in analysing case law on standing in environmental cases

to pay particular regard to whether the decision in question was given at a time during which the *substantial interest* test existed. Standing rules in environmental cases were subject to specific statutory intervention initially in the form of s. 50(4) of the Act of 2000, but that had now to be considered in the light of the provisions of s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, which removed the requirement imposed by s. 50(4) of the earlier legislation. The court observed at para. 6.4:-

> *"…Thus the earlier of those measures introduced, with effect from 2000, a requirement of prior participation but the latter reverted the law to the previous position that a failure to participate does not operate necessarily in all circumstances as a barrier to standing. Indeed, some of the case law which predated those legislative changes suggests that the traditional position was one where a failure to participate did not necessarily, and in all circumstances, prevent a relevant person from having standing."*

103. The court also observed that certain judicial interpretations of *Lancefort* might suggest a view that prior participation or an appropriate explanation for non-participation was a prerequisite for standing, but continued:-

> *"… it is arguable that Lancefort does not stand as authority for a general principle that prior participation is in all cases a prerequisite to standing. Lancefort certainly does suggest that it may, however, be a factor. But even if Lancefort might have been regarded as authority for the wider proposition it must, of course, now be read in the light of the introduction, in 2000, of an express statutory requirement for prior participation followed by the express repeal of that provision in 2006. On that basis it can no longer be held that Lancefort provides authority for any general preclusion of standing in the absence of prior participation or an appropriate explanation for the lack of it."*

104. In the opinion of the Supreme Court, a reasonably liberal approach ought to be taken to the sort of interest which must be potentially affected in order to confer standing in environmental cases. Thus, persons can have an interest by virtue of proximity to the proposed development. The court also considered the extent of the effect of the project on the individual in question, the nature and general importance of the site sought to be protected and that:-

> *"… developments which have the potential to have a material and significant effect on the environment generally or raise questions of particular national or international importance (such as the national monument involved in Mulcreevy) may confer standing on a much wider range of persons."*

105. The court continued at 6.11:-

> *"On the current state of the jurisprudence in Ireland and without, for the moment, having regard to the requirements of European law it seems that standing in*

environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question…"

Later, in considering the European dimension, the court was satisfied that as national standing rules must be consistent with broad access to justice, it follows that in interpreting national standing rules, the court of a member state is required to ensure that those rules meet the "*wide access to justice*" standard. Given that Irish standing rules were expressed in broad terms capable of appropriate interpretation, it did not seem to the court that any question of disapplication arose. Nevertheless, it remains necessary for the court in interpreting the "*sufficient interest"* requirement for standing contained in national law, to ensure that the interpretation conforms with the requirements of Article 11. The court continued:-

"…Second, it is potentially of some relevance to note the provisions of European law concerning the standing of environmental non-governmental organisations (NGOs) and the measures adopted in Ireland to ensure compliance with those provisions."

106. The distinction between NGOs and individuals was called in aid by both parties in *Grace and Sweetman* to support their respective positions. Thus, it was argued that the very fact that environmental NGO's have an almost unlimited access to environmental litigation removed the necessity for invoking a *Cahill v. Sutton* [1980] I.R. 269 type exception in environmental cases.

107. The principles relating to standing have evolved through national and European legislation; and as they have been judicially interpreted. This much is clear from *Grace and Sweetman*. There are, however, differences in the factual circumstances of this challenge and those which pertained in *Grace and Sweetman*. The court was not there concerned with an NGO which, it seems to me, if anything strengthens the applicant's position in this case. The court was not required to directly concern itself with circumstances in which a party participated in the process before the Board but had not made a particular point which it now seeks to raise on a judicial review application. Ms. Grace was not a prior participant. Counsel for the applicant questions how a person who has not participated in a planning inquiry can be in a better position vis a vis standing, than someone who has not advanced a particular claim before the Board but has otherwise participated.

108. Supporting *dicta* in favour of the respondent and notice party's contention, however, is to be found in the decision of Barrett J. in *An Taisce v. An Bord Pleanala and Others* [2018] IEHC 640. When considering an application for leave to appeal, he observed:-

"POINT 4. 'Was An Taisce precluded from challenging the Board's decision to accept the adequacy of the rEIS if it had not made any comment on the issue in the course of the planning process?' Under Irish law, one cannot typically raise in a judicial

review application a matter not previously put to the relevant decision-maker. The European Union law doctrines of equivalence/effectiveness do not vary this position here. Case C-263/08 Djurgården-Lilla is not authority for free-wheeling competence on the part of judicial review applicants to raise points not raised before the decision-maker. Case C-664/15 Project Natur- (see paras.[88]-[89]) expressly anticipates timing requirements as regards making objections. If there was an Irish rule that rendered European Union law less effective than national law that would cause difficulty; nothing of the like presents."

109. Although it seems to me that the court is in a position to address the standing issue by reference to national law as discussed in *Grace and Sweetman*, nevertheless, in the light of the arguments made before the court, it is also instructive to consider the position under European law.

110. In *Djurgarden-Lilla Vartens Miljoskyddsforening v. Stockholms Kommun Genom Dess Marknamnd* (Case C-263/08) issues arose as to the scope of the right of appeal provided by the Aarhus Convention and whether the conditions laid down by Swedish law were too restrictive. A question which the court was required to address was whether Member States, in implementing Article 6(4) and 10a of Directive 85/337, may provide that small, locally established environmental protection associations have a right to participate in the decision making procedures referred to in Article 2(2) of the Directive 85/337, but no right of access to a review procedure to challenge the decision adopted at the end of that procedure. There, national legislation dictated that only an association with at least 2,000 members may bring an appeal against the decision of adopted on an environmental matter.

111. The Court of Justice reiterated that the national rules must ensure:-

"'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts."

The court observed that while it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active, the number of members required could not be fixed by national law at such a level that it runs counter to the objectives of the Directive and in particular the objective of facilitating judicial review of projects which fall within its scope. Although the Directive 85/337 provided that members of the public concerned who had a sufficient interest in challenging projects or who had rights which may be impaired by such projects, are to have the right to challenge the decision which authorises it, the Directive in no way permits access to review procedures to be limited on the ground that the persons concerned had already been able to express their views in the participatory phase of the decision making procedure established by

Article 6(4) of the Directive. Thus, national rules which offered extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to the project, do not justify the fact that judicial remedies against the decision adopted at the end of that procedure are available only under very restrictive conditions.

112. The court therefore held that provisions of Article 10a of Directive 85/337 precluded a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of the Directive, solely to environmental protection associations which have at least 2,000 members. It seems to me that this decision is authority for the proposition that a party which has participated in the planning process cannot be excluded from the right to seek to review that process before the courts. Mr. Collins B.L. places particular emphasis on the contents of para. 39 of the decision where he stated that:-

> "*Accordingly, the answer to the second question is that the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a member state has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views."* (emphasis added)

113. In *Project Natua-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd* (Case C-664/15), the ECJ considered certain provisions of the Aarhus Convention. The court stated that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced. The question which the court had to consider was whether Articles 9(3) and (4) of the Aarhus Convention must be interpreted as precluding a rule of national procedural law that imposes a time limit on an environmental organisation, pursuant to which a person loses the status of party to the procedure and therefore cannot bring an action against the decision resulting from the procedure, if it has failed to submit objections in good time following the opening of the administrative procedure or, at the very latest, during the oral phase of that procedure. The court accepted that in principle, member states may, in the context of the discretion they have, establish procedural rules setting out conditions that must be satisfied in order to be able to pursue such review procedures, provided they also ensure compliance with the right to an effective remedy and to a fair hearing.

114. Importantly, at para. 88 of the court's decision, it is stated:-

> *"88 In principle, Article 9(3) of the Aarhus Convention does not preclude a rule imposing a time limit, such as the one set out in Paragraph 42 of the AVG, obliging the effective exercise, from the administrative procedure stage, of the right of a party to the procedure to submit objections regarding compliance with the relevant rules of environmental law, since such a rule may allow areas for dispute to be*

identified as quickly as possible and, where possible, resolved during the administrative procedure so that judicial proceedings are no longer necessary.

89 Thus, such a rule imposing a time limit may contribute to the objective of Article 9(3) of the Aarhus Convention, set out in the 18th recital of that Convention, of providing effective judicial mechanisms and appears also to be in line with Article 9(4) of that Convention, which requires that the procedures referred to, inter alia, in Article 9(3) of the convention provide 'adequate and effective' remedies that are 'equitable'."

115. The court held that the rule imposing a time limit may be justified, notwithstanding that as a precondition for bringing judicial proceedings, it constitutes a limitation on the right to an effective remedy before a court within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union. Such justification may arise:-

> *"in accordance with Article 52(1) of the Charter, to the extent that it is provided for by law, it respects the essence of that law, it is necessary, subject to the principle of proportionality, and it genuinely meets objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others…"*

The court concluded that Articles 9(3) and 9(4) of the Aarhus Convention, read in conjunction with Article 47 of the Charter must be interpreted as precluding, in circumstances pertaining in that case, the national procedure rule in question.

116. Counsel for the respondent submits it was never the intention of the Directive that environmental decision-making should be shifted to the court. In Project Natur the court addressed the issue of whether the provisions of the Directive prohibited national legal requirements from excluding small environmental organisations from exercising a right of bringing the matter before a Court. It was not being asked whether there exists a general and unrestricted right for an NGO to come to court and make any argument that it wants. It was being asked the more specific question as to whether the participation rights of the public, including an NGO, can legitimately be treated by a Member State as exhausted, if they had full access to the planning process. Article 11 expressly envisages that there will be a right of access to a review procedure, but the case law also envisages that the right of access to review procedure can be made subject to the laws of the Member State, but not laws that effectively completely exclude that right.

117. In *Commission v. Germany* a complaint was made about a national law which restricted standing to bring proceedings and the scope of the review by the courts to objections made during the administrative procedure. That law placed a restriction on the pleas in law which could be made by an applicant in a challenge to an administrative decision falling within the scope of Article 11 of the 2011 Directive, and another Directive on industrial emissions, to those which were previously made during the administrative procedure. The court ruled as follows:-

"77 The Court has previously held that Article 11(1) of Directive 2011/92, pursuant to which the decisions, acts or omissions covered by that Article must be subject to a review procedure before a court of law or another independent and impartial body established by law to challenge their substantive or procedural legality, lays down no restriction whatsoever on the pleas which may be relied on in support of such a review (see, to that effect, judgment in Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen, C 115/09, EU:C:2011:289, paragraph 37). That consideration meets the objective pursued by that provision of ensuring broad access to justice in the area of environmental protection.

78 Paragraph 2(3) of the UmwRG and Paragraph 73(4) of the VwVfG lay down specific conditions restricting the review by the courts which are not provided for in either Article 11 of Directive 2011/92 or Article 25 of Directive 2010/75.

79 Such a restriction laid on the applicant as to the nature of the pleas in law which he is permitted to raise before the court reviewing the legality of the administrative decision which concerns him cannot be justified by considerations of compliance with the principle of legal certainty. It is in no way established that a full review by the courts of the merits of that decision would undermine that principle.

80 As regards the argument concerning the efficiency of administrative procedures, although it is true that the fact of raising a plea in law for the first time in legal proceedings may, in certain cases, hinder the smooth running of that procedure, it is sufficient to recall that the very objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety.

81 None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings."

118. In my view this reinforces the proposition that as a matter of law there is no general rule that a prior participant who has not raised particular point before the Board is *automatically* precluded from raising such points in a court of review. To adopt such a stance might place a person who has not previously participated in a stronger position than someone who has. On the other hand, in my view, neither do the authorities establish an unrestricted right to raise new points. This is particularly so, as was recognised in the *Commission v. Germany*, where there is evidence of bad faith or a deliberate decision to withhold a point.

119. Clarke J. acknowledged in *Grace and Sweetman* that standing in environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice

having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question. Although these comments were expressed in the context of general standing, as opposed to an objection based on the failure to raise a particular issue, I believe that they must have relevance to the issue raised in this case. While each case must be dependent on its facts, bearing in mind the considerations alluded to in *Grace and Sweetman*, it seems appropriate in determining the *locus standi* of the applicants in this case, to give consideration to the nature of the illegality or infringement alleged, the consequences of a decision either way, any explanation that is advanced for the failure to raise the issue, and the overall obligations imposed as a matter of European law with regard to a particular process and to the requirement for broad access to justice.

120. The nature of the alleged illegality is significant. If the applicant is correct, then the Board has acted *ultra vires* and has failed to take due account of mandatory requirements in the consideration of matters relating to environmental concern. The explanation advanced for failing to raise this point at the earlier hearing, is that the applicant was unaware of the planning history of the quarry, the lack of the AA or the screening process which had been undertaken pursuant to s. 261A, matters which it had to establish for itself. It also pleads that it was hampered by the fact that the planning file for the quarry was not available electronically on the council's website, and that a copy had to be obtained from storage. Further, the s. 261A file was also not available electronically. It is stated by the applicant that it had originally pleaded a ground based on the AA but this had been deleted in advance of the filing of the original statement of grounds because the circumstances surrounding the AA were still not known. What was described by counsel as the more nuanced, evolved ground, was of a type that an individual or an NGO not versed intimately with the machinations of European environmental law, might not raise at a public hearing. In any event, it is maintained that it could never be said that the issue was not raised with a view to trapping the respondent.

121. The notice party maintains that information concerning the application which resulted in the 2008 planning permission regarding extraction activities at the quarry was available. Mr. O'Shea states that the information was either known or capable of being accessed or known to the applicant when it framed its objection and at the time of the oral hearing. To seek details of the planning file for the quarry after the Board had made its decision, he states, is no answer to the failure to raise all relevant issues before the Board. In any event, Mr. O'Shea avers that the NIS addressed impacts arising from the quarry and concluded that the quarrying operations would not contribute to cumulative or in combination impacts to Cork Harbour SPA.

122. It seems to me that it is also particularly important for the court to be mindful that where there has been a failure to raise a particular issue that might have been more fully considered and assessed by the deciding authority, parties to the statutory procedure will not have had the opportunity to deal with the objection on a substantive basis. This must be considered in light of the role of the court on an application for judicial review. This court is not concerned with the merits of the decision and care must be exercised in the

consideration of such "*new*" matters, lest the court is unwittingly led into an assessment of the merits of a particular point, where the body which is statutorily charged with the function of dealing with these matters, and recognised for its expertise in so doing, has not had the opportunity to address it.

123. One must also have some sympathy with the contention of the respondent that a question mark must arise over the explanation advanced by the applicant that it did not know that the development was "*proximate and linked with the Cork Habour SPA*." As the respondent points out, the NIS expressly identifies Cork Harbour SPA as a European site with the potential to be affected and it proceeded to examine the potential connection to the Cork Harbour SPA, including the in-combination or cumulative effects of the road development and the operation of the quarry. Although, the applicant might thus be open to criticism for not addressing issues relating to the quarry permission in as much detail before the Board as it has in this court, in the particular circumstances of this case, with the above caveats in mind and consistent with the requirement of broad access to justice, I am satisfied that I should entertain the arguments which have been advanced by the applicants on these points and that they have locus standi to make them. In arriving at this conclusion, I am somewhat guided by the fact that the "*new*" matters are to an extent aligned with issues which were considered and addressed by the inspector in her report at p. 235. When listing the issues raised by observers regarding flora and fauna, she noted that one such issue was that the EIS was inadequate in terms of cumulative impacts. The stated reason for this concern that the EIS was inadequate was because *"there would be a phenomenal increase in the rate of extraction of stone from the quarry from 30 years (as granted under the planning permission) to 3 years, required for the road project"*, and that this had not been assessed. Another matter which is referred to in her report at p. 236 as being one of the issues raised by the Department of Arts, Heritage and the Gaeltacht, concerned the "*extant permission for Raffeen quarry and conditions re restorative works following excavation*." It therefore appears that certain of the contentious issues raised by the applicant before this court, about which objection is taken by the respondent and notice party, on one view, might be considered not entirely unrelated to those themes. Further, in consideration of *locus standi*, I also should not lose sight of the fact the applicant disavows any attempt to collaterally challenge the quarry permission in an impermissible manner.

124. The overall project is a significant one. The applicant is an NGO and enjoys, as a matter of law, a general right of standing. The road project, in its entirety involves matters of European significance and importance. While the quarry is not a European site, there is a European site dimension to it, in view of the reclassification of the Glounatouig stream to bring it within the Cork Harbour SPA, which is a European site. I am also satisfied that there is no evidence that the applicant sought to deliberately withhold points from the hearing. Also, although the applicant is an NGO, the court nevertheless takes into account the fact that a number of its members reside in the immediate vicinity of the quarry. The decision of the court on this issue must be viewed and confined to the particular circumstances of this case and should not be interpreted as a "*freewheeling competence on the part of judicial review applicants to raise points not raised before the decision*

maker", something which was rejected by Barrett J. in *An Taisce v. An Bord Pleanala and Others* [2018] IEHC 640.

The Directive

125. The relevant provisions of the Directive are as follows. Article 1 of the 2011 Directive provides:-

> *"1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.*
>
> *2. For the purpose of this Directive the following definitions shall apply:*
>
> *(a) 'project' means:*
>
> - *the execution of construction works or of other installations or schemes,*
> - *other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources…"*

126. Article 5 of the 2011 Directive provides:-

> *"1. In the case of projects which, pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Articles 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV in as much as:*
>
> *(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;*
>
> *(b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment.*
>
> *[…]*
>
> *3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:*
>
> *(a) a description of the project comprising information on the site, design and size of the project;*
>
> *(b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;*

(c) the data required to identify and assess the main effects which the project is likely to have on the environment;

(d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;

(e) a non-technical summary of the information referred to in points (a) to (d)."

127. Annex IV provides:-

"INFORMATION REFERRED TO IN ARTICLE 5(1)

A description of the project, including in particular:

(a) a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases;

(b) a description of the main characteristics of the production processes, for instance, the nature and quantity of the materials used;

(c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

An outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects.

A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.

A description (1) of the likely significant effects of the proposed project on the environment resulting from:

(a) the existence of the project;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste.

The description by the developer of the forecasting methods used to assess the effects on the environment referred to in point 4.

A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

A non-technical summary of the information provided under headings 1 to 6.

An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information."

128. Article 8 of the Directive provides that *"the results of consultations and the information gathered pursuant to Articles 5,6,7 shall be taken into consideration in the development consent procedure."*

The EIS

129. While in this judgment, I have touched upon aspects of the EIS submitted by the authority, particularly where referred to in argument and in the affidavits, given the nature of the applicant's challenge to the adequacy of the Board's assessment, it is necessary to engage with the substance of the relevant portions of the EIS, NIS and the inspectors report and assessment. In doing so, I should pay particular regard to the terms of the quarry permission and the screening process concerning the quarry which have been described above at para. *40 et seq.*

130. The physical characteristics and land use requirements of the project are addressed in chapters 3, 7 and 8. At para. 3.10 the blasting required for the road is considered. A number of locations of potential areas of blasting are identified and it is noted that *"it is also anticipated that materials present at Raffeen quarry will be used for construction under the existing planning permission."*

131. Paragraph 3.13 of the EIS concerns *"Environmental Management during the Construction Phase"*, and in the context of resource requirements, "*earthworks*" are considered at para. 3.13.5.1 as follows:-

"The project will require approximately 2.2 million m³ of fill material. It is anticipated that approximately 1.15million m³ of reusable material will be excavated from the cuttings for the project. This means that there will be a deficit of material required to construct the road project, including the project requirements for higher quality rock material in the order of 1.05 million m³…

.. It is anticipated that the majority of the material deficit will be obtained from Raffeen Quarry. The route of the proposed road passes to the southern part of the quarry. The quarry has planning permission to resume material extraction… This planning permission is valid for a 30 year period.

The potential for cumulative impacts associated with the construction of the road and quarrying activity occurring simultaneously is addressed in the relevant specialist EIS chapters and within the NIS. The benefits of using material from the quarry from a sustainability perspective on air and climate are outlined in Chapter 13: Air and Climatic Factors.

It is anticipated that any fill material, which is sourced in the quarry, will be transported to its destination within the Lands Made Available (LMA) as the

southern part of the quarry will be within the lands acquired for the schemes. Ramps are likely to be formed at appropriate locations, within the quarry boundary, to facilitate access for dump trucks etc., directly onto the LMA.

Haulage of material from the quarry will access the LMA and avoid using local roads where possible…."

132. Chapter 17.4.2.1 of the EIS, under the heading "*waste*", excavated material is considered. It is repeated that there will be a deficit of material required to construct the project and that it is anticipated that where possible the majority of this material will be obtained from the quarry under its current planning permission. The advantages of using the reserves in the quarry are repeated. It is further stated that it is estimated that approximately 21,000 m^3 of excavated material from the quarry will be generated in order to create the wetland habitat area. It continues as follows:-

"At this stage, it is assumed that this material will be suitable for reuse on site as fill material. By reusing excavation material from the proposed cuttings where possible and sorting the remaining material from the quarry situated adjacent to the proposed M28 Road project the impact from excavations is considered to be slightly negative in the absence of mitigation."

133. "*Interactions and Interrelationships of Impacts*" are considered in chapter 18, where an analysis is conducted of two types of cumulative effects. The EIS was stated to have been prepared based on headings of its technical chapters including terrestrial, ecology, air and climate factors, noise and vibration, and landscaping and visual. The potential for in combination effects is described in s. 18.2 and the potential for significant cumulative effects in s. 18.3. Analysis is conducted of two types of cumulative effects. The first is the assessment of effects on receptors or receptor groups such as local residents which may be affected by different environmental elements generated by the proposed road project simultaneously or concurrently. This is stated to be referable to interrelationships or in combination effects between different environmental effects. Thus, where several effects affect one receptor such as noise, dust, and so on, these are assessed. The second type of assessment is that of the effects of the proposed road project together with other past, present and reasonably foreseeable projects where there is a potential for overlap, spatially or temporally. These are described as the cumulative effects.

134. The cumulative effects of the M28 road project and individual projects are considered at s. 18.3.1 which, in Table 18.4, outlines the potential for cumulative effects, where relevant, of the proposed M28 road project occurring with each existing or potential project in the study area under human environment and natural environment. The quarry is considered and under the heading "*Summary of potential for significant effects – human environment"* and the following is stated:-

"The cumulative effects on Raffeen Quarry are assessed on the basis that the quarry has permission and therefore can extract any time between now and 2038. It is proposed to utilise material from the quarry where feasible for the construction

phase of the proposed M28 road project. This has a slight positive cumulative effect for air quality and climate, noise and traffic as a result of reduced transport requirements on the local and regional road network and in turn air and noise emissions during the construction phase of the road and the operation phase of the quarry. There is however a heightened risk of wind – blown dust from materials handling and noise from the construction phase of the proposed road project and of the quarrying activity occurring simultaneously impacting on properties in the immediate vicinity of the quarry. This risk will be mitigated through the mitigation measures which will be carried out under the quarry's current planning permission and the mitigation measures proposed as part of this application with respect to dust and noise emissions".

135. Under the heading "*Summary of potential for significant effects – natural environment*" it is acknowledged that quarrying operations at Raffeen Quarry would result in the disturbance, both direct and indirect, of semi – natural habitats under the quarry footprint, access routes and adjoining areas including in *situ* wetland habitats, scrub, semi – natural grasslands, and areas of recolonising bare ground which support the pennyroyal, a plant species protected under the Flora Protection Order 2015. It is also acknowledged that the quarrying operations may affect breeding bird activities upon areas of quarried cliff face, principally through indirect disturbance, which had previously supported breeding peregrines. It continues:-

"Quarrying activities may also result in increased release of dusts and particulate matter which can reduce photosynthetic potential for plants associated with in situ and adjacent semi – natural habitats. Construction of the road will also result in the disturbance and removal of semi – natural habitats and pennyroyal, resulting in the potential for cumulative effects to these species during the construction phase of the road and the operation phase of the quarry. A habitat and species management plan has been developed for the M28 road to reduce negative effects from the road resulting in negligible impacts over the short to medium term and thus the potential for cumulative impacts associated with quarrying activities is avoided. There is a potential for cumulative impacts on sensitive ecosystems from dusts and particulate matter during the construction and operational phases of the road and quarrying activities. Dusts and particulate matter can be deposited on the leaves of plants reducing the photosynthetic potential. The literature suggests that the most sensitive species appear to be affected by dust deposition at levels above 100 mg/m² per day. As such, once dust deposition rates are maintained within the standard guideline for human nuisance (350 mg/m² per day), as set out in the mitigation measures specified in Chapter 13: Air and Climatic Factors , the impact of construction dust on sensitive ecosystems is considered negligible."

136. The mitigation measures are specified are as follows:-

"Implementation of the mitigation measures as set out in planning documents for both projects. No further mitigation required. No additional mitigation required.

Implementation of a habitat and species management as part of the M28 road at the quarry."

137. Individual environmental effects are considered in chapters 5 to 17. Terrestrial ecology is addressed in chapter 12. Potential impacts during the construction phase are addressed in Table 12.19. It is stated that in the event that aggregate materials are extracted from the existing quarry to facilitate the proposed project, there is potential for indirect and cumulative impacts to sensitive receptors within the quarry. This may include the loss or disturbance of habitat comprising recolonising bare ground which supports protective plant species, scrub and semi-natural grasslands, in addition to the disturbance of faunal species associated with the quarry. The direct impacts during both construction and operational phases, insofar as the quarry is concerned, are considered in Table 12.19. It is acknowledged that there will be landscape and associated habitat removal, and fragmentation disturbance to semi-natural habitats. The pennyroyal is addressed and it is stated that the construction phase would result in the removal of nesting. Direct impacts were also identified as including potentially, direct collision of faunal species with construction machinery, especially should night-time works be conducted. No direct impacts to the quarry were identified for the operational phase. The quarry was considered to be of county importance and it was stated that impacts to this receptor during construction and operational phases would be significantly negative at the county level in the absence of avoidance and mitigation measures. This was further addressed in a table at 12-149. It is recorded that in order to avoid direct and indirect disturbance of ongoing breeding activity within the quarry it was proposed to undertake construction works in this area outside the breeding season, 1st March until the 31st August, inclusive. Residual impacts, including the direct loss of suitable nesting and breeding habitats were also addressed. Construction works would not compromise the structural integrity or suitability of the remaining cliff face habitats located to the south of the footprint. Landscaping measures were proposed in respect of the operational phase of the project. It was recognised that such landscaping proposals would directly affect the peregrine falcon. Details of the landscape mitigation at the quarry were presented in a separate volume.

138. In Chapter 13, air and climatic factors were considered. Dust emission in the construction phase were addressed and it was acknowledged that in the event material is extracted from the quarry to facilitate the project, and to avoid the need to import material from off site, there was a potential for indirect dust impacts on the nearest sensitive receptors. The potential for dust emissions from the construction phase of the project, including the "*quarry operation under its current planning permission*" was stated to have been addressed qualitatively in accordance with the NRA guidelines. It was further noted that while the quarry was not currently operational there was the potential for windblown dust from the surfaces of open faces and stockpiles on the quarry and in the event that the quarry is to become operational as a result of the project or under its current permission, there was a heightened risk of windblown dust from materials handling impact properties in the immediate vicinity of the quarry. Regarding mitigation measures, in addition to the standard methods which were outlined in the report, measures were identified to be

applied to sensitive areas such as the area adjacent to the quarry, in the event that material is extracted for the purposes of the project, to prevent the potential for dust impacts on sensitive receptors in close proximity. These included speed restrictions on site traffic, minimising of dropouts from plant to plant to stockpile, the introduction of water vouchers, and the requirement to maintain monthly dust level below certain guidelines. It was felt that with the implementation of such mitigation measures and adherence to good working practice, the levels of dust generated were unlikely to cause an environmental nuisance. Where dust levels are found to be above a threshold of 350 mg/m² per day, the mitigation measures must be reviewed as part of a dust minimisation plan.

139. Noise is considered in chapter 14. Referring to the quarry, it was noted that the quarry has planning permission for blasting, rock processing and material storage. It was anticipated that the quarry will be in operation during the construction stage of the road either for the purposes of supplying material or other needs under its current planning conditions. Specific reference is made to condition 21 which limits noise emissions, and condition 24 which controls blasting. The potential impact of the quarry during construction was addressed and once again the planning permission attaching to the quarry was identified. It is proposed to utilise the quarry resource for the construction of the road project to minimise the impact upon material onto the site, from external sources. Potential noise and vibration impacts from machinery and construction were included in the construction stage model. At p. 14-32 the predominant noise sources from the quarry were identified as being from the various items of plant and machinery involved in quarrying activities, as well as from blast events. It was considered likely that noise from blast events will be audible at some sensitive receptors, the nearest of which was approximately 100m from quarry but, it was also acknowledged and stated that noise from the quarry blast will be intermittent with an average of four blasts per month as set out in the existing quarry permission, at condition 24.

140. Potential impacts on aquatic biodiversity were considered in chapter 10. In the context of construction phase impacts it was acknowledged that in the absence of mitigation, suspended solids impacts would be expected to be largely negative on a local scale with short-term impacts during the construction phase for freshwater receptors, including the Glounatouig stream.

141. In the NIS, it is stated at p. 66 that quarrying operations at the quarry would not contribute to cumulative or in combination impacts to Cork Harbour SPA. This is particularly addressed in Table 5.6 of the NIS as follows:-

> *"Quarrying operations at Raffeen Quarry will not contribute to cumulative or in-combination impacts to Cork Harbour SPA. Quarrying operations to be regulated by terms of planning to include attenuation of water run-off to the Glountouig stream which is a tributary of Cork Harbour SPA. In addition, Raffeen Quarry or its immediate surrounds do not support suitable habitat for over wintering avifauna*

associated with Cork Harbour SPA, therefore quarrying activities will not contribute to disturbance effects to SCI species for this European site."

142. The overall conclusion of the NIS was that the Cork Harbour area supports a number of developments that have been granted planning permission which could, in combination with the proposed M28 Road project, result in cumulative or in combination effects to that SPA. It was noted that the large infrastructure developments in the Cork Harbour area had been granted planning permission on the basis that targeted and site-specific mitigation is completed to minimise potential impacts. What was considered to be the remote and tenuous connectivity of the Great Island Channel SAC to the road project meant that potential impacts were unlikely. The implementation of best practice design, construction and operational measures were considered to negate the potential future impacts to that site. All possible sources of effects from the road project, in combination with all other sources in the existing environment and any other effects likely to arise from other proposed plans or projects had been identified, and robust and effective mitigation measures were outlined.

The Board's Assessment

143. The Board accepted the contents of the inspector's report before arriving at its decision and thus the Board's decision and Ms. Kennelly's report must be read together.

144. Ms. Kennelly assessed the proposed development, the submissions received from the applicant, prescribed bodies and third-party observers and the traffic consultant's report. She considered the assessment issues arising from the proposed scheme, including the policy context and the need for the development and the adequacy of the EIA and the AA. In the second part of the report, she assessed the CPO. At p. 57 of the report, she noted that one of the issues which was raised by observers was that of project splitting. This issue was raised, however, in the context of the contention that the road was contended to be part of the Cork Port project and tied to the expansion of the Port.

145. Issues regarding the quarry were more particularly addressed in chapter 17 of her report in the context of flora and fauna. The issue raised was described as follows:-

"Cumulative impacts-EIS inadequate-The cumulative effects of the development of the road and the resumption of the extraction from the quarry have not been adequately addressed. There would be a phenomenal increase in the rate of extraction of stone from the quarry for 30 years (as granted under the planning permission) to 3 years, required for the project."

146. The inspector noted that the quarry had been subject to much survey and analysis in the EIS and was also the subject of considerable discussion and debate in both written and oral submissions. The discussion of the issues relating to the quarry was more particularly focused on protecting plant and bird species; the pennyroyal and the peregrine falcon. She noted that the proposed road traverses the southern end of the quarry, necessitating a substantial area of fill and that the authority intended to source the stone material for the overall road project from the quarry, which is in separate ownership.

147. At para. 17.2.2, the inspector referred to issues which had been raised by the Department concerning the extant of the quarry permission and the conditions regarding restorative works following excavation. The criticism of the applicant is that these issues were not adequately addressed or particularly followed up by the Board. At p. 242 the inspector noted that the quarry had been the subject of considerable discussion and debate, both in written and oral submissions, and had also been the subject of much survey and analysis in the EIS. Particular reference was made to the peregrine falcon and the pennyroyal. The inspector also noted that:-

> *"…Direct impacts on Raffeen Quarry, during the construction phase, would principally involve land take leading to habitat removal, fragmentation and disturbance as well as collision of fauna and avifauna with machinery. Indirect construction impacts were identified as disturbance and destruction of semi natural habitats located outside the footprint of the project, such as pennyroyal. No direct operational impacts were predicted for this receptor. Potential indirect impacts include ongoing disturbance/avoidance by fauna, vehicle collision, eutrophication and alteration of the great regime…"*

It is also instructive to note, that while the particular emphasis is on habitats, when the inspector referred to issues raised by the NPWS and third-party observers, she stated that an issue had been raised by Dr Goodyear that it was impossible to assess the impact on the habitats within the quarry without certain drawings and that the cumulative impact of the two projects had not been properly considered. Reference is stated to have been made to court decisions where it had been established that all elements that are material to the project for example, which connections must be considered as part of the project. At p. 249, the inspector continued as follows:-

> *"On this basis, it was asserted that the proposal to extract stone from the quarry to facilitate the construction of the road must be considered as part of the overall EIA of the M28 road project. She further considered that the EIS submitted with the application for the quarry did not adequately reflect the ecology of the quarry as it currently exists."*

148. It was noted that while the applicant for the quarry permission had sought to continue extraction over a period of 150 years on a campaign basis, which would have involved five phases and extraction well below the water table, the Board decided to restrict the permission of the first phase with a further restriction on excavation below 16m OD. The inspector also addressed the concerns regarding the restoration/after-care recommendations in respect of the quarry development, but observed that these restoration and aftercare recommendations were stated to be principally to maximise the benefits for flora and fauna. It was noted, that part of the argument was that those proposed plans were based on extraction over several phases on a campaign basis and would have resulted in extraction to a level approximately 20m below the water table. It was proposed that once the phases were complete, the quarry floor would be flooded to the natural water level, to form a lake. The argument had been made that this would

have necessitated substantial drawdown of water and the topography and environment of the quarry would be dramatically different to that which received planning permission, which provided that there would be no extraction below the water table. The inspector continued at p. 251 of the report:-

> *"Thus, the restoration plans on file are considered to be indicative only. In addition, as the proposed road project occupies much of the southern part of the quarry and would be constructed on an embankment with an elevation of approximately 20 m, together with proposals to recreate wetland and other habitats on either side of the embankment, it is considered that the previously proposed restoration plan cannot be implemented as originally envisaged. However, the restoration of these areas of the quarry outside the CPO line are beyond the scope of this application and the remit of the Board."*

149. While the inspector agreed that, ideally, a revised topographical plan of the "*worked-out quarry*", with the road in place, would be useful in terms of assessing the impact of the two schemes, it was considered that the nature of the established use and the terms of the permission granted by the Board, together with the information submitted with both the application for the quarry and the current application for the road project, provided a sufficient level of information upon which the Board could make a decision on the application which was before it. It is clear that the inspector considered issues relating to flora and fauna in the context of the restoration plan for the quarry, with the potential of cumulative impacts being identified. She concluded that provided mitigation measures and monitoring regimes were implemented as proposed, she did not consider that there would be significant adverse impacts on the habitat of the species it supports.

150. Reference was made at the oral hearing to previous court decisions involving windfarm developments wherein it was held that all elements that were material to the project must be considered as part of the project. It was therefore asserted that the proposal to extract stone from the quarry to facilitate the construction of the road must be considered as part of the overall EIA of the M28 road project. Dr. Goodyear also expressed the view that the *EIS submitted with the application for the quarry* did not adequately reflect the ecology of the quarry as it currently exists. Counsel for the notice party had addressed this issue in his submissions to the inspector at the oral hearing. Reference was made to the fact that the quarry had been subject to the EIA unlike the windfarm which were the subject of court judgments referred to by Dr Goodyear.

151. At p. 251 of the report the planning permission for the quarry, the appeal process and the registration of the quarry were referred to. The inspector considered the cumulative impacts with the "*permitted quarry at Raffeen*" and addressed complaints that the EIS was deficient, by reason of:

    i. certain alleged inadequate assessment of alternatives;

    ii. failure to comply with s. 15 of the Climate Change and Low Carbon Development Act 2015;

iii. failure to address the species protected under Annex IV of the Habitats Directive, for example, otters;

iv. inadequate surveys in the absence of mention of invasive species;

v. alleged deficiencies in the NIS with particular reference to the importance of and intermittent usage of overwintering sites for wild birds; and

vi. issues regarding deficiencies in planning drawings and documents.

152. Ms. Kennelly referred in some detail to the EIS and considered in particular chapters 13, 14 and 18. She noted that provision for mitigation had been considered in specialist chapters in the EIS where any potential impact to sensitive receptors, human or natural, is likely. I have dealt with these above – suffice to note that these chapters were considered by the inspector as were the potential for inter-relationship/in combination effects as described in s.18.2, s. 18.3. and Table 18.4 which refer specifically to the quarry. She noted that there was a potential for cumulative impacts from the proposed development, in conjunction with existing, planned and proposed infrastructure should construction periods coincide, particularly in terms of dust and noise. She observed that the project included strict controls on dust and noise emissions during construction as did the other planned projects in the vicinity. She further considered that local cumulative effects in respect of noise, vibration and dust during the construction period which were likely to arise in the vicinity of the quarry, but that the extraction of materials in the quarry had the benefit of planning permission and had been subjected to EIA, with associated mitigation measures to restrict such emissions. A similar conclusion was reached in respect of the direct, indirect and cumulative effects on air and once again while some cumulative effects may arise from the development together with existing and permitted developments, these would be avoided, managed and mitigated by measures which form part of the proposed development and through suitable conditions. She was satisfied that the significant environmental effects arising as a consequence of the proposed development had been adequately identified, described and assessed and that these effects could largely be avoided, managed and mitigated by proposed mitigation measures and suitable conditions. With regard to the direct, indirect and cumulative effects on human beings, the inspector was satisfied that these issues had been appropriately addressed in the application and information submitted by the applicant and where adverse impacts were likely to arise, they would be avoided, managed and mitigated by the measures which formed part of the proposed scheme, the proposed mitigation measures and through suitable conditions. She concluded that the proposed development would not have any unacceptable direct or indirect impacts in terms of human beings.

153. Ms. Kennelly was satisfied that the EIA had been carried out in accordance with Article 3 of the 2011 Directive and s. 51 of the Act, and that it had assessed the impacts on human beings, flora, fauna, soil, water, air, climate, landscape, material assets, cultural heritage and the interaction between the foregoing.

154. The screening for AA was also considered by the inspector and she noted that there were two European sites within the zone of influence of the project namely the Cork Harbour SPA and the Great Island Channel SAC. However, she also concluded that as the site of the proposed development was not situated within a European site, no direct impact would arise. Nevertheless, indirect impacts were possible due to the proximity and connectivity to these sites through three water courses and through disturbance of the avifauna, during both construction and operational phases of the development. She records that it was decided not to screen out the Cork Harbour SPA or the Great Island Channel SAC and both sides were brought forward for an AA and the potential impacts of the development, both direct, indirect and in combination effects on the sites was considered in detail. Ultimately, the inspector concluded that there would be no direct impacts on any Natura 2000 site arising from the development. She was satisfied that there would be direct and indirect impacts on habitats during construction and indirect impacts during the operational phase of the project. The direct impacts included a net loss of wetland habitats and a loss of semi – natural grasslands. She was satisfied that compensatory wetlands and grasslands would offset these impacts. At p. 301 of her report she commented as follows:-

> *"Cumulative impacts on habitats from the proposed development in conjunction with existing, planned or proposed development are unlikely to arise, except in relation to the habitats within Raffeen Quarry. The issue was discussed in detail at 17.4.5 above. It is considered that routing the proposed road through the quarry would result in the loss/fragmentation/disturbance of habitats, but as the quarry has planning permission to extract materials across the entire footprint of the quarry over the next 30 years, these habitats are likely to be lost permanently, even if the road does not go ahead. In particular, the proposal to carefully recreate high quality wetland areas in advance of the construction phase, including the harvesting and translocation of species and vegetation will provide for permanent benefits and opportunities for continuity of the existing biodiversity. It is considered, therefore, that the cumulative impact of the proposed road and the permitted quarry or habitats within the quarry will be positive, given that the proposed development includes the provision of compensatory habitats which will be carefully recreated and monitored to secure successful establishment of equivalent conditions."*

155. Ms. Kennelly concluded at p. 335 of her report that on the basis of the best available scientific knowledge, the proposed development would not adversely affect the favourable conservation status of overwintering avifauna populations, including curlew or any other qualifying interests, associated with Cork Harbour SPA or of the qualifying interests of Great Island Channel SAC. She was therefore satisfied that on the information which was in file, which she considered adequate to carry out the Stage 2 AA, that the proposed development, individually or in combination with other plans or projects would not adversely affect the integrity of any European site.

156. The inspector also considered issues regarding the peregrine falcon and its nesting habitats, together with mitigation measures proposed during the construction phase in order to direct the peregrine falcon away from the quarry during that phase and concluded:-

> *"It is considered, therefore, that the proposed suite of mitigation measures presented in the EIS, HSMP and at the oral hearing, apart from the proposed Lough Beg artificial structure (16/11/17), together with the presence of suitable alternative habitat within the Zone of Influence, would provide for adequate alternative nesting sites for breeding peregrine falcon, which is no longer a species of conservation concern. The proposed woodlands screen planting would also serve to deter this species from nesting during the operational phase at the cliff face in close proximity to the motorway. Provided that the mitigation measures and monitoring regime are implemented as proposed, I do not consider that there would be significant adverse impact on the species or its habitats."*

157. The inspector thought questionable the suitability of the quarry as a breeding site and observed that it was accepted that there were potentially suitable habitats in the wider district for breeding peregrine falcons which are no longer a species of conservation concern. Notwithstanding this, she stated:-

> *"It is considered that the proposed mitigation measures to direct the species away from the motorway and to provide for alternative artificial nest sites, together with monitoring, would help to avoid and offset the potential adverse impacts."*

158. A proposed artificial nest box should not be implemented on the grounds of proximity to the SPA and a possible conflict with the bird species for which the SPA had been designated. The inspector concluded that the cumulative effect on the peregrine falcon was likely to be positive as no compensatory measures were proposed as part of the permitted quarry development, but mitigation measures as part of the road project would minimise impacts on the species.

159. Similarly, Ms. Kennelly addressed the position of the pennyroyal mint, a protected plant species. She noted that Dr Goode of the NPWS informed the hearing that translocation of the plant species is not required because the variety identified as growing within the footprint of the proposed road was non – native and did not have biological status. Nevertheless, because s. 21 of the Wildlife Act 1976 and the Flora Protection Order 2015 refer to pennyroyal mint as a species without distinguishing variety, an application for a licence to take, alter or interfere with the habitat and environment of pennyroyal mint was still required, and thus the inspector considered the position of this species.

160. At para. 20.6 of the report, having considered the likely significant direct and indirect effect on human beings, flora and fauna, soil, water, air, climate and landscape, material assets and cultural heritage, and the interactions between the foregoing, she considered that the significant environmental effects arising as a consequence of the proposed development had been adequately identified, described and assessed. She was satisfied

that these effects can largely be avoided, managed and mitigated by the proposed mitigation measures by suitable conditions. Where any residual impacts remain without being fully mitigated, she considered that the environmental effects would not justify refusal of approval, having regard to the overall benefits of the proposed development.

The adequacy of the Assessment and Report of the Inspector

161. It is quite clear that the inspector was aware of the necessity to consider the development cumulatively with other developments and in particular the extraction of material from the quarry. I am satisfied that the inspectors conclusions were based on the quarry operating within the confines of its existing permission. It is also clear from the contents of her report, when read in its entirety and in context, that she cannot but have been aware of the conditions relating to the planning permission, the EIS which accompanied the application for that permission and the subsequent assessment which was conducted in 2012. It is perhaps true to say that quarry permission was more significantly and directly raised in relation to concerns regarding the effect of the flora and fauna within the quarry, but it is clear from p. 250 of the inspector's report that she was aware of the quarry permission, the registration of the quarry, the fact that the original conditions were appealed and the restrictions confining excavation to the first phase. She was also aware of conditions which were attached placing restrictions on noise, blasting, groundwater monitoring and implementation of a restoration plan, to which I have previously referred.

162. It is true that the validity of the quarry permission was not specifically raised but the applicant has expressly disavowed any attempt to collaterally challenge that permission; albeit implicit in its argument is that in the context of assessing cumulative impacts, the nature of the previous permission, and perhaps some legal frailty underpinning it ought to be taken into account, something which was not done by the authority, the Board, or its inspector. The point at issue here is that the applicant maintains that it is impermissible to regard the quarry development as being a discrete development from that the road itself and that in this regard the quarry EIA was on a substantially different development to the one proposed here. I am not satisfied that this is the case.

163. In *Friends of the Curragh Environment Limited v. An Bord Pleanála* the applicant sought leave to apply for judicial review, and an of certiorari quashing two decisions of An Bord Pleanála whereby it granted permission for a realignment of approximately one kilometre of roadway on the Curragh, and secondly the demolition of the western half of the west stand of the Curragh Racecourse and the construction of a 72 bedroom hotel and ancillary facilities. The Turf Club had engaged in the redevelopment of the Curragh Racecourse complex which had been undertaken under a master plan. This plan aimed to create a modern racing complex with improved stands, visitor facilities and stables. The first phase of the redevelopment consisted of the realignment of the road, the demolition of part of the existing stand and construction of a 72 bedroom hotel and ancillary facilities. It was common case that there were further intended phases of the redevelopment. The Turf Club submitted one EIS in relation to the applications for permission for the road realignment and hotel development. It is to be noted, however, that it was also common case that an EIS was not mandatory, having regard to the threshold set by the Planning

and Development Act 2000 and the Regulations made thereunder. The failure of the respondent to assess the impact on the environment of the overall master plan for the racecourse prior to making its decision on the two appeals relating to road alignment and hotel development, was central to a ground upon which the challenge was brought. In essence, this was a project splitting ground. At p. 18 of the judgment, Finlay Geoghegan J. described the questions required to be considered as being:-

> *" … whether there is anything in Directive 85/337/EEC as amended which makes it clear that a planning authority must assess not only the impact on the environment of the development for which permission is sought but also the impact on the environment of future or proposed related developments for which permission is not yet sought."*

164. Having considered the provisions of Article 2 of the then applicable Directive 85/337/EEC, she concluded that there was nothing in the Directive which made it clear that the:-

> *"the planning authority must assess not only the impact on the environment of the development for which permission is sought, but also the impact on the environment of future or proposed related developments for which permission is not yet sought."*

165. With regard to the project splitting suggestion, she emphasised that there was no allegation that the Turf Club had artificially divided the master plan to avoid the need to lodge an EIS or an EIA on those parts of the project which were the subject matter of the applications for planning permission. While it was clear that there are circumstances in which a planning authority should have regard to related developments or even proposed developments when considering whether an EIA is required, the issue in that case was different. An EIS was submitted and an EIA conducted. Finlay Geoghegan J. concluded:-

> *"The conclusion which I have reached that Directive 85/337/EEC as amended only requires an environmental impact assessment of the project or development which is the subject matter of the application for planning permission and not of any related project which may be the subject of future or proposed application appears to me similar to the conclusion reached (albeit in relation a different national statutory scheme) by Davis J. in the English High Court in R. (on the application of Candlish) v. Hastings Borough Council [2005] E.W.H.C. 1539."*

166. I think it ought to be borne in mind that this dictum concerned the provisions of the Directive 85/337/EEC, but in my view it nevertheless supports the proposition that the Directive did not require an examination by way of EIA of anything except the project for which the development consent was sought. This does not detract, however, from the requirement to conduct cumulative assessments in appropriate cases.

167. Different consideration apply where circumstances give rise to project splitting. In *O'Gríanna v. Framore Limited* [2014] IEHC 632 Peart J. held that the connection of a wind farm to the national grid was an integral part of the overall development of which the

construction of the turbines was the first part. He therefore concluded that the Board had failed to carry out an EIA in accordance with s. 172 of the Act of 2000 in that no cumulative assessment of the proposed development and the necessary connection to the national grid had been undertaken. Therefore, he quashed the decision of the Board which granted the first permission and remitted the matter back for further consideration. Subsequently, the Board issued a notice on the developer requiring it to submit a revised EIS to incorporate sufficient information to enable the Board to conduct an EIA in relation to the overall proposal, including the grid connection. In response, the developer submitted a revised EIS, an AA screening report together with a NIS.

168. Further judicial review proceedings ensued. A number of issues arose. The first was whether the Board had failed to carry out an EIA in respect of the grid connection works and the wind turbine development by reason of the fact that the grid connection works did not form part of the proposed development in respect of which the application for planning permission was made. McGovern J. in his decision in *O Gríanna v. An Bord Pleanála (No. 2)* [2017] IEHC 7 observed that an overriding objective of the Directive was to ensure protection of the environment and quality of life. Noting that the process in which the court was engaged was a judicial review, and not an appeal on the merits against the decision of the Board, and also acknowledging the views expressed by Lord Hoffman in *Berkeley v. The Secretary of State for the Environment* [2001] 2 A.C. 603, that the EIA Directive should be given a purposive interpretation and should not be used to strike down consents where there has in reality been substantial compliance with its requirements, having identified with precision what those requirements are. McGovern J. observed at para. 39:-

> *"39. The E.I.A. Directive and the Irish legislation envisage a situation where there may be different stages of the consent procedure. This is recognised in the judgment of Peart J. in determining that for an E.I.A. to be completed at this state of the development, it was required to assess the cumulative impacts of the grid connection and the wind farm. It is also acknowledged in condition no. 2 applied by the Board. The grid connection was not authorised by a decision of the Board in these proceedings.*
>
> *40. The principle point raised for the applicants in the substantive High Court hearing before Peart J. related to the absence of information on the grid connection to enable a cumulative assessment to be carried out and is not impugned in these proceedings.*
>
> *41 . In the current application the applicants have not raised any point on the substantive E.I.A. carried out nor have they purported to allege any deficiency in the E.I.A. The judgments of the Supreme Court in O'Connor v. Environmental Protection Agency [2003] 1 I.R. 530 and Martyn v. An Bord Pleanála [2008] 1 I.R. 336 suggest that an E.I.A. can be carried out at a stage wherein the partial consent for part of an overall project has been given."*

169. McGovern J. stated that the applicants had not engaged with the content of the EIA nor had they shown any prejudice regarding matters that characterise a significant alteration to the application:-

> *"When all is said and done the overall development is still a six turbine development with a connector and the decision impugned in this application concerns the wind farm aspect of that development."*

He was satisfied that the EIA assessment conducted by the Board was adequate and was a necessary consequence of the remittal by Peart J. in the substantive proceedings.

Decision

170. For the reasons outlined above, I am satisfied that the application in this case ought to have been made, and was made, in accordance with the provisions of the 2011 Directive.

171. In my view, there is no question of project splitting in this case and the project for the purposes of Article 2 (1) of the 2011 Directive is the road scheme. The quarry is owned by a private operator and has its own planning permission which was obtained long before this road project was prepared. The project is to be carried out, not by the owners of the quarry, but by the authority and notice party to these proceedings. The cumulative impacts and effects of the quarry and the road were in any event considered in great detail. In my view, the inspector and the Board were aware of what was proposed in terms of the quarry and the use of materials therefrom. I am also satisfied from my review of the inspector's report that the Board was also made aware of the essential terms of the quarry planning permission and the 2012 screening. It is also quite clear, as was reiterated on many occasions within the EIS, that the extraction of the materials, if feasible or possible, is proposed to be in accordance with the quarry planning permission and conditions attached thereto.

172. To the extent that the applicant maintains that there has been a cessation of quarry activity, I find that the assessment of the quarry and cumulative impacts were conducted on the basis of current ecology. Further, I am not satisfied that any case regarding the adequacy of the AA has been established. It seems to me to be correct, as the respondent submits, to say that the inspector was very much alive to water pollution and how it could affect the SPA. It also appears to me, without finding it necessary to decide, that there is much merit in the submission of the notice party that the applicant appears to go no further than raise the *fact of a hydrological link* between the quarry and the SPA, but without advancing any *evidence of any likely effects.*

173. Further, insofar as the screening assessment of the quarry is concerned, while the applicant maintains that there is a frailty attached to the manner in which this assessment was conducted, the quarry is not a European site and what was required to be consider whether there were likely to be significant effects on the Cork Harbour SPA. I am satisfied that such exercise was conducted and it was concluded that the quarrying operations would not contribute to cumulative or in combination impacts with the Cork Harbour SPA.

174. Considerable emphasis was placed by the parties on the proper interpretation of the quarry permission. Reliance was placed on decisions such as *Re XJS Investments Limited* [1986] I.R. 750 and *Lanigan v. Barry* [2016] 1 I.R. 656. On the one hand, the notice party suggests that on the application of that test to both the quarry development and the development consent for the road project, that a proper interpretation of planning permission is that neither permission intended to impose any restriction on the rate of extraction of materials in the quarry. The applicant takes a completely different view. There is no challenge to the validity of that permission before this court, and in my view, despite various points raised by the applicant, the planning permission must continue to enjoy the presumption of validity. It is clear that the Board was aware of the controversy regarding the rate of extraction, as it was specifically raised in consideration of issues relating to flora and fauna. As previously stated, in my view there is evidence from various statements in the EIS to show that the Board was aware that it is proposed that the majority of the shortfall of fill material required to construct the project, after the use of excavated materials from the cuttings for the project, will be obtained from the quarry in accordance with its permission where possible. The Board was alive to these issues and it appears to me that it conducted its assessment with these considerations and objections in mind.

175. While there may be a difference of opinion regarding the proper interpretation of the quarry permission, I am not satisfied that there is anything in the inspector's report which was adopted by the Board which might be said to confer a planning status on the quarry which it does not otherwise have. Nothing in this decision is to be taken as an expression of the court's views as to whether any activity which may be engaged in by the quarry operators in the future, whether as part of the extraction of materials for the project, or otherwise, may or may not amount to a breach of the planning permission or constitute, or not, an intensification of user, requiring a further planning application. Given that the road authority is the planning authority charged with the enforcement of planning legislation, it is to be assumed that it will not abdicate its responsibility in this regard.

176. In all the circumstances, but particularly in the light of the very detailed review of the EIS and AA conducted by the inspector, I am satisfied that the Board had before it information on which to determine that the EIS, the NIS and the EIA of the road project/scheme were adequate, including on those issues concerning the quarry.

177. Even if the court was to disagree with some particular aspect of the assessment conducted by the Board, the proper role of the court in the consideration of an application for judicial review must not be forgotten. In this regard, I have been referred to the decision of Hedigan J. in *Craig v. An Bord Pleanála* [2013] IEHC 402, where he stated that:-

> *"The adequacy of an EIS is thus clearly a matter for the Board which is the decision-maker. The assessment of the adequacy of the EIS is a factual matter involving considerable expertise in planning. It is classically especially a matter*

upon which an expert body must decide. The test for this court in examining such an assessment is thus the O'Keeffe one."

In the light of the court's observations and finding on the locus standi issue, this appears to me to be particularly relevant in the context of a challenge based on grounds that were not specifically raised before the decision maker. Nevertheless, and in any event, I am satisfied that the Board had before it relevant material on which to consider the issues raised in respect of the quarry.

Preliminary reference

178. The applicant maintains that this is similar to the recent decision of Simons J. in *Friends of the Irish Environment v. An Bord Pleanála* [2019] IEHC 80 but it seems to me that there is a relevant distinction between the facts of this case and those considered by Simons J. There the applicant sought to extend the time of a permission which it enjoyed. As explained by Simons J., the dispute centred on whether the competent authority had to fulfil certain procedural requirements under the Habitats Directive, and in particular whether they applied only on the occasion of the original grant of a planning permission or whether they also applied to a subsequent decision which extended the duration of the planning permission but involved no physical changes to the programme as permitted. The permission was required to be implemented within 10 years and was extended for a further period of five years. It was this decision to extend the duration of the planning permission which was impugned in that decision. Here no such application is made by the quarry operators. In my view, no issue arises which requires such a preliminary reference.

Conclusion

179. Despite the skilful arguments of counsel for the applicant, I have come to the conclusion that the EIS was required to be, and was, conducted in accordance with the requirements of the 2011 Directive. I am not satisfied that the applicant has established that the respondent has been in breach of its obligations under the 2011 Directive, or that the approval of the scheme or the granting of the consent to the carrying out the development are invalid for the reasons advanced. I am not satisfied that the applicant has established that the project was not properly assessed or that the combined in combination effects of the road and the quarry were not adequately addressed and assessed.

180. In the circumstances, the applicant has failed to discharge the onus of proof which lies on it and I must therefore refuse the relief sought.