THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 601
[2020 No. 22 JR]

BETWEEN

SABRINA JOYCE KEMPER

APPLICANT

AND
AN BORD PLEANÁLA,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND
IRISH WATER DAC

NOTICE PARTY

JUDGMENT of Mr. Justice Allen delivered on the 24th day of November, 2020

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Introduction

1. This is an application for leave to apply by way of judicial review an order of *certiorari* quashing a decision by An Bord Pleanála ("*the Board")* made on 11th November, 2019 under s. 37G of the Planning and Development Act, 2000 to grant permission to Irish Water for the development of the Greater Dublin Drainage Project, comprising a new wastewater treatment plant ("*WwTP*") on a 29.8 ha site at Clonshaugh, a sludge hub centre on the same site, an orbital sewer running from Blanchardstown to Clonshaugh, a pumping station at Abbotstown, a regional biosolids storage facility at Newtown/Kilshane in Fingal, and an outfall pipeline into the Irish sea, about one km north-east of Ireland's eye.

2. In addition the applicant seeks declarations that the decision of the Board was *ultra vires* and contrary to Council Directive 2011/92/EU ("*the EIA Directive*") and Council Directive 92/43/EEC ("*the Habitats Directive*") and that it lacked sufficient reasons and was contrary to fair procedures.

3. Alternatively, the applicant seeks a declaration that the State respondents have failed to properly transpose the EIA Directive.

4. By direction of the court (Simons J.) made on 23rd January, 2020 the application was made on notice and following close case management was heard by way of a telescoped hearing over three weeks in July, 2020.

The pleadings

5. By s. 50(2) of the Planning and Development Act, 2000, the validity of the decision of the Board may not be questioned otherwise than by way of an application for judicial review under O. 84 of the Rules of the Superior Courts. By s. 50A(3), leave may not be granted under s. 50 unless the court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed. It is well settled, and it is common case, that the test to be applied is that propounded by Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125. In order for a ground to be substantial "*it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous*… ".

6. The function of the court on an application by way of judicial review of a planning decision is well settled and has been repeatedly stated but I agree with the submission on behalf of the Board that it is useful at the very outset to recall it.

7. I will adopt the restatement by MacGrath J. in *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929, which in turn borrowed heavily from the judgment of Haughton J. in *People Over Wind v. An Bord Pleanála* [2015] IEHC 271:-

"76. This is an application for judicial review and it is important to recall the role of the court on such an 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 contained in an EIS. This may, however, be subject to 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 cannot 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 made for it.'*

77. In order to show that the Board 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."

8. The court is limited to reviewing the legality of the decision. It is not itself to conduct an EIA or an appropriate assessment but will examine whether the competent authority, in this case the Board, applied the correct legal test and whether it reached the findings necessary to support its conclusions. The court is not to conduct an appeal on the merits of the Board's decision or any elements of it.

9. Judicial review proceedings are adversarial proceedings in which the applicant bears the onus of proof. That burden will not be met by mere assertion, but the applicant must bring forth, or more usually in a judicial review, point to, evidence which will establish the validity of the challenge.

10. The Board acknowledges that particular considerations apply in cases of appropriate assessment in which the court must be satisfied that the criteria for a complete and lawful appropriate assessment have been met but the court will acknowledge and respect the expert knowledge and expertise of the authority entrusted by law to make the decision.

11. The proposed WwTP plant is designed to deal with up to 500,000 PE, that is person equivalent, of sewage. The treatment process would remove all solids and the outfall pipeline would carry the treated effluent underground from the plant at Clonshaugh for 5,379 m. to Baldoyle, and then under the seabed for 5,934 m. to be attenuated through a multiport diffuser into the Irish sea. The eventual diameter of the permitted pipeline is

2,000 mm. The object of the project is to deal with an enormous volume of wastewater and if constructed it would generate huge volumes of sludge, biosolids and effluent.

12. The headline grabbing opening of the application was that permission for the proposed development had been granted without any consideration of what would come out of the end of the pipe. That is simply and obviously incorrect. The EIAR, in volume 3, Part A of 6, examined in great detail the hydrography of the proposed pipeline route and the impact of the construction and operation of the development. It looked at the existing quality of the receiving waters and the impact on those waters of the proposed discharge. It looked at the Water Framework Directive, and all of the relevant regulations, including the Urban Wastewater Treatment Regulations and the Surface Water Regulations. It looked at the impact of the discharge of treated effluent and the potential discharge of untreated waste water by reference to the maximum permitted concentrations of dissolved inorganic nitrogen, molybdate reactive phosphorous, biochemical oxygen demand, and Escherichia coli on the basis of Average Daily Flow, Flow to Full Treatment, and Process Failure. All of this material was considered by the Inspector who dealt extensively in her report with the question of marine water quality, the regulatory requirements, and the impact on marine water quality of the operation of the plant as well as the construction. Apart from the incorporation of the Inspector's report, the decision of the Board expressly spelled out the conclusion that the development would be acceptable in terms of the quality of effluent discharged into the receiving water environment and would not result in a deterioration of the quality of bathing water or shellfish waters.

13. Whether the assessment was adequate or not is another day's work, but it is plain that the nature and quantity of the effluent which would emerge from the pipe through the diffuser was considered by the Board.

14. Order 84, r. 18(1) of the Rules of the Superior Courts requires that every application for judicial review shall be made in accordance with the provisions of that order. Order 84, r. 18 (2) requires that all such applications should be grounded on a statement required to ground an application for judicial review in the prescribed form. Order 84, r. 20 (3) spells out that it shall not be sufficient for an applicant to give as his grounds an assertion in general terms of the ground concerned but should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.

15. It is not permissible to say, as the statement of grounds does in this case, that the facts and matters relied upon in support of each of the grounds pleaded and each of the reliefs sought are identified in the verifying affidavit and the documents exhibited to that affidavit. A purported incorporation by reference in the statement of grounds of all those facts and matters set out in the applicant's affidavit and in the documents exhibited is impermissible and ineffectual and betrays a failure on the part of the draftsman to understand the basic requirement of the rules.

16. The rules provide for a short form verifying affidavit. It is not permissible to file a long affidavit or to purport to subordinate the statement of grounds to a narrative litany of complaints and assertions which the applicant is not competent to make, still less to a virtual haystack of 9,000 pages of exhibits.

17. In this case there was an extensive exchange of affidavits.

18. The grounding affidavit of the applicant chronicled the evolution of the GDD Project from 2008 up to the planning application by reference to which she set out her argument that the project was not – as the planning application, the information put before the Board, and the assessment made by the Board were – limited to a plant with a capacity of 500,000 PE. The applicant went on to list a number of alleged deficiencies in the Environmental Impact Assessment Report ("*EIAR*") and the Natura Impact Statement ("*NIS*") which, it was said, failed to properly assess the impacts of the construction and operation of the project on a number of habitats and interests. Along the way the applicant identified the existence of various drawings, documents and reports and without engaging with the substance of what was contained in them asserted that the EIAR was inadequate and the NIS flawed. At para. 79 the applicant exhibited the Inspector's report and at para. 80 asserted that the Inspector had erred in her assessment and conclusions. Those errors were said to "*include inter alia*" a list of seventeen points which were not tied back to the grounds or to the passages in the report in which the errors were said to have been made. More than once the criticism was that various matters were not documented "*properly or at all*" so that there was no clear assertion that the matter had not been documented at all, or any attempt to show that although the matter had been documented, it had not been done properly.

19. A very long intended statement of opposition was filed on behalf of the Board in which the generalised pleas and assertions on the statement of grounds were met by the Board identifying precisely where in the Inspector's report, the EIAR and the NIS the matters said not to have been addressed had been addressed, and where and how the matters which were said not to have been adequately addressed were dealt with.

20. The answer on behalf of Irish Water took a different approach. The intended statement of opposition was relatively short but with it a number of affidavits were filed identifying where what had been asserted had not been done was done, and where and how what was asserted had been done inadequately had been dealt with. The affidavits were sworn by those who had been involved in the planning of the project and the gathering and evaluation of the information in the EIAR and NIS. Broadly speaking, each of the deponents set out to show – by reference to the evidence before the Board and the Inspector's report – why the applicant's assertions were said to be wrong.

21. In response to the opposition papers and replying affidavits the applicant swore a very long supplemental affidavit which in the main comprised argument and disagreement, which prompted another round of affidavits from the Irish Water experts which in the main comprised argument and disagreement, following which the applicant swore a long

second supplemental affidavit, which in the main comprises argument and a fair amount of repetition. This protracted exchange was to an extent fuelled by an apprehension on the part of the Board and Irish Water that the applicant was attempting to add to the grounds and a determination to address the substance of what were said to be mere assertions by the applicant and opinions which it was said she was not competent to express.

22. It seems to me that with the very limited exceptions to which I will come the affidavits generated much heat but little light. In *Sliabh Luachra v. An Bord Pleanála* [2019] IEHC 888 McDonald J. emphasised that in judicial review proceedings the court is not engaged in a *de novo* hearing and does not itself carry out an appropriate assessment but rather its task is to assess whether the Board has carried out the appropriate assessment in compliance with the requirements of the law. In the end, that was the basis on which the case was argued and the reference to the affidavits was very limited.

23. Paragraph E of the statement of grounds, which sets out the grounds upon which the reliefs are sought, runs to about nine pages divided by inaccurate and confusing headings. What is introduced as "*Factual background*" quickly becomes a list of criticisms and alleged failures on the part of Irish Water and the Board. Under the heading "*Unreasonableness*" the statement of grounds lists five specific alleged failures to comply with identified obligations under Irish law and EU law obligations generally. And so on.

24. The intended statements of opposition of the Board and Irish Water identified in the various grounds set out in the statement of grounds groups of grounds directed to individual elements of the GDD Project, and groups of grounds directed to alleged shortcomings in the appropriate assessment carried out by the Board under the Habitats Directive and regrouped and addressed the grounds by reference to the elements of the project and assessments challenged. This helpful regrouping of the grounds was more or less followed in the written legal submissions filed on behalf of the applicant and those written submissions were responded to and the case argued accordingly.

Overview

25. The applicant is a customs and taxation consultant who lives in Portmarnock near the beach which is sometimes called the Velvet Strand. She is a daily sea swimmer and has concerns as to the potential impact of the development on the water quality and the environment generally. She objected to the planning application, filing written submissions in response to the original application and to additional information provided by Irish Water in the course of the planning process. The applicant attended the oral hearing which took place between 20th March, 2019 and 2nd April, 2019 and made a further submission at that hearing.

26. The possible development of a major WwTP plant in North County Dublin has been under consideration for many years.

27. The first leg of the applicant's case is that the development which was the subject of the application to the Board on 20th June, 2018 is significantly different to that originally envisaged so that the various assessments which were made at the earlier stages of the process cannot be relied on to assess the impact on the environment of what has been permitted. There are two strands to this. The first strand is the capacity of the plant, and the second is the location.

28. In May, 2008 Fingal County Council published a Strategic Environmental Assessment for the Greater Dublin Strategic Drainage Scheme. That assessment had considered sixteen alternative drainage options and the conclusion was that the most environmentally, economically and technically advantageous option was the development of a new 850,000 PE treatment plant. That conclusion prompted the search for a suitable site.

29. In May, 2012 Fingal County Council published an Alternative Sites Assessment and Route Selection Report and in June, 2013 an updated Selection of the Preferred Site, Pipeline Routes and Outfall Location. In the course of that process the required capacity was reviewed and estimated to be 334,000 PE in 2020, rising to 720,000 PE in 2040. The assessment at that stage was that a 20 ha site would be required to accommodate the plant and a co-located sewage sludge hub, and that a 720,000 PE plant would require an outfall with a diameter of 1,800 mm. The June, 2013 Preferred Site Report identified nine shortlisted sites and three preferred site options at Annsbrook, Clonshaugh and Newtowncorduff. The sites at Annsbrook and Newtowncorduff were associated with outfalls off the coast at Rush. The site at Clonshaugh was associated with an outfall just south of Portmarnock. The southern outfall was assessed as the more favourable.

30. In the course of the pre-application consultation over six years between 2012 and 2018 Fingal County Council and later Irish Water contemplated a number of options for the development of the plant. An initial proposal in January, 2013 for a 750,000 PE plant to be built in two stages was revised in June, 2017 to an 800,000 PE plant in two stages and further revised in November, 2017 to a 500,000 PE plant to be built in one stage.

31. In the minute of the consultation meeting of 26th June, 2017 the applicant has isolated two paragraphs. The first noted that the construction of Phase 1 was intended to deal with loads up to the year 2045 and Phase 2 for loads thereafter. The minute noted that the EIS to be lodged with the planning application was to *"examine the entirety of the project" and the site was "to be sized for the overall project with the outfall sized to facilitate Phase 2."* The second paragraph recorded that the Board required confirmation that there were adequate available lands with adequate capacity to accept the bio-solids that were to be spread.

32. The applicant in her grounding affidavit highlights that the suggestion that there might be a single stage 500,000 PE plant – which was discussed at a meeting on 20th November, 2017 – was made at a time when the proposal of a two stage 800,000 PE plant had been under consideration for some time. She suggests that the new proposal was of an altogether different development. While the applicant says that the change was made

"for reasons not explained in the various minutes recorded by [the Board]" she does not say that she is or was unaware of what that reason was: which was that the capacity of the WwTP at Ringsend was to be increased, with a corresponding reduction in the required capacity of the Clonshaugh plant. The minute of the same meeting shows that Irish Water then informed the Board of its intention to apply for planning permission for the proposed regional biosolids facility as part of a planning application for the upgrade of the Ringsend WwTP as well as part of the GDD Project application.

33. On 6th June, 2018 Irish Water applied to the Board under s. 37E of the Planning and Development Act, 2000 for permission for an upgrade of the existing WwTP at Ringsend and to construct a 48,000 m3 capacity biosolids storage facility at Newtown, and that permission was granted by order of 24th April, 2019.

34. On 20th June, 2018 Irish Water applied to the Board under s. 37E of the Planning and Development Act, 2000 for the permission the subject of these proceedings. That application was accompanied by an EIAR. The applicant in her affidavit emphasises that the EIAR described the project as a development to treat wastewater from a 500,000 PE plant and gave the figures for a range of flows, the highest of which was the maximum flow that could be generated by a plant of that capacity. However, she says, referring back to the Preferred Site Report of June, 2013, the 2018 proposal was for an outfall pipeline with a diameter under land of 1,800 mm and under sea of 2,000 mm. The permitted pipeline, she says, has the capacity to deal with peak flows from a plant of significantly more than 720,000 PE but the Board had been invited only to assess the impact on the marine environment of a plant with a capacity of 500,000 PE. Accordingly, it is submitted, the Board did not consider the impact on the environment of the entire development.

35. The second strand to the argument built on the change in the planned, or proposed, or contemplated, capacity of the plant is that the reduction in the capacity of the plant gave rise to a requirement for a new alternative sites assessment. The site at Clonshaugh – which measures 29.8 ha – was selected at a time when what was under consideration was a plant with a capacity of 720,000 PE, for which a site of at least 20 ha would be required, and the possible alternative outfalls assessed by reference to various criteria, including dilution and dispersal and cost management. The applicant in her grounding affidavit deposes that it appears to her to be illogical to have rejected alternative sites for cost reasons while at the same time neglecting to use the opportunity presented by a smaller plant to scale back the cost of the land and infrastructure. She suggests that the "*purported downsizing*" of the proposed development to 500,000 PE "*fell outside the 2008 SEA and should have triggered a new search for sites and marine outfalls"*. Alternatively, if the project includes an agenda to manage flows from an 800,000 PE plant, then the impacts of the discharge from such a plant should have been put forward for assessment.

36. Apart from the case which the applicant makes as to the size of the site and the outfall pipe, she deposes that the likely significant effects on human health and the environment *"includes the likelihood of effects from the operation of the planned treatment*

infrastructure beyond its design capacity". The applicant's case is that it is evident from the tendering process for the construction of the plant that Irish Water is "*anticipating a Stage 2 increase in capacity to 800,000 PE*".

37. Besides the case made by reference to the change in in the planned capacity of the plant and the diameter of the marine outfall, the applicant challenges the validity of the decision on a number of grounds by reference to specific Irish and EU legislative requirements which I will identify as I come to them.

Recusal application

38. I recall, briefly, at this point that on the third day of the hearing an application was made on behalf of the applicant that I should recuse myself and abandon the hearing on the ground that I had previously, as a barrister, acted in a case on behalf of Irish Water.

39. Late in the afternoon of the fourth day, having heard all of the parties, I decided that no case had been made out that I should do so. For the reasons summarised in an ex tempore ruling and to some limited extent elaborated on in a written judgment delivered on 23rd September, 2020 [2020] IEHC 477 I concluded that there was no basis upon which a properly informed objective observer who was not unduly sensitive might reasonably apprehend that I would not deal with the application fairly, objectively and even-handedly and, in particular, that there was no cogent and rational link between the fact that I had previously argued a case on behalf of Irish Water and the declared apprehension that I might be perceived to be objectively biased in determining whether – as was part of the applicant's case – the impugned decision was tainted by a reasonable apprehension of objective bias on the part of two of the members of the Board who had made the decision.

Alleged objective bias

40. The very last ground listed in the statement of grounds under the heading "*Contrary to Fair Procedures"* is that the Board erred in law and acted contrary to fair procedures by creating an apprehension of objective bias or by allowing a situation to arise which could be perceived by a rational observer to be biased. Earlier in the statement of grounds, under the heading "*Factual Background*" it is suggested that this is due to a number of failings on the part of the Board "*including*":-

    (i) Repeated decision making for the regional biosolids storage facility;

    (ii) The appointment of Inspectors to the pre-planning consultation and the planning application when the Board knew or ought to have known that those Inspectors had not made declarations of interest or when none were recorded for them in the public register;

    (iii) The appointment of a Board member to lead the process who had just months before been the head of planning for a public limited company with interests that relate to the subject development;

(iv) The selection of a deciding Board member who had a recent prior involvement in securing the Greater Dublin Drainage Project implementation in the context of his recent role.

41. I pause here to say that an applicant for judicial review is not entitled, by prefacing a list with the word "*including*", to seek to create for himself or herself the opportunity to later add to the list, or to put his or her opponent, or the court, upon a roving enquiry as to whether there might be anything else in the affidavits or exhibits that might have been added to the list. I treat the list of identified alleged failings on the part of the Board as exhaustive. I ignore as completely irrelevant the allegation that the Board was or ought to have been alive to any fact or circumstance by reference to which a reasonable apprehension of objective bias might have arisen. The test for objective bias is an objective test and the subjective state of knowledge or belief of the subject of the complaint is not relevant.

42. While this is the last of the grounds raised by the applicant, it seems to me that logically it should be dealt with first. If, as asserted, the decision making process was tainted by bias, that would be a ground on which the decision should be set aside, irrespective of the ability of the applicant to establish any other flaw in the process by which it was reached.

43. While the statement of grounds uses the word "*including"* the stated grounds must be taken as an exhaustive list. By the letter of the law, and probably by rights, I should not look beyond the statement required to ground the application for judicial review, but the Board has met the allegation head on. While Ms. Butler was very firm in the position she took on the entitlement of the applicant to seek to introduce any grounds over and above those stated in the statement of grounds, she did not argue that the court should not take into consideration facts which the applicant sought to introduce in what should have been her verifying affidavit and which ought to have been set out in the statement of grounds.

44. The facts and arguments in support of the allegation of "*Apprehension of Objective Bias*" are set out at paras. 86 to 99 of what the applicant describes as her grounding affidavit.

45. The applicant points out that the permission granted by the Board by its order of 11th November, 2019 – which included permission for the regional biosolids storage facility – was made only months after the Board had previously granted permission for the same facility. In the view of the applicant, any reasonable observer would question the likelihood of the Board objectively deciding the application before it, knowing that the Board had approved "*the same facility in the same location in a separate application also made to its Strategic Infrastructure Development division, a small subset grouping of Board members"*. In the same paragraph it is suggested that the conditions for odour and noise imposed by the impugned permission are different to those to which the earlier permission was subject, but it seems to me that that is a separate issue. I cannot see how conflicting or inconsistent decisions in favour of the same applicant could give rise to an apprehension of bias.

46. The applicant's affidavit identifies three Inspectors who were involved in the planning application in respect of whom the applicant and her friend Catherine McMahon had found no declarations of interest in the Board's records of interests. These are Mr. Paul Caprani, who prepared the report at the pre-application consultation stage; Ms. Mairead Kenny, who prepared the report for the planning application; and a Ms. Sarah Lynch, who, it was said, according to the records of Board meetings, had an involvement in the impugned process.

47. The affidavit identifies the Board member who previously worked for a public limited company as Mr. Chris McGarry, the leading Board member on the planning application, and the public limited company as Glenveagh Properties plc. It is said, by reference to a statement published by the company in 2019, that Glenveagh's main developments and land banks are in the Greater Dublin Area in Kildare, Meath and North Dublin. The applicant expresses the belief that any reasonable observer, including herself, would believe that the GDD Project facilitates the development of houses in the greater Dublin area "*and therefore relates to the ambitions and growth strategy of Glenveagh Properties plc and related to Mr. McGarry's former role of head of planning in that company*." [The emphasis is the applicant's.]

48. The affidavit identifies the Board member who had a recent prior involvement in securing the GDD Project implementation in the context of his recent role, as Mr. Dave Walsh, and his recent role as Assistant Secretary in the Department of Housing, Planning and Local Government where he is said to have had "*primary responsibility*" for the development and delivery of the National Planning Framework, one element of which was the development of the "*impugned treatment works*".

49. The applicant suggests that it is difficult to understand why the Board put Mr. McGarry in the lead position and selected Mr. Walsh as a deciding Board member when it knew or ought to have known "*that the scenario had the appearance of conflicts of interest and was contrary to its own Code of Conduct*" and that in doing so the Board created an apprehension of objective bias.

50. The intended statement of opposition on behalf of the Board suggests that it is unclear how the fact that the regional biosolids storage facility formed part of a previous application for planning permission could give rise to a reasonable apprehension of bias. I agree, and I note that in the written submissions filed on behalf of the applicant the complaint in respect of the regional biosolids storage facility is not that it gave rise to an apprehension of bias but that it was unreasonable and illogical to have granted permission for a facility already permitted and to have made the second permission subject to different conditions than the first. While the written submissions assert or recall that the two permissions for the regional biosolids storage facility "… *is also an aspect of the pleadings of objective bias*" no argument was offered there, or in oral argument, as to how an apprehension of bias could or would or might arise. I do not overlook the observation in the applicant's written submission that the grant of permission on 11th November, 2019 on the Clonshaugh application was predetermined by

the grant of permission on the Ringsend application 24th April, 2019 but that, it seems to me, is a throwaway assertion which has not been supported by the evidence or by argument. The first grant permitted the use of the regional biosolids facility in conjunction with the proposed upgrading works at Ringsend, the second permitted the use of the same facility in conjunction with the WwTP permitted to be constructed at Clonshaugh.

51. Save in the case of Irish Water as to the allegation of bias arising out of the two decisions to grant permission for the regional biosolids storage facility, the State respondents and Irish Water have left the issue of bias to the Board.

52. It is common case that the legal principles applicable to determining an issue of objective bias are well settled and the Board agrees with the restatement of those principles relied on by the applicant in *O'Callaghan v. Mahon* [2007] IESC 17, at para 80:-

> *"80. The principles to be applied to the determination of this appeal are thus well established:*
>
> *(a) Objective bias is established, if a reasonable and fair-minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial;*
>
> *(b) The apprehensions of the actual affected party are not relevant;*
>
> *(c) Objective bias may not be inferred from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process;*
>
> *(d) Objective bias may be established by showing that the decision-maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses."*

53. In *Bula Ltd. v. Tara Mines Ltd*. *(No. 6)* [2000] 4 I.R. 412 the Supreme Court emphasised that a mere connection between the decision-maker and one of the parties was not enough. The link must be rational and cogent. As McGuinness J. put it at p. 510 of the report, having considered the judgment of Merkel J. in *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd*. (1996) 135 A.L.R. 753:-

> *"This requirement of a 'cogent and rational link' between the judge's past associations and the capacity of those associations 'to influence the decision to be made' seems to me to fulfil the requirement that the applicants' apprehensions should be both reasonable and realistic and I respectfully adopt it as a correct analysis test in the present case."*

54. Mr. Collins, in his written submissions and in oral argument, acknowledging that the applicant had not in her statement of grounds expressly asserted a plea of objective bias within her various complaints of infringement of the EIA Directive, sought to rely on the judgment of the CJEU in *Joined Cases C-341/06 P and C-342/06 P, Chronopost SA* where, at para. 54, it was said that "*the tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect*", and on the obligation of national courts to interpret national law as a far as possible in accordance with EU law but did not suggest that there was any higher obligation imposed by EU law than applies under Irish law.

55. Mr. Collins also sought to frame his submissions in relation to bias in the context of an obligation, which was not referred to in the statement of grounds, to ensure *"safeguards and guarantees"* in domestic law, referencing *Radio One Limerick Ltd. v. Independent Radio and Television Commission* [1997] 2 I.R. 291 and *O'Neill v. Irish Hereford Breed Society Ltd.* [1992] 1 I.R. 431.

56. It seems to me that absent any suggestion that the test in EU law is different to that which applies in Irish law, and given that as far as the question of objective bias is concerned the "*safeguards and guarantees*" contended for are only that the decision-making process in this case should be tested by reference to the well-established principles of law, nothing turns on whether the case was pleaded in the terms in which Mr. Collins would argue it.

57. As to the Inspectors' declarations, the Board's position was that Mr. Caprani's involvement was limited to the pre-application consultation, in respect of which no complaint was made, and that Ms. Lynch had no involvement at all with the case, but her name appeared in error on the file. It was acknowledged that there was no declaration of interest on file from Ms. Kenny, but the Board's position was that the applicant had not identified any conflict which ought to have been declared; that there was no legal requirement for a nil declaration; and that an apprehension of bias could not reasonably arise from the fact that something was not done which was not required to be done. Messrs. McGarry and Walsh had, in fact, made nil declarations.

58. In response to the long second affidavit of the applicant which had been filed in response to the intended statements of opposition and the affidavits filed on behalf of the respondents and notice party, Messrs. McGarry and Walsh each swore short verifying affidavits setting out their professional backgrounds and the nature of their previous employment.

59. The applicant in her second affidavit had exhibited a bundle of lobbying records which were said to show that during the period of Mr. McGarry's employment with Glenveagh other representatives of that company had met with the chief executive officer of Fingal County Council in relation to zoning and planning matters, including the potential rezoning of two parcels of land in Fingal in the catchment of the proposed development, and that in 2017 representatives of Glenveagh had telephoned and e-mailed County

Counsellors in Kildare in relation to the possible rezoning of lands in that county, within the catchment area of the proposed development. She exhibited the financial statements of Glenveagh for 2018 which outlined various land acquisitions made that year. And she exhibited a prospectus issued in 2017 which showed a business model of buying land that might or might not have the benefit of planning permission or zoning for development and which might not have the services or facilities necessary for immediate development. She pointed to a planning permission obtained by Glenveagh on 16th March, 2020 for a site at Castleknock, on foot of plans prepared while Mr. McGarry was employed by Glenveagh, and to the requirement in the Board's code of conduct for a "*2-year gap*".

60. I pause here to explain that the so-called "*2-year gap*" is a reference to para. 15.4 of the Board's code of conduct which precludes a member of the Board dealing with a file "… *relating to a planning authority or a private practice where he/she was previously employed during the previous 2 year period or any voluntary or professional organisation of which the person is or was a member during the previous 2 year period."*

61. Mr. McGarry was appointed to the Board in February, 2019. He is a career planner with coming up to 30 years' experience, a former chairman of the Royal Town Planning Institute, and a member of the Irish Planning Institute. He was previously employed as head of planning with National Asset Management Agency and as head of planning at Glenveagh for about eleven months between 21st February, 2018 and 31st January, 2019.

62. Mr. McGarry pointed out that many of the acquisitions and activities referred to by the applicant had predated his employment by Glenveagh; that his involvement in the identified lobbying had been limited to attendance at one meeting; and that, as required by the Board's code of conduct, he had not been involved in the decision in relation to Castleknock because that was a file relating to a business in which he had been employed in the previous two year period. For the avoidance of doubt (although there was not then or at any time later any suggestion otherwise) Mr. McGarry confirmed that he had no financial interest in Glenveagh and no ongoing connection to Glenveagh.

63. Mr. McGarry concluded his affidavit by stating that he had dealt with the application in a professional and impartial manner. The applicant had expressly disclaimed any suggestion that Mr. McGarry had dealt with the application otherwise than properly and impartially or that Glenveagh had conducted its business otherwise than in an entirely professional manner. The legal test of objective bias being objective, Mr. McGarry's subjective opinion that he was not conflicted is strictly speaking irrelevant but, the suggestion having been made that he might reasonably have been perceived to have been biased, he was entitled to put the applicant and the court in possession of the full facts and if he was not entitled to say, then certainly he is to be forgiven for saying, that in his belief he behaved professionally and impartially.

64. The submissions made on behalf of the applicant rehearse the evidence but do not really bring the matter any further than the initial proposition that the circumstances were such

that he might have been perceived to have been "*more attuned to the perceived 'positives' of the proposed development rather than to the consequences of any 'negatives' which from her perspective include siting issues and environmental impact".* The applicant contends that Mr. McGarry's involvement was a breach of the Board's own code of conduct because it was too close in time to his previous employment.

65. The applicant's written submission points in particular to the Castleknock development which, it is said, was a project at risk of refusal due to lack of sufficient sewage capacity and was the subject of a submission from Inland Fisheries regarding the lack of wastewater treatment capacity. That submission ignores the fact that permission for the Castleknock development was granted and that Mr. McGarry had nothing to do with the application or appeal.

66. The second affidavit of the applicant "*expressed similar concerns about the objectivity of Mr. Walsh*". Mr. Walsh, in his employment prior to his appointment to the Board in October, 2018 was said to have had what the Board had described as "*primary responsibility*" for the development and delivery of the National Planning Framework, a key objective of which was to implement the Greater Dublin Strategic Drainage Study. The applicant exhibited a letter of 25th October, 2019 to the Dáil Public Accounts Committee in which Mr. Walsh discussed his prerogative as chairperson of the Board, or the prerogative of any member of a normal quorum Board meeting, to consider whether any planning application or appeal should be referred to a meeting of the full Board or all available Board members. The applicant suggested that in circumstances in which two of the four members of the Board to whom the file had been assigned had recently been employed in roles in which it might be assumed that "*they or their employers would have welcomed a grant of planning permission"* and in which "*a third member of the Board had elected not to make any declaration of interests, it would be easy to understand the Chairperson exercising his prerogative in order to ensure that the full range of backgrounds and outlooks was available*…". If it is not precisely what the applicant says, what I understand this to mean, and the submission on her behalf to be, is that Mr. Walsh should have convened a full Board. Whatever superficial attraction there might be to a layman in the proposition that Mr. Walsh should have ensured that the allegedly biased members of the Board were outnumbered by unbiased members, it is legally utterly unsound.

67. It is submitted that the option of convening a full Board is an important safeguard against the apprehension of objective bias. That is plainly wrong. The *dictum* of MacMenamin J. in *Usk and District Residents Association Ltd. v. An Bord Pleanála* [2009] IEHC 346, [2010] 4 I.R. 113, at para. 75 relied on in support of the proposition is clear authority to the contrary. What was there said was:-

> "*There is ample authority as to how, in applying or avoiding the doctrine of necessity, a decision making body may remove that part of it which is 'infected' with bias, for example by the recusal of those members of a committee who may*

have made a prior determination which might bear on an impugned decision. But these four panel members did not do so or take any steps to avoid the difficulty."

68. It is not in dispute that the applicant was entitled to expect that the application would be decided by an unbiased panel. If any member of the panel was biased, he or she ought to have recused himself or herself. If the circumstances – whether the members of the panel were alive to it at the time or not – are such as to give rise to a reasonable apprehension of objective bias, that will taint the decision. The decision of a full Board including a member or members who are biased will be just as tainted as the decision of a panel including such a member or members.

69. While the applicant, on the one hand, argues that the possibility of referring an application to a full Board was or is an important safeguard against an apprehension of objective bias, it is argued, on the other, that "*the objective bias test incorporates the risk that in collective decision making, the views of one or two Board members could inhibit the making of an impartial decision by other Board members*". If what is meant by this is that a collective decision is tainted by objective bias on the part of any one member of the panel, or committee, or court, that is in my view trite. It was for example the basis on which Murphy J. made the declaration of invalidity in *O'Neill v. Irish Hereford Breed Society Ltd*. [1992] 1 I.R. 431 and, indeed, the basis upon which the Supreme Court set aside its own previous order in *Kenny v. Trinity College Dublin* [2007] IESC 42.

70. Section 148 of the Planning and Development Act, 2000 provides:-

"148.- (1) Where a member of the Board has a pecuniary or other beneficial interest in, or which is material to, any appeal, contribution, question, determination or dispute which falls to be decided or determined by the Board under any enactment, he or she shall comply with the following requirements:

(a) he or she shall disclose to the Board the nature of his or her interest;

(b) he or she shall take no part in the discussion or consideration of the matter;

(c) he or she shall not vote or otherwise act as a member of the Board in relation to the matter;

(d) he or she shall neither influence nor seek to influence a decision of the Board as regards the matter."

71. Section 147 of the Act of 2000 provides insofar as is material:-

"147.- (1) It shall be the duty of a person to whom this section applies to give to the relevant body a declaration in the prescribed form, signed by him or her and containing particulars of every interest of his or hers which is an interest to which this section applies and for so long as he or she continues to be a person to whom this section applies it shall be his or her duty where there is a change regarding an

interest particulars of which are contained in the declaration or where he or she acquires any other interest to which this section applies, to give to the relevant body a fresh declaration.

(2) A declaration under this section shall be given at least once a year.

(3)(a) This section applies to the following persons:

(i) a member of the Board…

(b) This section applies to the following interests:

(i) any estate or interest which a person to whom this section applies has in any land, but excluding any interest in land consisting of any private home within the meaning of paragraph 1(4) of the Second Schedule to the Ethics in Public Office Act, 1995;

(ii) any business of dealing in or developing land in which such a person is engaged or employed and any such business carried on by a company or other body of which he or she, or any nominee of his or hers, is a member;

(iii) any profession, business or occupation in which such a person is engaged, whether on his or her own behalf or otherwise, and which relates to dealing in or developing land.

(4) A person to whom this section applies and who has an interest to which this section applies shall be regarded as complying with the requirements of subsection (1) if he or she gives to the relevant body a declaration referred to in that subsection:

(a) within the period of twenty-eight days beginning on the day on which he or she becomes such a person,

(b) in case there is a change regarding the interest particulars of which are contained in a declaration already given by the person or where the person acquires any other interest to which this section applies, on the day on which the change occurs or the other interest is acquired. …

(8) The Board … shall for the purposes of this section keep a register ('the register of interests') and shall enter therein the particulars contained in the declarations given to the Board … pursuant to this section. …"

72. Section 150 of the Act of 2000 requires the Board to adopt a code of conduct for dealing with conflicts of interest and promoting public confidence in the integrity of the conduct of its business which must be followed by *inter alia* members of the Board. Sub-section (2) sets out a list of the matters which are required to be included in the code of conduct including the Board's policy as to the disclosure of interests and relationships where the interests and relationships are relevant to the work of the Board.

Absence of nil declarations

73. As to the applicant's contention that the failure of two of the Board's Inspectors to make nil declarations of interest might give rise to a reasonable and realistic apprehension of bias on the part of a reasonable, independent observer, the Board makes two points: first, that there is no requirement for such a nil declaration, and second that there is no suggestion that either of the Inspectors concerned had any interest that should have been declared.

74. In her second supplemental affidavit filed on 25th June, 2020 (five months into the judicial review process) the applicant asserts that the filing of nil declarations has been best practice across the public sector since 2002 and that in November, 2019 *"barely two weeks after the impugned decision was made"* the Standards in Public Office Commission published advice to that effect. If the point made in that affidavit is that the requirement for a nil declaration is a fundamental safeguard, that is not one of the grounds advanced in the statement of grounds. It is submitted that the requirement in s. 147(1) to make a declaration must be interpreted in the context of s. 147(2), which requires a declaration to be made at least once a year and that so construed together the Act requires a nil declaration. I cannot accept that argument. The obligation to make a declaration is founded upon the existence of an interest to which the section applies. I am satisfied that absent an interest specified in s. 147(3) there is no statutory obligation to make a declaration.

75. The first point made on behalf of the Board is an assertion of law, which I am satisfied is correct. The second is an observation on the case made on behalf of the applicant which is at least implicitly acknowledged on her behalf to be correct and which, whether acknowledged to be correct or not, is correct. The failure of the two Inspectors to make nil declarations – or perhaps it would be better to say the fact that they have not made such declarations – is not relied upon by itself as a ground upon which the decision-making process is impugned but as leading to a reasonable and real apprehension of objective bias. It seems to me that the correct application of the legal test requires that there should be imputed to the objective observer knowledge of the fact that the two Inspectors had nothing to declare. If that is so, even if there was in the legislation or in the code of conduct then prevailing a best practice requirement to make a nil declaration, all that the reasonable, objective observer could conclude was that the Inspectors had failed to confirm the objective fact that they had no declarable interest so as to put into the public record the fact that they had no such interest. I cannot see that there could be any rational and cogent link between any such oversight and the perceived ability of the Inspector or member to deal with any application fairly and impartially.

76. It seems to me that the true relevance of the making of a declaration becomes apparent when one hypothesises the possibility of an accident in which a member of the Board might have forgotten a declared interest and dealt with an application which he or she ought not to have dealt with. In such an event the decision could not stand and would not be saved by the declaration previously made.

77. The applicant has not established substantial grounds for an apprehension of bias by reason of the absence of nil declarations by Ms. Kenny and Mr. Caprani.

78. As to the fact that there was not on the Board's file a nil declaration by Ms. Sarah Lynch, I do not propose to dwell on the argument made by reference that the fact that the minutes of the meetings of the Board erroneously showed the wrong name for one of the members in attendance. That was a simple administrative error which was corrected when it came to notice. That mistake was not referred to in the statement of grounds and there was no application to amend the statement of grounds and so I need not consider the arguments. If I had, I would have unhesitatingly rejected any argument that the decision-making process or the decision might conceivably have been invalidated by an obvious administrative or clerical error by which no one could have been misled.

Mr. Chris McGarry

79. I confess that I struggled somewhat to understand precisely what Mr. McGarry's perceived conflict was said to be. It is clear that Glenveagh, as a developer, has an interest in whatever solution can be found to the lack of capacity to deal with wastewater in the Greater Dublin Area. So has every other developer. Over the course of developing the strategy for dealing with the problem a number of options were considered and what was settled on was a regional WwTP and sewage sludge centre. The affidavit of Mr. Sean Laffey, chartered civil engineer, filed on behalf of Irish Water, outlines the need for the Greater Dublin Drainage Project and traces its origins back to a Greater Dublin Drainage Study which was commissioned in 2001. A Final Environmental Report published in May, 2008 recommended a preferred strategic drainage option of a new regional WwTP at a suitable location in North County Dublin with a coastal outfall point at a suitable location in North County Dublin. There is no challenge to the strategic plan, which was settled upon ten years before Mr. McGarry was employed by Glenveagh. The GDD Project is part of the National Planning Framework, to which the Board is required by s. 143(1)(c) of the Act of 2000 to have regard. Irish Water's application to the Board was for permission for a development which would implement the national strategy and the function of the Board was to assess that application.

80. I can readily accept that Mr. McGarry, as an experienced planner, was "*attuned"* to the need to find a solution to Dublin's wastewater capacity shortage but I can see no connection between that and his employment with Glenveagh. Nor do I see how the enthusiasm of Mr. McGarry (or any other member of the Board) to see the problem solved would impair his or her judgment on the merits of a particular proposal. The Board may or may not ultimately have gone about the assessment in the right way but the time at which it is said that Mr. McGarry was disqualified was the time at which the application was lodged. I see some confusion in the submission made on behalf of the applicant. On the one hand it is correctly recognised that the test of objective bias is objective, but on the other the "*negatives*" of the proposal are identified from the applicant's point of view. Those "negatives" are said to be site location and environmental impact. It is not suggested that Glenveagh has any interest in the location of the WwTP or any other

element of the project or that the value of any of its lands would be enhanced or diminished by the location of the plant in Clonshaugh or anywhere else.

81. If the proposition is that a reasonable observer might apprehend that Mr. McGarry's ability to assess the impact of the proposed development on the environment would be clouded by the advancement of the interests of his erstwhile employer, I cannot accept that. As counsel for the Board submit, the logic of such a proposition would disqualify anyone and everyone who might previously have worked for a developer, whether as an employee or as a construction professional.

82. As to the argument that Mr. McGarry's appointment to the panel was in breach of the code of conduct, specifically the requirement for a "*2-year gap*" , Ms. Butler argues that the applicant is seeking to characterise the Greater Dublin Drainage Scheme as a matter in which Glenveagh was involved. I am satisfied that para. 15.4 of the Board's code of conduct is not engaged by the applicant's case. Mr. McGarry did not previously have any involvement with the subject matter of the application. Neither did Glenveagh.

83. The applicant has not identified any substantial grounds for any apprehension of objective bias on the part of Mr. McGarry.

Mr. Dave Walsh

84. In his verifying affidavit, Mr. Walsh gave evidence of his career prior to his appointment to the Board in October, 2018. Mr. Walsh has upwards of 20 years' experience in the Department of Housing, Planning and Local Government and its predecessors, ultimately as Assistant Secretary in the Housing and Planning Division. He explains that the National Planning Framework is a high-level Government document designed to guide development and investment in the State. He suggests that the policies in question are not those of the Department or of any civil servant in the Department and that the role of a civil servant is to support the Government of the day in the formulation and implementation of policy. One element of the National Planning Framework is a National Strategic Outcome for Water, Effective Waste Management and Waste, and one of the elements of that is the provision of a new WwTP in North County Dublin. Mr. Walsh explains that water policy falls within the remit of the Department's Water Services Division, which is a separate division to that of which he was Assistant Secretary. While Mr. Walsh had overall management responsibility for delivering the National Planning Framework, he was not involved in writing the document. He says that his role as regards delivery of the National Planning Framework was a small part of his overall workload and has no recollection of the Greater Dublin Drainage Study and delivery of a new WwTP having been discussed at any meeting which he chaired. Delivery of projects would have been primarily a matter for the planning authorities and latterly Irish Water.

85. More pertinently, perhaps, Mr. Walsh points out that the general policy for a new WwTP in North Dublin does not preclude the requirement that any development proposal for that infrastructure should be carefully examined before any decision is made to grant permission for it. In a nutshell, the policy is not concerned with the design, planning and

location of the infrastructure project and Mr. Walsh had no involvement with any of those matters.

86. Mr. Walsh also deposes to his belief that his previous work did not create a conflict of interest or affect his ability to consider the planning application objectively and impartially. Again, if Mr. Walsh's subjective opinion is not legally material, I do not think that he is to be faulted for expressing it.

87. Counsel for the Board, in argument, emphasised the role of civil servants to act impartially, as servants of the Government of the day. Counsel sought to draw an analogy between the independence and impartiality required of civil servants and the role of a barrister practicing as a member of an independent referral bar. I have to say that I am unconvinced. While I accept the proposition that civil servants regard themselves as independent of their political masters from time to time, I am not sure that a civil servant implementing policy would be regarded by an objective observer as a mere cipher. In any event, while the objective observer is imputed with a reasonable knowledge of the practice of a barrister – or the role of a civil servant – he is not taken to have the in depth knowledge or nuanced perspective of an experienced lawyer or academic – or civil servant. In *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, starting at the bottom of p. 444, Denham J. cited with approval a passage from the judgment of the High Court of Australia in *Vakuta v. Kelly* (1989) 167 C.L.R. 568 where that court said:-

> *"An experienced lawyer would appreciate the ability of a trial judge to ensure that preconceived views do not cause the actual decision to be tainted by prejudgment or bias. The likelihood that the lay observer would not lies at the heart of the requirement of the appearance as well as the reality of impartial injustice."*

88. If the analogy is a good one, a long, recent and varied connection – quite apart from previous involvement in the project – could constitute grounds on which a civil servant later appointed to An Bord Pleanála ought to recuse himself.

89. Ms. Butler found a helpful unreported judgment of the Court of Appeal in England. *R. (Secretary of State for Communities and Local Government) v. Ortona* [2009] EWCA Civ. 863 was an appeal by the Secretary of State against a High Court decision to quash the decision of an Inspector dismissing an appeal by a developer against a refusal of an application for planning permission. The developer wanted to demolish a former bus garage in Cromer, Norfolk, and to build a retail unit and what in England are called flats. The main reason for the refusal of permission was that the proposal involved the loss of the bus station and made no acceptable alternative provision for public transport. The main issue on the appeal was whether the proposed development would contravene the local authority's local plan policies. The impugned decision was made on 23rd August, 2007. The Inspector had been employed by Norfolk County Council from 1975 to 2003 and was involved in planning policy throughout his employment. From 1994 he was responsible for transport planning, including the local transport plan, and from 2000 was responsible for the development of control matters in relation to highways. For the first

two years after his appointment as a planning Inspector in March, 2003 he was not involved in Norfolk appeals but that was reviewed in 2005 and he heard and determined the developer's appeal.

90. O'Sullivan L.J. (with whom Patten and Mummery L.JJ. agreed) said at para. 33:-

> *"Mr. Brown referred us to a number of authorities. For my own part I did not find those authorities to be of material assistance because they demonstrated that each 'bias' case must turn on its own particular facts and the whole of the surrounding factual context must be considered. The Inspector in the present case had worked for Norfolk County Council for very many years from 1975 to 2003. In my view that would not in itself have been sufficient to give rise to any real fear of apparent bias. Nor would the fact that the Inspector had been involved at some unspecified level with the structure plan policies generally, which would necessarily have included transport policies. What is of critical importance in the present case is the Inspector's responsibility within the county council for transport planning, including the local transport plan, in which capacity he would have been responsible for the formulation of the transport policies in issue in the appeal, although of course I acknowledge that the policies were those of the county council rather than any individual planning officer. The responsibility for transport policy formulation was coupled with his responsibility for the practical application of those policies at local level as the officer responsible for development control matters relating to highways. This was not a planning officer who had been peripherally involved with the policies in issue in this appeal. He had been directly responsible for the formulation and implementation of those policies."*

91. In *Ortona*, the developer's planning consultant, who in the small world of planning knew the Inspector, raised the issue of apparent bias immediately on the appointment of the Inspector to deal with the appeal. The Inspector's answer to the concern was that *"planning is a small world and that it was inevitable that you come across people you have known before."* That has some resonance in this case in which a similar argument is made on behalf of the Board. In that case it appears not to have carried much, if any, weight, above or below. The judgments in *Ortona* show that the court gave permission for fresh evidence on the appeal to support an argument as to the additional administrative burdens to which the judgment of the High Court would give rise if it was allowed to stand. That evidence does not appear to have carried much weight either.

92. The authorities on bias are, as Patten L.J. put in in *Ortona*, necessarily highly fact specific. In the mix are the duration of the previous professional relationship, the time that has elapsed since it ended, the nature and extent of the previous relationship, the nature and extent of the previous work, and, most of all, I think, the connection between the previous work and the assignment under consideration.

93. Ms. Butler brought the court to the relevant part of the National Planning Framework. She emphasised that the Sustainable Management of Water and Other Environmental

Resources was one only of a number of National Strategic Outcomes and that the objective to "*Implement Greater Dublin Strategic Drainage Study through enlarging capacity in wastewater treatment plants (Ringsend) and providing a new treatment plant in North County Dublin – known as the Greater Dublin Drainage (GDD) Project*" was one of eight water objectives. Ms. Butler emphasised the policy-led approach of the National Planning Framework and the high level of Mr. Walsh's involvement in it. I agree that these are all matters that are to be taken into account in assessing the context of Mr. Walsh's previous association with the GDD Project but the critical factor, in my view, is that the application made to the Board had nothing to do with the policy that there should be a GDD Project. That policy was something to which the Board was required by s. 143(1)(c) of the Act of 2000 to have regard to but there was no policy as to the location of the plant or associated infrastructure, or the route of the pipe, or the location of the marine outfall. The policy expressly references the need to comply with environmental requirements such as the EU Water Framework Directive. The framework document identifies that it was Irish Water which had developed the Water Services Strategic Plan. If the question that was to come to the Board was, for the sake of argument, a confirmation of the decision to prefer the regional WwTP over the alternative of a number of local plants, the position might have been different but the application in this case was for permission for a development which, if permitted, would meet the policy objective.

94. To assess what reality there might be to an apprehension of bias it is useful to contemplate on a high level the function of the Board on the planning application. It is to assess whether the proposed development complies with the law – specifically in this case to make the environmental impact assessment and appropriate assessments required by law – and is in accordance with proper and sustainable planning and development. The evidence is far short of this but if one were to contemplate that Mr. Walsh might have been reasonably apprehended to have brought with him from the Department of Housing, Planning and Local Government a desire to implement the GDD Project, I cannot believe that any rational objective observer would apprehend that he would or might, or that there was a real risk that he would or might, consciously or subconsciously, fail to make the necessary assessments and allow any old WwTP and associated infrastructure. In my view there is no rational or cogent link between Mr. Walsh's previous limited involvement as a civil servant with the GDD Project and the role he had as a member of the Board in relation to proposed development the subject of the planning application.

95. In the case of each of Mr. McGarry and Mr. Walsh the applicant has focussed on the closeness in time of their previous professional association and their assignment to deal with the planning application. Proximity in time may be a factor but it cannot be determinative. Each case is to be decided on its own facts. If there is no link between a previous engagement and the administrative decision, the proximity in time may count for little. If there is a substantial link, a long lapse of time may count for very little.

96. I do not believe that the applicant has identified substantial grounds upon which a well-informed, reasonable, objective observer might, by a clear and cogent link between Mr.

Walsh's previous employment and his role as a member of An Bord Pleanála, apprehend a real risk that he might not deal with and decide the planning application in a fair, unbiased and impartial way.

Locus standi and issue specific locus standi

97. The intended statements of opposition filed on behalf of the respondents and the notice party admitted that the applicant had *locus standi* but raised an issue as to the extent of that standing.

98. The question of the applicant's standing was addressed in the written submissions filed on behalf of the applicant, the Board, and Irish Water. I confess that I had some difficulty in piecing together what, precisely, the applicant's case was. The starting point was that the fact that the applicant had participated in the planning process gave her *locus standi*, which standing was enhanced by the fact that she was resident in Portmarnock and a sea swimmer and a member of the Velvet Strand Sea Swimmers and Beach Users Group, but the written argument moved almost immediately to the proposition that prior participation cannot be a prerequisite to *locus standi*, and from there to the proposition – which does appear to me to follow logically – that any argument of issue specific *locus standi* is irreconcilable with the proposition that an applicant for judicial review need not have participated in the administrative process.

99. It was submitted on behalf of the applicant, on the authority of *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10, and by reference to the decision of the Court of Justice in Case C-263/08 *Djurgarten*, that prior participation in the planning process was not a precondition of *locus standi* to apply for judicial review of the decision. It was submitted that absent a requirement for prior participation in the planning process, a rule that restricted an applicant who had participated to those grounds which he had raised in the planning process would put him or her in a worse position than someone who had not participated, and that to limit an applicant to issues which he or she had raised in the course of the planning process would mean that every objector would have to raise all of the issues, even of these had been fully dealt with by other participants.

100. It was variously submitted that the issues which the applicant wished to canvass on the judicial review application had been raised in the course of the planning process; and were sufficiently aligned with issues which were considered and addressed by the Inspector in her report (reference was made to the judgment of MacGrath J. in *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929); and that even if they had not been raised, the Board was required by law to have considered them and that its decision was amenable to judicial review if it had not.

101. The written submissions filed on behalf of the Board and Irish Water conceded the applicant's general *locus standi* by reason of her participation in the planning process but offered a detailed argument, starting with *Lancefort v. An Bord Pleanála* [1999] 2 I.R. 270 and largely resting on the analysis of MacGrath J. in *M28 Steering Group v. An Bord Pleanála*, that the applicant should be confined to issues raised before the Inspector –

which it was said some of the issues had not been – or issues which were otherwise live in the decision making process – which it was said these issues were not.

102. At the oral hearing before the court, Mr. Collins was able to bring to the attention of the court the opinion of Advocate General Bobek in Case C-826/18, referred to as *Distressed Pigs,* which was published on 2nd July, 2020, only five days before the commencement of the hearing before me on 7th July, 2020 which, he said, if accepted by the High Court or the Court of Justice of the European Union would definitively dispose of the issue of issue specific *locus standi*. In that opinion Advocate General Bobek explored the relationship between the public participation procedure, dealt with in Article 6 of the Aarhus Convention, and the right of access to justice to challenge decisions, which is provided by Article 9. The key question (so far as this case is concerned) was whether European law and Article 9(2) of the Aarhus Convention in particular must be interpreted as precluding a provision of national law which excluded access to justice in respect of a decision on the part of the public concerned (interested parties) if that party could be reasonably criticised for not having set out any views against (parts of) the draft decision. In other words, can an applicant for judicial review be limited to points that should have been raised in the administrative process. On the analysis of the opinion, a member of *"the public"* who participates in a public participation process cannot thereby acquire the status of a member of "*the public concerned*". If that is correct – and the analysis and reasoning of Advocate General Bobek appears to me to be highly persuasive – the basis upon which the applicant claimed, and the Board and Irish Water conceded, *locus standi* was wrong.

103. I respectfully say "*if"* the opinion of Advocate General Bobek is correct because after Mr. Collins had made his argument as to why it should dispose of any contest as to the right of the applicant to raise all of the grounds set out in the statement of grounds, Ms. Butler, for the Board, and Mr. McGrath, for Irish Water, withdrew their objection based on issue specific *locus standi*.

104. It can, I think, be confidently expected that this important question of law will be clarified by the Court of Justice before it comes back before an Irish court.

Regional WwTP and Marine Outfall

The entire project

105. The planning of the GDD Project and in particular the development of a major WwTP in North County Dublin was, as I have said, under consideration for a number of years. Over those years the estimate of the required capacity of the plant was revised from time to time. The initial estimate of 850,000 PE was revised in 2012 to 720,000 PE, then in 2017 to 800,000 PE, and finally in about November, 2017 (in conjunction with the planned upgrade of the Ringsend facility) to 500,000 PE, which was the capacity for which planning permission was sought on 6th June, 2018.

106. As I have said, what was contemplated along the way until the estimate settled at 500,000 PE was that the plant would be built in two stages. When, in June, 2017, what

was under consideration was a WwTP to be built in two stages and with an eventual capacity of 800,000 PE, Irish Water was contemplating a marine outfall with a diameter of 2,000 mm, which would be sufficient to carry the effluent which would be generated by such a plant.

107. The site at Clonshaugh on which it is proposed that the 500,000 PE WwTP will be built was selected at a time when what was under consideration was a 720,000 PE plant, and the pipe which is to be laid could deal with the effluent from a substantially larger plant than that for which planning permission has been sought and obtained. The applicant challenges the validity of the decision of the Board on a number of grounds based on the size of the site at Clonshaugh and the capacity of the planned marine outfall.

108. The applicant's case is that the Board failed to consider the whole development but rather considered either the wrong development or an incomplete development. It is said that over the course of the planning of the project it changed and that the Board failed to assess, at the early stages, the development that emerged at the end of the process. The development, it is said, started life as an 800,000 PE development but ended up as a 500,000 PE development. Because, it is said, the site selection was carried out at a time when a larger development was contemplated, it was not a valid selection of a site for the revised smaller development. It is suggested that the consequence of the reduction in the size of the project is that there are obviously a great many more sites that could accommodate it. Because, it is said, the marine outfall has capacity to deal with the effluent that would be generated by a 800,000 PE plant, the Board ought to have considered the impact on the environment of the output from such a plant. Moreover, it is said, the site assessment in 2012 did not comply with the enhanced requirements of the 2014 EIA Directive.

109. The applicant would make the case that the Board failed to take account of alternative sites of less than 20 ha which may have been suitable for the siting of a 500,000 PE WwTP and failed to take account of "*a wider range of marine locations that may have been suitable for accommodating the effluent discharge from the smaller plant.*" The failure of the Board to do so is said to have been contrary to s. 37G(2)(a)(i) of the Planning and Development Act, 2000, as amended; articles 94(b) and (c) and paras. 1(d) and 2(b) of Schedule 6 of the Planning and Development Regulations, 2001; and Article 5(1)(d) and Annex IV, section 2 of the EIA Directive.

110. Section 37G(2)(a)(i) of the Act of 2000 requires the Board, when making a decision in respect of a proposed development for which application has been made, to consider the likely consequences of the proposed development for the proper planning and sustainable development in the area in which it is proposed to situate the proposed development.

111. Article 94 of the Planning and Development Regulations, 2001 prescribes the content of an EIAR which, so far as material, is required to contain the information specified in para. 1 of Schedule 6, and any additional information specified in para. 2 of Schedule 6 relevant to the specific characteristics of the development. Paragraph 1 of Schedule 6 requires

that the EIAR should contain *"a description of the reasonable alternatives studied by the person or persons who prepared the EIAR"* and para. 2 of Schedule 6 requires the inclusion of *"a description of the physical characteristics of the whole proposed development*".

112. Article 5(1)(d) of Directive 2011/92/EU as amended by Directive 2014/52/EU provides that where an EIA is required, the developer shall prepare and submit an EIAR which must include *"a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment."*

113. Mr. Collins highlighted the change in the 2014 Directive to "*the reasonable alternatives studied by the developer*" from the requirement under the 2011 Directive which had been to "*outline the main alternatives studied by the developer*", and the fact that the site selection process had commenced under what he called the old regime.

114. Because, it was said, the site selection process had started at a time when what was contemplated was an 800,000 PE or a 720,000 PE WwTP, and by the time the site was selected what was contemplated was a 500,000 PE WwTP, all of the site selection had been undertaken in respect of a materially different development to that which was eventually the subject of the application. A 500,000 PE site, it was said, requires a different site analysis to an 800,000 PE site which is "*50% or more larger*". It was suggested that the reduction in the plant capacity necessarily meant that the area of the required site would reduce and that the reduction in plant size gave rise to a *"whole different myriad of options"* which needed to be explored.

115. In support of the argument that account ought to have been taken of the potential impact of an 800,000 PE WwTP, counsel referred to a number of authorities.

116. *Bund Naturschutz in Bayern v. Freistaat Bayern* Case C-396/92 was a reference to the CJEU by the Bayerischer Vervaltungsgerichtshof for a ruling on three questions, the last of which was whether the concept of "*project*" in Council Directive 85/337/EEC in its application to motorways and express roads was to be understood as meaning that the environmental impact must be assessed solely for the section of a road link for which development consent was sought or, in addition to that section, for the road link as a whole. The court did not find it necessary to answer that question but Advocate General Gulmann dealt with in his opinion delivered on 3rd May, 1994. Counsel pointed to two paragraphs:-

> *"71. The important question in the present connection is not, however, which projects are to be subject to an environmental impact assessment.*
>
> *It is whether, in connection with the environmental impact assessment of the specific project, there is an obligation to take account of the fact that the project*

forms part of a larger project, which is to be carried out subsequently, and in the affirmative, the extent to which account is to be taken of that fact.

The subject-matter and content of the environmental impact assessment

must be established in the light of the purpose of the directive, which is, at the earliest possible stage in all the technical planning and decision-making process, to obtain an overview of the effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect on the environment. That purpose entails that as far as practically possible account should also be taken in the environmental impact assessment of any current plans to extend the specific project in hand.

72. For instance, the environmental impact assessment of a project concerning the construction of the first part of a power station should, accordingly, involve the plans to extend the station's capacity fourfold, when the question of whether the power station's site is appropriate is being assessed.

Similarly, when sections of a planned road link are being constructed, account must be taken, in connection with the environmental impact assessment of the specific projects of the significance of those sections in the linear route to be taken by the rest of the planned road link."

117. Reliance was also placed on the decision of the Supreme Court in *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, which was referred to in argument as the *Apple* case. That case, as Finlay-Geoghegan J. explained in the opening paragraph of her judgment, concerned the proper approach to be taken to the conduct of an EIA where the development for which permission is sought is part of a larger plan or masterplan.

118. Apple Distribution International had obtained planning permission for the construction of a data centre and associated works and grid connection on a site near Athenry, County Galway. The permission sought and obtained was for a single data hall on a site of about 202 acres, but a masterplan submitted with the application showed that it was envisaged that ultimately there might be eight such data halls built on the site and the permission for the grid connection or substation, which was the subject of a separate application, was for a facility which could have served eight data halls. The issues identified at para. 21 were whether the Board was required to carry out an EIA of the masterplan before deciding the appeal in relation to the data centre application or the application to it in relation to the substation; if not, what consideration the Board was required to give to the masterplan when considering the EIA of the proposed data centre and ancillary works and the substation; and if the court was in a position to decide either or both of those issues, whether the Board had complied with its obligations.

119. Having set out the terms of Articles 2 and 3 of the EIA Directive and the provisions of Irish law by which they were transposed, Finlay-Geoghegan J. noted that while the Irish

legislation used the term "*proposed development*" rather than the term "*project*" which was used in the Directive, there was no difference between them. She began her analysis by looking at the opinion of Advocate General Gulmann in Case C-396/92 *Bund Naturschutz in Bayern v. Freistaat Bayern*, starting a little earlier in the opinion than the passages on which the applicant in this case focussed. Advocate General Gulmann, at para. 64 of his opinion, noted that the plaintiffs in the main action had argued that the EIA must be carried out for the entire road link planned and, at para. 65, suggested that that view had much to recommend it. He continued, starting at para. 66:-

"66. *The optimal solution is presumably for an environmental impact assessment to be carried out both in connection with decisions on the routing of the entire length of road and on decisions for the specific construction projects for sections. That is also the solution chosen by the Bundestag when it transposed the EIA Directive, in connection with which, as mentioned, when amending the Law on Trunk-Roads it imposed an obligation to carry out an environmental impact assessment in both respects.*

67. *That is, however, not a solution that the Member States are bound to chose under the EIA Directive. As stated by Freistaat Bayern and the three governments which have submitted observations, it is not possible to interpret the directive to the effect that it makes an environmental impact statement mandatory for anything other than the specific projects submitted by developers to the competent authorities in order to obtain authorisation to carry out construction or other works – even if the actual application relates to only one part of a larger link road which, as normally happens in practice, is to be constructed in stages.*

68. *The principle underlying the directive is unambiguous: an environmental impact assessment is to be carried out for projects in respect of which the public or private developer is seeking development consent (see on this point in particular Article 1(2), Article 2(1) and (2), Articles 5, 6 and 8 in particular, which all assume that applications have been submitted for consent to a project).*

69. *That result is confirmed by the difficulties which could arise in laying down what comprises 'an entire project' when the concept is not the same as 'a specific project in respect of which an application has been submitted'. In addition, there might be difficulties in carrying out an environmental impact assessment as provided for in the directive for projects which have not been worked out in detail. It must be self-evident that a directive cannot indefinitely have the effect of forcing the Member States to depart from normal practice according to which long road links are executed by constructing sections over staggered periods.*

70. *It is, however, undoubtedly correct that, as the United Kingdom points out, the purpose of the directive should not be lost by the projects which should be subject to an environmental impact assessment being given a form which renders an environmental impact statement meaningless. The Member States must ensure*

that the obligation to carry out an environmental impact statement is not circumvented by a definition that is over-strict or otherwise inappropriate, in light of the purpose of the directive, of the projects in respect of which application must be made."

120. In the *Apple* case, the Supreme Court considered that Advocate General Gulmann was clear and correct in his opinion as to the limits imposed on Member States by the EIA Directive. In that case, as in this, the applicants had emphasised para. 71 of Advocate General Gulmann's opinion, but the position as to the underlying principle was, as stated in para. 68 of the opinion, "*unambiguous*". The Supreme Court was clear, at para. 32, that the assessment which must be carried out is an assessment of the project or proposed development for which planning permission is sought. The obligation to take into account the masterplan is different to carrying out an EIA of the masterplan.

121. In the *Apple* case the applicants relied, as in this case the applicant relies, on the fact that the Inspector, and hence the Board, had considered justification of the site selection by reference to the masterplan, and on the judgment of Peart J. in *O'Grianna v. An Bord Pleanála* [2014] IEHC 632 and the decision of the Court of Appeal in England in *Brown v. Carlisle City Council* [2010] EWCA Civ. 523, [2011] Env. L.R. 5 in support of an argument that the "*project*" was not a standalone project limited to the development for which planning permission had been sought.

122. In *O'Grianna* the application had been for the construction of wind turbines, without any works in relation to a connection to the national grid. Peart J. found that the connection to the national grid, what had been characterised as Phase 2, was in truth an integral part of the wind turbine project which, on its own, served no function. He held that in reality the wind farm and the connection to the national grid was one project. Since the EIA did not address the potential impact on the environment of the connection, it did not comply with the EIA Directive.

123. In *Brown* the application was for the construction of a freight distribution centre at Carlisle airport. The upgrade of the freight distribution centre was linked to a regulatory scheme for the upgrading of other features of the airport and could not lawfully be carried out on its own but the EIS was confined to those works. In the *Apple* case, Finlay-Geoghegan J. said that the judgment of O'Sullivan L.J. was indicative of an approach that required an assessment of the cumulative effects of a proposed development which is either not yet permitted or in respect of which an application has not yet been made, or which requires an assessment to be made of the cumulative effects of the proposed development and a future development where there is a functional and legal interdependence between the two.

124. Finlay-Geoghegan J. agreed with the assessment and conclusion of the High Court (McDermott J.) that there was no functional interdependence between the development of the first data centre and the potential further seven shown on the masterplan. The proposed data centre was, of course, functionally dependent on the substation, and vice

versa, but the environmental impacts of the two had been considered together in a cumulative assessment and no objection had been taken to the manner in which that had been done.

125. At para. 50 of her judgment in the *Apple* case, Finlay-Geoghegan J. turned to the question of the Scope of EIA on Phase One of a Masterplan. The court returned to the opinion of Advocate General Gulmann in *Bund Naturschutz in Bayern* which was identified as the only case before the CJEU in which a similar issue had been raised. The court identified the requirement in Article 3 of the EIA Directive to carry out the assessment "*in an appropriate manner in the light of each individual case*" which, it said, emphasised that the manner in which the assessment was to be carried out was fact specific to the individual case. At para 56 she said:-

> *"As already determined, the EIA is to be conducted of a specific project which is the subject of the planning application and there is no obligation to carry out an EIA of the masterplan. However, to give effect to the purposes of the EIA Directive so that the potential effects on the environment be assessed at the earliest possible stage, account must also be taken, when carrying out the EIA of the proposed development, of the future potential phases of the masterplan, so far as practically possible. The purpose of this is* inter alia *to enable the proposed development and potential future phases of the masterplan to be designed so as to have the least possible impact on the environment. The precise manner in which that is required to be done will depend upon the individual facts and circumstances of the specific project and the overall masterplan."*

126. On the facts of the *Apple* case, the purpose of the Board taking into account the masterplan when carrying out the EIA of the proposed development and, *inter alia*, assessing the potential environmental impacts of further data centres, was to inform itself at the earliest possible stage of such potential impacts so that it would take a decision on the specific planning applications with the fullest environmental knowledge. As Finlay-Geoghegan J. put it, borrowing an expression from Laws L.J. in *Bowen-West v. Secretary of State for Communities and Local Government* [2012] EWCA Civ. 321, [2012] Env. L.R. 22, the location and size of the site relevant to the data centre application and the construction of a substation and grid connection suitable for multiple data centres would each give "*a foot in the door*" for the construction of future data centres. As to whether on the facts of that case the Board had taken the masterplan into account as far as practically possible, that could be determined by reference to the Inspector's report which had been expressly adopted by the Board in its decision. Having examined the Inspector's report the court concluded that he had, and that the Board had.

127. What precisely it was that the applicant in this case was contending that the Board should have done was unclear. On the one hand it was acknowledged that the Board did not have to conduct "*a full belt and braces assessment*", but on the other it was argued that if there was any intention that the plant might later be upgraded to deal with an 800,000 PE there was a present requirement to establish that the receiving environment could

deal with such an increased output. There was no suggestion that the assessment made by Irish Water of likely demand was wrong, but it was submitted that no consideration had been given to the possibility that it might have been, and that the time at which the demand might exceed the planned capacity might be sooner that projected.

128. In my view there is no substance to this criticism. The function of the Board is to consider the potential impact of a proposed project or development on the environment. In this case it had no role in reviewing the assessment made by Irish Water of the projected requirement for waste water disposal in the greater Dublin area, still less in contemplating a range of possibilities – which, by the way, no one had suggested – that the requirement might be less than or greater than that projected by Irish Water, or that the projected requirement for a 500,000 PE plant might be reached sooner or later than the time horizon of 2050.

129. It is the case (as I will explain in some detail later on) that there is scope to increase the capacity of the plant at Clonshaugh, and it is the case that the pipe for which permission has been obtained would be capable of dealing with the effluent that might be generated by a larger plant but there is no functional interdependence between the permitted development and any further development that might take place in the future. It is true that Irish Water has to some extent "*future proofed*" both the site of the WwTP and the marine outfall, but it seems to me that this falls short of a masterplan for future development. It is acknowledged that there was no requirement to carry out an EIA of the potential impact of the construction or output of, say, an 800,000 PE plant and it was more or less acknowledged (and if it was not acknowledged, it is the fact) that it would be futile to attempt to contemplate what the impact on the environment might be of an expansion thirty years hence by reference to a guess at what the waste water disposal requirements might then be and at what the methods and standards of treatment might then be.

130. I find that the applicant has not established the existence of substantial grounds for contending that the Board did not consider the whole project.

131. This is a convenient point to deal with a somewhat related ground. At para. 18(V) of the statement of grounds it is alleged – without prejudice to the argument that the Board erred in law by failing to consider the whole project – that the Board acted contrary to Article 3(1) and Annex IV, section 5 of Directive 2011/92/EU by failing to consider the likely significant effects of the plant operating above its planned capacity. In the applicant's written submissions the relevant provision of national law is identified as s. 37G(2)(A)(i) of the Planning and Development Act, 2000. This ground is also based on the fact that the marine outfall pipeline was oversized for the proposed 500,000 PE plant and was designed for (or had the capacity to carry) the effluent that might be generated by an 800,000 PE plant.

132. There is no factual basis for any apprehension that the plant might operate above its planned capacity. Nor is there any factual or reasonable basis for any apprehension that

the size of the plan might be increased without the necessary permissions and consents, a precondition of which would be compliance with the requirements of the Directive and the Act as to the assessment of the likely significant effects of the operation of a plant with a greater capacity. The Board assessed the proposal which was made by Irish Water and there is no basis in law or logic upon which it might be criticised for failing to consider anything else.

133. There was some confusion in the applicant's grounding affidavit in relation to the possible requirement that the plant would be able to deal with 150,00 PE of waste water that might be generated by a significant industrial customer. A report published by Irish Water had indicated that an unidentified industrial customer had submitted a new connection enquiry seeking additional treatment capacity. It was said by the applicant, on the one hand, that it was common case that part of the loading of the proposed plant was to be the waste water from this customer, and on the other, that the applicant believed that "*this excess capacity of 150,000 PE*" was not included in the proposed design volume of 500,000 PE. The evidence was clear that the projected volume of 500,000 PE included "*headroom"* for this industrial waste water, if it was required, but if, for the sake of argument, it did not, the consequence could only be that the customer's wish could not be accommodated, and not that Irish Water might seek to operate the plant above its capacity. If, for the sake of argument, the basis of the projected requirement for capacity was not clear, there could have been no justification for the Board treating the application for a 500,000 PE plant as an application for a 650,000 PE plant. It follows that the Board cannot properly or sensibly be criticised for failing to do so.

Site selection

134. The second strand to the argument based on the change in the planned capacity of the plant is that the reduction in the estimate of the required capacity from 720,000 PE when the site at Clonshaugh was selected to 500,000 PE gave rise to a need for a new alternative site assessment.

135. The fundamental premise of the applicant's case in relation to site selection is that a 500,000 PE WwTP could be constructed on a smaller site than a 720,000 PE or an 800,000 PE WwTP. It is submitted that it goes without saying that the possible suitable sites for a smaller development will be different, and quite probably larger in number, than the number of suitable sites for a larger development. I cannot accept that. There is not a shred of evidence to support the assertion that the site size required is directly proportionate to the capacity of the plant. There is not a shred of evidence to support the proposition that there is a single site, never mind a large number of sites, that could accommodate this development, other than those considered by Irish Water.

136. The applicant's case, moreover, is premised on the proposition that an 800,000 PE WwTP could have been sited on a 20 ha site. That, it seems to me, is plainly at variance with the fact that at the start of the site selection process the search was for sites of not less than 20 ha. Any site that is not less than 20 ha must be bigger than 20 ha. Precisely

how much more than 20 ha might be required would necessarily depend on where the site was.

137. The process by which the site at Clonshaugh was selected was very much more complicated than simply looking for a plot of not less than 20 ha. It was set out in Chapter 5 of the EIAR of June, 2018 which dealt with *Consideration of Alternatives*. That chapter commenced by recalling the consideration during the evolution of the proposed project of five alternatives: do nothing; alternative non-project approaches to the provision of additional wastewater treatment; alternative strategic drainage scenarios; alternative site assessment and route selection; and the consideration of potential for re-use of treated water. The key recommendation of the GDSDS Final Strategy, as amended by the Strategic Environmental Assessment by Fingal County Council in 2008 was for a single Regional WwTP in North County Dublin, discharging into the Irish Sea, and an orbital drainage network to divert some existing foul drainage catchments into the proposed new plant. The GDSDS and its SEA were reviewed in 2017 and the project team then concluded that the findings and recommendations of those reports remained valid for the reasons given.

138. The EIAR, at para. 5.6 dealt with the question of alternative site assessment and route selection, and at para. 5.7 with outfall location. The selection of the site for the plant, the route of the pipeline, and the location of the marine outfall were all tied together.

139. The alternative site assessment and route selection was made in four phases. In Phase 1, 22 potential sites of suitable size were identified. This was done by mapping a very large study area on the basis of a number of restraints – ecology, cultural heritage, geology, water, landscape, and sensitive receptors – to find all unrestrained sites, taking into account the need for corridors to accommodate the orbital sewer and outfall pipeline and potential marine outfall locations. The exercise was directed to identifying suitable sites of sufficient size, not sites of a particular size.

140. Of the 22 potentially suitable sites so identified, ten were screened out: two by reason of existing planning permissions, and eight by reference to their location vis-à-vis the load centre and pipeline corridor. As part of Phase 1 the remaining twelve sites were assessed under high level engineering and design constraints and three of them were deemed to be *"less favourable".*

141. In Phase 2, which included public consultation, the shortlisted nine sites were assessed in relation to a wide variety of environmental and technical criteria and a list made of three emerging preferred sites: Annsbrook, Clonshaugh and Newtownduff. Following the publication in May, 2012 of the Alternative Sites Assessment and Route Selection Report (Phase 2), Phase 3 of the process was to bring the three emerging preferred sites to public consultation and that led to the publication of a further report. In Phase 4 of the process the preferred site option was identified. The selection was not simply of a site of sufficient size to accommodate the WwTP but took account of the orbital sewer, the outfall pipeline location, and the location of the marine outfall.

142. Paragraph 5.5 of the EIAR set out the eight steps which had led to the identification of the "*Clonshaugh site option*" as the most favourable and summarised the reasons for the selection of the site for the WwTP and the outfall. The full details of Phase 4 had been set out on an Alternative Sites Assessment and Route Selection Report (Phase 4) Final Preferred Site and Routes published in June, 2013 and the EIAR in June, 2018 reported that the assumptions and data underlying that report had not significantly changed. Paragraph 5.7 of the EIAR summarised the work done specifically in relation to the identification of potential marine outfall locations, which had also been previously published.

143. When the site assessment is examined it becomes quite clear that the alternative sites assessment entailed a great deal more than the identification of a suitably sized site for the WwTP and that what was referred to in shorthand as the "*Clonshaugh site option*" entailed a great deal more that the location of the WwTP at Clonshaugh.

144. Mr. Collins submitted that there was no meaningful explanation as to why a smaller development requires a bigger site area. Leaving aside the assumption that the smaller plant could be accommodated on a smaller site, I do not see it as objectionable in principle that Irish Water might apply to put the plant on a site which might be bigger than absolutely necessary. Neither do I see how the possibility that a smaller WwTP might have been accommodated on a smaller site meant that the site previously selected was unsuitable. Neither do I see how it is relevant that what was referred to as the campus style planning and landscaping requirements of the Clonshaugh site meant that the construction of the plant there meant that a site area of 30 ha was required. It stands to reason that the established or planned pattern of development in a particular area can be a factor in dictating the extent of the required site. The question is not, as was submitted on behalf of the applicant, whether the development could be done better elsewhere but whether it could be done on the proposed site, and what other reasonable alternative sites the developer had looked at.

145. Mr. Collins sought to make much of the change in the Directive – in the course of the site selection process – from a requirement to identify the "*main*" alternatives studied by the developer to the requirement to identify the "*reasonable*" alternatives studied by the developer. The argument, as I understood it, was that "*main*" alternatives were not the same as "*reasonable*" alternatives. I cannot accept that. While in theory, I suppose, a developer might study main alternatives which might not be reasonable alternatives there was no suggestion that that was dome in this case. Specifically, it was not suggested that the alternative sites studied by Irish Water were not reasonable alternatives to the chosen site. Rather the argument was that Irish Water should have gone back to the drawing board.

146. The drawings of the proposed plant showed that there was space for additional tanks. It was submitted on behalf of the applicant that Irish Water by providing space for a possible future expansion was building in spare capacity or additional capacity. I cannot accept that. The application was for a 500,000 PE plant and sufficient tanks to allow that

capacity to be dealt with. If there is to be any expansion in the capacity of the plant that will have to be the subject of a new planning application and all the assessments that go with it.

147. It is submitted that if the developer has any intention of building an 800,000 PE plant he has to make sure that the receiving environment can receive the output from such a plant. That, in my view, does not arise on the facts. The plant at Clonshaugh has been planned by reference to projected waste water requirements with a time horizon of 2050. There is no present intention to add to the planned capacity and the time horizon is such that it is impossible to say what might be required thereafter. Moreover, any assessment now as to the potential impact of the output of a bigger plant would serve no purpose. The relevant time at which that impact would have to be assessed is the time, if ever, at which it was proposed to increase the output and the relevant standards would be those prevailing at the time of any such additional development. There was no necessity or ability to take account of any future plans beyond noting, as the Inspector and the Board did, that the site could accommodate further expansion in the future.

148. The same applies to the bore of the pipe. The environmental impact of the operation of the pipe depends solely on the nature and volume of the effluent that will emerge at the outfall. Whether the pipeline is capable, or would be capable, of dealing with a greater volume of effluent is neither here nor there. If the environmental impact of the construction and tunnelling work is any different or greater by reason of the diameter of the pipeline, that has been taken into account in the assessment of the impact of the construction phase.

149. The fact that there is some futureproofing at the site of the plant at Clonshaugh and in the diameter of the proposed pipeline does not mean that the proposed development is anything other than was proposed and has been permitted. The applicant's reliance on *Bund Naturschutz in Bayern v. Freistaat Bayern* Case C-396/92 and *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23 is misplaced. What it is, short of a "*full belt and braces assessment"*, the Board is supposed to have done was not made clear. Whether the permitted development is a foot in the door for an upgraded plant in 2050 and beyond very much remains to be seen.

150. The Inspector's report dealt with the question of "*Site Selected*" in some detail. Starting on p. 66, she said:-

> *"I now respond further to observers' comments in relation to the merits of the selected site and the method of its selection. Observers state that the selection of the Clonshaugh site was politically motivated. One former elected representative supports this claim. The decision is described as unfair and as one which affects a community which already hosts a wide range of uses.*
>
> *While the selection by [Fingal County County] of a site on the periphery of its administrative and electoral areas and close to a population resident in the area*

administered by [Dublin City Council] may have that appearance, those claims are completely undermined in my opinion by the fact that the SEA process resulted in Clonshaugh being selected. That process addressed complex issues in detail and it considered the hurdles to be overcome in obtaining consent for the selected sites. A multi-criteria analysis and consideration of detailed modelling would have been involved. I am satisfied that it was on the basis of this further analysis that the WwTP was selected.

The selection of the site necessarily was undertaken in conjunction with consideration of where the marine outfall would be located. The site at Clonshaugh was compared to Annsbrook and Newtowncorduff and was considered to be more favourable on the basis of a greater number of criteria including less ecological value, better initial dilution and mixing of a southern outfall and ease of tunnelling of southern outfall. Section 5.7 of the EIAR further considers the assessment undertaken of outfall location. The latter was subject of detailed hydrodynamic studies which set out the water quality implications of both northern and southern outfall."

151. The Inspector went on at pp. 67 and 68 to identify a number of issues raised in the course of the oral hearing with the ASA before concluding:-

"Having considered the reports and all submissions I conclude that the approach to the site selected for scheme is based on a proper assessment of the likely environmental effects of the different possible approaches. I do not consider that there is evidence to suggest that the cost of the Clonshaugh option was given undue weight. I reject the simple conclusion that the site selection was largely political. In my opinion the applicant has presented for the consideration of the Board an application for a development which [it] proposes following a very thorough, robust assessment of the various alternatives as summarised in the EIAR."

152. The applicant argues that what is conspicuously absent from the Inspector's consideration is any reference to the reduction in the capacity of the plant from 700,000 PE to 500,000 PE but that was not an issue which was raised at the oral hearing and is premised on an assumption, for which there is no evidence, that the reduction in the capacity of the plant would give rise to a directly proportionate reduction in the footprint of the plant and so the size of the site that would be required. The Board and Irish Water abandoned their argument that the applicant ought not be permitted to raise issues on the application for judicial review that were not raised in the public consultation, but it is unfair to criticise the Board or the developer or the Inspector for not dealing with a point which was not made, unless the applicant can demonstrate that it is clearly a point that they should have dealt with.

153. A longish affidavit of Mr. Ciaran O'Keeffe, engineer, was filed on behalf of Irish Water. Mr. O'Keeffe was the project manager of the GDD Project from 2011 until April, 2019 and

gave evidence at the oral hearing. Mr. Collins, having himself filed a number of very long affidavits, is nevertheless correct in principle to point out that the judicial review must be approached on the basis of the material which was before the Board, but as far as site selection is concerned, Mr. O'Keeffe's affidavit largely comprises a summary of the information in the EIAR and a specific refutation, by an expert, of the assumption that the reduction in capacity would lead to a pro rata reduction in site size. The object of Mr. O'Keefe's affidavit, in the main, was not to seek to put before the High Court evidence which had not been before the Board but to provide a roadmap of the evidence before the Board, the evaluation of that evidence, and the conclusions reached. By reference to the drawing for the WwTP, Mr. O'Keeffe was able to say that the area for potential future expansion of the facility – and so, it might be said, the extent by which the site exceeded the immediate requirements of the proposed development – was about 3 ha, and that the reason that the pipeline was bigger than would immediately be required was that the design horizon for such infrastructure is between 75 and 100 years.

154. In support of the argument that insufficient consideration was given to alternative sites, the applicant relies on the opinion of Advocate General Kokott given on 7th November, 2018 in Case C-461/17 *Holohan and Others* on a reference from the High Court. Among the eleven questions referred were three directed to the requirements of Article 5(3)(d) of the EIA Directive 2011/92/EU and para. 2 of Annex IV that the EIAR should provide 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.

155. It is submitted on behalf of the applicant that, in line with this opinion, for this scale of WwTP the EIA Directive must be interpreted in accordance with the Espoo Convention insofar as the consideration of alternatives is concerned so that the EIA must set out a description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative; a description of the environment likely to be significantly affected by the proposed activity and its alternatives; and a description of the potential environmental impacts of the proposed activity and its alternatives and an estimation of its significance.

156. The main proceedings in *Holohan and Others* concerned a challenge to a decision of An Bord Pleanála approving a proposed road construction project at Kilkenny. The proposed road cut through a number of protected natural areas. At an early stage of the planning of the project consideration had been given by the developer to the possibility of spanning the protected area by a bridge but this was rejected on cost grounds. The issue was whether the developer was obliged nevertheless to provide information on the environmental effects of carrying out the development in that way. Advocate General Kokott dealt with the questions relating to the alternatives in the environmental impact assessment starting at paragraph 92.

157. The first of the three questions as to alternatives was whether an alternative could be regarded as one of the "*main alternatives*" even though it had been rejected at an early stage. The opinion of Advocate General Kokott, adopted by the court, was that for the

purpose of assessing which alternatives are to be regarded as main alternatives, the relevance of those alternatives to the environmental effects of the project or their avoidance should be decisive. The stage at which an alternative was rejected was irrelevant from that point of view, but it might indirectly have a bearing on the reasons to be given.

158. The second and third of the three questions as to alternatives sought to clarify the extent of the information which the developer must provide on the environmental effects of the alternatives. Before coming to those questions Advocate General Kokott examined Article 5(3)(d) and contrasted the requirements of the EIA Directive with those under the Espoo Convention. It is on this analysis that the applicant relies in support of the proposition that the EIA must include information in relation to reasonable alternatives, generally, as opposed to the alternatives studied by the developer.

159. Advocate General Kokott started her analysis at para. 97 by stressing the fact that Article 5(3)(d) of the EIA Directive requires only information as to the other alternatives studied by the developer. She said that the fundamental decision on the part of the EU legislature to place reliance on the assessment of the developer also had a bearing on the information required to be provided by the developer on the alternatives which he has studied.

160. Advocate General Kokott contrasted Article 5(3)(d) of the EIA Directive with Article 5(1) of Directive 2001/42/EC on the assessment of certain plans and programmes on the environment, which includes reasonable alternatives, and traced the legislative history of Directive 97/11/EC and Directive 2014/52/EU from which it was apparent that the proposal of the Commission and Parliament of wider obligations did not prevail.

161. At paras. 105 to 109 of her opinion, Advocate General Kokott looked at the Espoo Convention, which requires a description of reasonable alternatives and their effect on the environment. Noting that that Convention is applicable only to projects which are likely to have significant transboundary impact, she said:-

"107. It is true that, for the purposes of a uniform interpretation, it would be desirable to interpret the EIA Directive in accordance with that Convention, since much of the Directive is intended to implement that Convention. Furthermore, the EU's powers must be exercised with due regard for international law; consequently, EU secondary law must in principle be interpreted in accordance with the EU's obligations under international law.

108. However, in the light of its wording and legislative history, it is not possible to interpret Article 5(3)(d) of the EIA Directive as meaning that a project may obtain development consent only if the reasonable alternatives to it are also described and their effects on the environment are also assessed."

162. The applicant acknowledges that the development in this case would not have transboundary effects (or, as Mr. Collins puts it, has not sought to expand her plea to include transboundary effects) but submits that what is characterised as a lacuna identified by Advocate General Kokott is relevant to the overall interpretation of the EIA Directive and accordingly domestic law. Mr. Collins points to para. 109 of the opinion where it is said:-

> *"109. The question as to whether the rules on the assessment of alternatives which are applicable to certain projects under the Espoo Convention are by extension directly applicable to the EIA Directive, because, regard being had to its wording and the purpose and nature of that Convention, the latter contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure, has not been raised. Nor, presumably, would it be ultimately relevant to any judgment to be given in the main proceedings, since the project at issue does not, prima facie, fall within the scope of the Convention. There is therefore no need for the Court to give a ruling."*

163. The applicant's submission is, variously, that the EIA Directive must be interpreted in accordance with the Espoo Convention so as to extend the requirement in Article 5(3)(d) beyond the reasonable alternatives studied by the developer to reasonable alternatives, and that, "*accordingly, this issue has not yet been decided and is not therefore acte clair*". In *Holohan and Others* Advocate General Kokott observed that the project the subject of the main proceedings did not *prima facie* fall within the scope of the Convention. It is now submitted that the reason why the ring road in Kilkenny did not fall within the scope of the Convention was that it was not a road of four or more lanes of 10 km or more in length, so as to come within para. 7 of the list of activities at Appendix I. By contrast, it is said, the development the subject of the impugned permission is a wastewater treatment plant with a capacity exceeding 150,000 PE, and so comes within para. 19 of Appendix I.

164. The applicant's case is that the provisions of national law that transposed the EIA Directive – article 94(b) and (c) and paras. 1(d) and 2(b) of Schedule 6 of the Planning and Development Regulations, 2001 – must be interpreted in accordance with EU law. It follows, so the argument goes, from the principle of primacy of EU law that bodies called upon to apply EU law are obliged to take all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case law that may be contrary to EU law.

165. So, as I understand the argument, *Holohan and Others* is authority for the proposition that Article 5(3)(d) of the EIA Directive is to be read without the words "*studied by the developer*", and EU law requires that those words in paras. 1(d) and 2(b) of the 2001 Regulations should be disregarded, and the EIA condemned because it considered only those alternatives studied by the developer.

166. I cannot accept that argument and I do not entertain any doubt that would warrant a reference to the CJEU. Contrary to what has been submitted, Advocate General Kokott did not say that the EIA Directive must be interpreted in accordance with the Espoo Convention. What she said was that it had not been argued. The opinion does not disclose why she thought that the Kilkenny ring road did not fall within the scope of the Convention and does not, to my mind, justify an assumption that it was simply the width or length of the road.

167. What for convenience is referred to as the Espoo Convention is the Convention on Environmental Impact Assessment in a Transboundary Context. As is clear from the title, it is directed to the transboundary environmental impact of proposed activities. Article 2 requires each party to the Convention to take the necessary measures to implement it, including, with respect to the activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure. The Convention does not apply to any and every WwTP with a capacity exceeding 150,000 PE but only to such plants as are likely to cause significant adverse transboundary impact. It is not suggested that the proposed WwTP at Clonshaugh, or the marine outfall, is likely to have any transboundary effect and so Espoo is simply irrelevant.

168. I mention here for the sake of completeness that I do not see that the change in the requirement from main alternatives studied by the developer in 2001/42/EC to reasonable alternatives studied by the developer in 2014/52/EU makes any difference to this issue which revolved around whether the consideration of alternatives, whatever they were, was limited to those studied by the developer. It was not suggested that the Clonshaugh site was unsuitable or that any of the other sites looked at by Irish Water were not reasonable alternatives to the site chosen.

169. The requirement in Article 5(3)(d) of the EIA Directive for information studied by the developer was deliberately decided upon by the EU legislature and correctly transposed into Irish law and it is by reference to that requirement that the impugned decision is to be reviewed.

170. In her written submissions the applicant sought to make the case that the consideration of reasonable alternatives is part of the Board's obligation in relation to proper planning and sustainable development. The applicant points to the obligation on the Board under s. 37G(2)(a)(i) of the Act of 2000 to have regard to the likely consequences of a proposed development on the proper planning and sustainable development in the area in which it is proposed to situate the development; the power of the Board under s. 37B(3) to give advice to a prospective applicant in the course of pre-application consultation; the power of the Board under s. 37F(1) to require further information; the entitlement of the Board to impose conditions on the granting of permission, including conditions relating to the protection and conservation of the environment; the obligations imposed on planning authorities by article 13B of the Planning and Development Regulations, 2001, as inserted by the Planning and Development (Strategic Environmental Assessment) (Amendment)

Regulations, 2011 to prepare an environmental report on the likely significant effects on the environment of implementing a new development plan, and by article 13I to make available a statement summarising the reasons for choosing a development plan as adopted in the light of other reasonable alternatives. If, it is said, the development plan itself must be subjected to reasonable alternatives, then proper planning and sustainable development as understood in Irish law must include the consideration of alternatives. The argument, as I understand it, is that on receipt of a planning application the Board must contemplate what alternatives there might be to the development proposed, other than those disclosed by the application to have been considered by the developer, and require the developer either to consider those or, perhaps to make a different application.

171. Again, the net practical effect of the construction contended for would be to rewrite Article 5(1)(d) of the EIA Directive and the Irish legislation transposing it so as to disregard the words "*studied by the developer*". It is quite clear that EU law and the Irish planning code take a different approach to development plans, on the one hand, and applications for planning permission, on the other, and I can see no basis on which the legislation might be so construed as to impose on an applicant for planning permission any greater or different obligation than has been imposed by the legislation.

172. I find that the applicant has not established substantial grounds for an argument that the site selection process– as pleaded – failed to comply with s. 37G(2)(a)(i) of the Planning and Development Act, 2000, as amended, or articles 94(b) and (c) and paras. 1(d) and 2(b) of Schedule 6 to the Planning and Development Regulations, 2001; or Article 5(1)(d) and Annex IV, section 2 of the EIA Directive, or – as Mr. Collins tried to lob in at the conclusion of his oral argument –was irrational.

173. I will next deal with the applicant's argument that the Board failed to consult with the Environmental Protection Agency in relation to the waste water discharge from the outfall pipeline. Before doing so, I pause to recall that in the course of oral argument it was submitted that this alleged failure went to the site selection process. I cannot see that it does. The question to which the consultation with the EPA is directed is the impact of the proposed discharge on receiving waters. That, it seems to me, arises at the point of discharge and it does not matter where the effluent is generated. Moreover, since the site selection will necessarily have been made before the planning application, the consultation by the Board with the EPA cannot inform site selection.

Consultation with the Environmental Protection Agency

174. The applicant asserts that the Board failed to consult with the EPA as required by the Waste Water Discharge (Authorisation) Regulations, 2007 (S.I. No. 684) as amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016 (S.I. No. 652), and contrary to the EIA Directive which, it is said, sets out the requirements for coordinated and/or joint procedures where the obligation to carry out assessments relating to environmental issues arises simultaneously under that Directive and other EU legislation. The argument, as I understand it, is that the Board

failed to do what it was required to do by the Irish legislation whether on its face or construed in light of the requirements of EU law.

175. Alternatively, if the Irish legislation cannot be construed as imposing on the Board the obligations which are said to be imposed by EU law, it is said that Ireland has failed to properly transpose Article 2 of the EIA Directive.

176. It is not contested that the consultation obligation created by art. 44 of the 2007 Regulations was engaged, rather the Board and Irish Water argue that it was complied with.

177. The confusing assertion in the statement of grounds (which is said to have arisen from the somewhat confusing correspondence on the Board's file) was that the EPA missed the deadline set by the Board and that despite further correspondence there was "*no further submission*" on the file. What the Board's file shows, and the applicant now accepts, is that by letter dated 29th November, 2018 the Board wrote to the EPA inviting the EPA to make any observations it might have in relation to the proposed development by no later than 5.00 p.m. on 11th January, 2019. An e-mail came in to the Board on 8th February, 2019. This was a month after the deadline. On the afternoon of 11th February, 2019 the Board wrote that the response could not be accepted because it was out of time and renewed its request, setting a new deadline of 20th February, 2019. Early on the following morning the EPA re-sent the response it had previously sent.

178. The Board's letter of 29th November, 2018 referred to the GDD Project which it identified as being a proposed development which comprised or was for the purposes of an activity for which a wastewater discharge licence was required. It recited that under the provisions of s. 37F(5) of the Planning and Development Act, 2000, before making a decision in respect of such a proposed development, the Board "*may*" request the EPA to make observations and invited the EPA to make any observations "*it may have*" in relation to the proposed development by no later than the date and time to which I have referred.

179. The response of the EPA referred to the request and, purportedly in accordance with the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016 (S.I. No. 652 of 2016) made "*the following observations*".

180. Two technical points are made.

181. Section 37F(5) of the Act provides:-

> "*(5) Before making a decision under section 37G in respect of proposed development comprising or for the purposes of an activity for which an integrated pollution control licence or a waste licence is required, the Board may request the Environmental Protection Agency to make observations within such period (which period shall not in any case be less than 3 weeks from the date of the request) as may be specified by the Board in relation to the proposed development.*"

182. It is acknowledged by the Board that the reference in its letter of 29th November, 2019 to s. 37F(5) was wrong.

183. Article 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 as amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016 provides:-

> *"44. (1) Where Regulation 41, 42 or 43 applies, before making a decision in respect of a proposed development, a planning authority or An Bord Pleanála shall where the authority or the Board consider that the proposed development is likely to have a significant impact on waste water discharges, request the Agency, within such period (not being less than 3 weeks from the date of the request) as may be specified by the planning authority or the Board, to make observations in relation to their assessment of the likely impact of the proposed development on waste water discharges and the Agency shall comply with any such request.*
>
> *(2) When making its decision, the planning authority or the Board, as the case may be, shall have regard to the observations received from the Agency.*
>
> *(3) The making of observations by the Agency under this Regulation shall not prejudice any other function of the Agency under these Regulations."*

184. The word *"shall"*, which I have underlined, was substituted by the 2016 Regulations for the word "*may*" in the 2007 Regulations as originally made.

185. The applicant's first technical point is that the deadline of 20th February, 2019 set by the Board's e-mail of 8th February, 2019 was less than the minimum of three weeks prescribed by both s. 37F(5) and article 44. I am not satisfied that that is a substantial ground upon which the consultation (if it was otherwise valid) could properly be condemned. The purpose of the prescribed time is to ensure that the EPA has a sufficient opportunity to deal with a request. The legislation prescribes a three week minimum but envisages that longer may be required. I am wholly unconvinced that the Board needed to issue a new request and could not have taken the response of 8th February, 2019 into account because it was late. The Board's request imposed a mandatory obligation on the EPA to respond and I do not believe that that obligation ceased or was dissolved by the expiry of the time limit. The EPA's letter of 12th February, 2019 sent in response to the renewed request sent on the afternoon of the previous day, was in substantially the same terms as that of 8th February, 2019 and it is clear that the EPA had previously had whatever time it needed (or thought that it needed) to give the response which it gave. The adequacy of the response is another matter.

186. The applicant's second technical point is that because the Board's letter of 29th November, 2019 referred to s. 37F(5) of the Act and the Board did not invoke article 44 of the 2007 Regulations there was no valid consultation. In response to the Board's argument that if the request did not refer to the correct legislation the EPA's response

did, the applicant argued that the EPA's e-mail referred to the 2016 Regulations, which was not the correct legislation.

187. In an administrative structure which is highly technical it is plainly desirable that the relevant rules should be accurately identified but what is important is not that the correct boxes are ticked but that the substance of the rules should be complied with. If the request and response had not referenced any legislation they would not thereby have been invalidated and neither, in my view, could they be invalidated by a mistaken reference *per se*. The Board was entitled to invite observations and the EPA was obliged to make them. The applicant does not suggest otherwise. The height of the argument is that article 44 was not expressly invoked. There is a lot of smoke in the applicant's written submission about the sludge hub centre, but it is perfectly clear from the request and the response that the subject matter of the correspondence was wastewater. If the substance of the request was correct, it would not have been invalidated by a mistaken reference to the wrong statutory provision. By the same token, if the substance of the request was wrong, it would not be saved by the invocation of a statutory provision under which a different request might have been made.

188. The substance of the applicant's case in relation to consultation by the Board with the EPA is that, as Mr. Collins puts it, *"the generic type correspondence issued by the EPA does not constitute 'observations in respect of their assessment of the likely impact of the proposed development on wastewater discharges'"* as required by article 44 – so that there was no consultation – or, as Ms. Butler puts it, that what the EPA said was inadequate.

189. What was said by the EPA in its e-mail of 12th February, 2019, insofar as is relevant was:-

> *"The development proposed may require a licence under the Waste Water Discharge (Authorisation) Regulations 2007, as amended. The Agency has not received a licence application relating to the development described above.*
>
> *It is noted that the planning application was accompanied by an EIAR. Should the Agency receive a licence application for the development, the applicant will be required to submit the associated EIAR to the Agency as part of the licence application. The EIAR will be considered and assessed by the Agency and the Agency shall ensure that before a licence is granted, the licence application will be made subject to an Environmental Impact Assessment as respects the matters that come within the functions of the Agency. All observations from the planning authority will be taken into account as part of the Agency's assessment and before making a decision in relation to the licence application.*
>
> *Should a licence application be received by the Agency all matters to do with emissions to the environment from the activities proposed, the licence application documentation and EIAR will be considered and assessed by the Agency.*

Where the Agency is of the opinion that the activities, as proposed, cannot be carried on, or cannot be effectively regulated under a licence then the Agency cannot grant a licence for such an activity."

190. In its request of 29th November, 2018 the Board had said that it understood that a copy of the planning application and the EIAR had been sent to the EPA. The response did not confirm or deny that. It is not clear by whom this material was provided to the EPA or for what specific purpose. It is not suggested that there was any obligation on the part of the EPA to do anything with the information, or that the EPA in fact did anything with it. Now as I will come to, Ms. Butler, for the Board, argues that if the applicant has any complaint as to the adequacy of the response from the EPA she has chosen the wrong target but for the moment I think that it is fair to say, as Mr. Collins submits, that the input of the EPA into the process, such as it was, was limited to saying that it would look at any licence application that might be made to it if and when any such application was made.

191. The applicant's case is that article 44 of the 2007 Regulations must be read in the context of article 43 which, it is said, requires the Board to decide whether the discharge would cause non-compliance with the "*combined approach*" to emission control which the EPA is required to put in place when licensing discharges. The purpose of the consultation with the EPA, it is said, is to inform the Board when addressing that question.

192. The applicant further submits that the interaction between the Board and the EPA was not in accordance with the EIA Directive, as amended, which, it is said, sets out the requirement for coordinated and/or joint procedures where the obligation to carry out assessments relating to environmental issues arises simultaneously from that Directive and other EU legislation, specifically Directive 2000/60/EC, The Water Framework Directive. The applicant relies on recital 37 and Articles 2 and 6 of the EIA Directive 2014/52/EU, on Commission Notice 2016/C 273/01 on streamlining environmental assessments conducted under Article 2(3) of the EIA Directive, and the decision of the CJEU in *Case C-50/09 Commission v. Ireland*.

193. *Case C-50/09 Commission v. Ireland* was an action by the Commission under Article 226 EC for an alleged failure on the part of Ireland to fulfil obligations, including the obligation to effectively transpose Articles 2 to 4 of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment where several authorities were involved in the decision making process. The Commission's case was, and the court found, that there was a gap in the Irish legislation as it then stood which arose from the inability of the EPA to require an environmental impact statement and the possibility that the EPA might receive and deal with an application for a licence before an application had been made to a planning authority, which alone could require the developer to submit an environmental impact statement.

194. The court started by noting that Member States were entitled to entrust the granting of development consent to several entities and that Member States were entitled to decide

the rules of procedure and requirements for the grant of development consent. The requirement in Article 2(1) of Directive 85/337 that the EIA must take place before the giving of consent entailed an examination of the direct and indirect effects of the project on those factors referred to in Article 3 and on the interaction between those factors before consent was given. Ireland was entitled to entrust the attainment of the aims of the directive to two different authorities but only on the basis that those authorities' powers and rules would ensure that an EIA was carried out fully and in good time, that is to say, before the giving of consent. The court accepted that there could be an overlap of the respective powers of the authorities responsible for environmental matters, but any overlap could not fill the gap identified by the Commission: which was that the EPA might decide a licence application without an EIA.

195. Mr. Collins submits that the essence of what the case says is that there must be joined-up, coordinated interaction between the consent givers where there is a multi-staged development consent. I do not believe that that is correct. The lacuna identified in the transposition of the directive was simply that part of the development consent might be given without an EIA.

196. In this case, says Mr. Collins, development consent has been granted in advance of a complete assessment having been undertaken. The premise of that, however, is that the EIA made by the Board did not take account of emissions, or perhaps, that the Board could not make its assessment until it knew what the EPA's assessment would be, or, perhaps, had an indicative view of what the EPA's assessment would look like. It is submitted that the EIA will not have been completed until the EPA makes its EIA on the licence application. That, it is said, absent any meaningful interaction, can give rise to very different results and outcomes and problems which, it is said, is exactly the problem identified in *Case C-50/09 Commission v. Ireland*.

197. It was submitted on behalf of the Board that the applicant had misinterpreted the word "*their*" in article 44. The EPA was not, it was said, required by article 44 to make any assessment or to make any observations to the Board on any assessment it might have made. Any proposition that each authority must have completed its assessment before the other could is a logical impossibility. Mr. Collins rejected the suggestion that the applicant had misconstrued article 44 and disclaimed any such argument but argued that what the provision requires is an exchange of information and views on the assessment of the likely impact of the proposed development on wastewater.

198. At first glance it might be thought that there is some ambiguity in the requirement of article 44 of the 2007 Regulations. If one were to take as the starting point that the Board should consider that a proposed development is likely to have a significant impact on waste water discharges, such a likelihood might, as in this case, be obvious from the description of the development and the obligation to communicate with the EPA arises immediately. What is not clear from article 44 on its own is whether the word "*assessment"* is a verb or a noun. If it is a verb, the EPA might have something to say about how the Board should go about its assessment. But if it is a noun, it would

contemplate that the Board before canvassing the views of the EPA would have made its assessment, or some sort of assessment. Mr. Collins focussed more on the quality of the engagement – or correspondence – rather than the requirements of Regulations, but he did submit that it is a noun. The argument became rather convoluted. It did not clearly separate the technicalities from the substance and insisted that there was either no consultation at all or no proper consolation without clearly identifying the inadequacy: but in the undergrowth of the applicant's supplemental affidavit the point was made that the Board asked the EPA the wrong question. That is the nub of the matter.

199. In my view the correct starting point is to look at the cases to which article 44 applies. Those are the cases to which articles 41, 42 or 43 apply.

200. Article 43 of the 2007 Regulations provides insofar as is relevant:-

"43. (1) Where … An Bord Pleanála is considering an application for permission … for development being development which involves a disposal of waste water to a waste water works … the Board … shall consider whether the discharge of waste water from the proposed development, in conjunction with existing discharges to the receiving waters, would cause non-compliance with the combined approach or, in situations where there is existing non-compliance, would result in a significant breach of the combined approach.

(2) Where, following consideration under paragraph (1) … the Board forms the opinion that the proposed discharge would result in non-compliance with, or a significant breach of, the combined approach, the … Board shall

(a) refuse permission or approval for the development,

(b) impose conditions in any grant of permission or approval to ensure that the discharge does not result in non-compliance with, or in a significant breach of, the combined approach, as the case may be, or

(c) decide not to proceed with the development."

201. Article 3 of the 2007 Regulations provides:-

"'combined approach', in relation to waste water works, means the control of discharges and emissions to waters whereby the emission limits for the discharge are established on the basis of the stricter of either or both, the limits and controls required under the Urban Waste Water Regulations, and the limits determined under statute or Directive for the purpose of achieving the environmental objectives established for surface waters, groundwater or protected areas for the water body into which the discharge is made."

202. Article 43(1) requires the Board, when considering an application for permission for development which involves the disposal of waste water to a waste water works, to

consider whether the discharge of waste water from the proposed development would cause non-compliance with the combined approach or would result in a significant breach of the combined approach. Article 43(2) directs the Board as to what is to be done in the event that it forms the opinion that the proposed discharge would result in non-compliance with, or a significant breach of, the combined approach. Since the opinion drives the decision, it seems to me that the consultation must occur before the opinion is formed. If that is so, the trigger for the consultation is a provisional or tentative view, based on the consideration required by article 43(1) as to the impact of the proposed development on the receiving waters, that the impact is likely to be significant.

203. The premise of the Board's request of 29th November, 2018 was that the proposed development was one for which a wastewater discharge licence was required. The trigger for consultation in s. 37F(5) of the Act is the mere requirement of a licence – an integrated pollution control licence or a waste licence – and the observations to be made by the EPA are observations on the proposed development. The trigger for consultation in article 44(1) is that the planning authority or the Board should consider that the proposed development is likely to have a significant impact on waste water discharges and the observations of the EPA are observations on the assessment of that likely impact. In other words, the authority or the Board is to convey to the EPA their assessment of the likely impact of the proposed development and the EPA is to make its observations on that assessment. I am reinforced in this construction by the requirement in article 44(2) that the authority or the Board, when making its decision, should have regard to the observations of the EPA, and, indeed, by the scheme of s. 37F(5) which contemplates substantive engagement by the EPA in relation to the proposed development.

204. The Board's request to the EPA was for the Agency's observations in relation to the proposed development on the premise that it was one for which a waste water discharge licence was required. That was not the correct premise or the correct question. The EPA's response was premised on the fact that the proposed development might require a licence and set out what the EPA would do if an application was made. There is a superficial attraction to the argument that the applicant's criticism of the EPA's response is misdirected but if the analysis is refocussed on the request, it seems to me that the EPA cannot be criticised for not doing something it was not asked to do and that the correct target is the Board, for not making the assessment of the likely impact of the proposed development which it was required to make and then requesting the Agency to make its observations on that assessment.

205. The Board submits that the legal obligation to ensure that certain authorities are given the opportunity to express an opinion on certain materials does not equate to an obligation to ensure that the body so consulted actually uses the opportunity to express an opinion or to police the content or quality of any opinion so expressed. I am not at all sure that this is correct in principle, but it seems to me that it does not arise in this case because the request made to the EPA was for its observations on the necessity for a

waste water discharge licence and not, as required by article 44, its observations on the likely impact of the discharge.

206. Mr. Mulcahy, on behalf of the Board, correctly identifies the legal obligation of the Board as being to ask: "*Dear Agency, do you have any observations on our assessment?"* He is perfectly correct that legislation does not require or contemplate that the Agency will have already carried out its own assessment, or the Agency is required to carry out its own assessment, but the question asked was: "*Dear Agency, what do you think about the requirement for a wastewater discharge licence for this development*?" Mr. Mulcahy, correctly I think, summarises the applicant's argument as being that the inadequacy of the reply rendered the Board incapable of carrying out its own EIA. But, he says, the Inspector's report shows that she was satisfied that she had sufficient information to complete her assessment. That is factually correct, but it begs the question as to whether the Inspector was legally correct to be so satisfied. The regulations provide for mandatory consultation in relation to the Board's assessment of the likely significant impact on waste water discharges. By article 44(2) the Board when making its decision must have regard to the observations received from the Agency on the assessment which it has previously made. The clear purpose of that requirement is that the Board's assessment of the application should be informed by the views of the Agency. In my view the failure to understand and implement the mandatory consultation means that the Board's assessment of the application was not so informed and so was legally flawed.

207. For these reasons I am satisfied that the applicant has identified a substantial ground upon which to challenge the validity of the impugned decision. The infirmity in the consultation is not simply the invocation of the wrong legislative provision but a failure on the part of the Board to correctly identify and to meet the obligation imposed by article 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 as amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016. It is common case that the obligations created by article 44 are mandatory on both sides and I am satisfied that it has been demonstrated that the required consultation did not take place. On this ground, the decision of An Bord Pleanála of 11th November, 2019 cannot stand.

208. While the failure of the consultation required by article 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 was argued more or less as a standalone ground, it seems to me that it may have wider implications for the validity of the process by which the decision was reached, and so to the question of whether, and if so the basis upon which, the matter might be remitted, to which I shall come.

The alleged failure to transpose

209. The primary case made on behalf of the applicant is that the Board, in a large number and wide variety of respects, failed to comply with a large number and wide variety of requirements of EU law and of Irish law transposing EU law. The primary case is that the Board was bound to do, and not to do, what is was said the Board did not do, and did do. Insofar as the consultation between the Board and the EIA is concerned, the applicant's

case is that there is a requirement of consultation which was not met. The clear articulation of any alternative case that there is no requirement in Irish law for consultation because of a failure to transpose the Directive was always going to be a challenge.

210. The statement of grounds, as I have observed earlier, is rather a jumble. The intended statement of opposition of the Board identifies thirteen grounds in paras. E.2 to E.16 of the statement of grounds under the heading "*Factual Background*", many of which are repeated or restated in the five grounds set out at para. 17 under the heading "*Unreasonableness*", in the twenty-one grounds set out at para. 18 under the heading "*Error in the application of Irish and European Union Law*", and in the eight further grounds at para. 19 under the heading "*Contrary to Fair Procedures".*

211. The case against the State respondents, at E.18(XXI) is the twenty first of twenty one alleged instances of alleged error in the application of Irish and European Union law. The plea is that:-

> *"In the alternative the [State] respondents in failing to ensure proper provision in Irish legislation for a co-ordinated and/or joint procedure between the [Board] and the EPA for conducting an EIA on a project that is also subject to the Urban Waste Water Treatment Directive 91/271/EEC, erred in law and failed to properly transpose Article 2 of the EIA Directive."*

212. The State respondents in their intended statement of opposition object that the statement of grounds fails adequately to particularise the applicant's case against them, contrary to the requirements of Order 84.

213. In support of this objection the State respondents pointed to O. 84, r. 20(3) and *A.P. v. Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729. As to the consequences of a failure to state the grounds with sufficient clarity and precision, the State respondents referred, for instance, to the judgment of Cregan J. in *Malone v. Mayo County Council* [2017] IEHC 300 where the grant of leave was set aside, and the judgment of Haughton J. in *Alen-Buckley (No. 2) v. An Bord Pleanála* [2017] IEHC 541 in which, at the hearing, the court ruled out a number of arguments that could not be linked back to the pleaded case. As to any case against the State of a failure to transpose, in particular, reference was made to the judgment of McDonald J. in *Sweetman v. An Bord Pleanála (IGP Solar)* [2020] IEHC 39 in which the court, having emphasised the requirement that the case be pleaded specifically and with appropriate particularity, said at para. 103:-

> *"It is not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it is contended that a specific provision of Irish law fails to comply with a specific obligation imposed by the Directive concerned."*

214. Reference was also made to the judgment of Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 122.

215. Mr. Collins "*did not particularly disagree with*" these authorities but did *"wonder increasingly as these cases come along as to how far pleading points can go".* I see no room in the authorities for doubt or puzzlement. The court will not grant leave on any ground that that has not been pleaded with sufficient clarity and particularity and will not entertain argument on any point which has not been so pleaded. In the case of an alleged failure to transpose, the ground must identify with precision the alleged shortcoming and the declaration sought must be framed in terms which, if made, would convey to the Attorney General precisely what the shortcoming is and so precisely what is needed to be done to rectify it.

216. The applicant refers to the fact that the Board has not made the same point, but this goes nowhere. In the first place, an objection by a respondent is neither strengthened nor weakened by the fact that the same objection has been made or has not made by any other respondent. In any event, the Board is absolutely clear that it regards any alleged failure to transpose as a matter for the State respondents.

217. The response to the objection gives weight to it. The response is that the applicant's case is absolutely apparent from the pleadings, from the submissions, from the affidavits, from the Board submissions, and from the State's submissions. The point however is that the applicant's case must be spelled out with particularity in the statement of grounds. In principle the applicant's case cannot be found in the respondent's affidavits or submissions. The applicant is not permitted to add grounds by reference to arguments made in his affidavits or submissions. Above all, it is not an answer to such an objection for the applicant to adopt as a particular statement of his case the respondent's hypothesis as to what it might have been.

218. There was some discussion in argument as to whether, if there was any merit to the objection, the statement of grounds might be amended but, in the end, there was no application to amend. It was suggested at one point in the oral argument that if the applicant's argument were to be accepted, the pleading could be amended, and even that having reserved judgment the court might invite an application to amend, but I will treat that as what His Honour Judge James Carroll used to call an advocate's argument.

219. The applicant's submissions on this point focussed on the outcome of the engagement – or the correspondence – between the Board and the EPA. Because, it was said, there had been no meaningful communication, either there was non-compliance with article 44 of the 2007 Regulations or there was "*an infirmity in the transposition*". The statement of grounds, it was said, made it clear that the alleged absence of consultation was either the fault of the Board or a fault of transposition. Logically, then, once it is established that the consultation by the Board was not what was required, the applicant effectively acknowledges that there was no failure of transposition. The applicant had plenty to say in the statement of grounds in relation to the consultation between the Board and the EPA

but nothing at all about transposition, beyond that there had been, or might have been, a failure to transpose.

220. In the written submissions filed on behalf of the applicant reference is made to *Case C-50/09 Commission v. Ireland*. The alleged failure to transpose Article 2 of the EIA Directive is said to be in breach of the ruling in that case.

221. It seems to me that the decision of the CJEU in Case C-50/09 *Commission v. Ireland* neatly illustrates the hopelessness of trying to fix an alleged failure to transpose to the alleged consequences. In that case Ireland tried to meet the Commission's complaint that the then wastewater licensing rules permitted, or left open the possibility of, a licence application before an EIA had been carried out by arguing that under Irish law development consent required planning permission as well as a wastewater licence, so that there was no practical benefit to a developer applying for a licence without making a simultaneous application for planning permission. The court disposed of that argument at para. 70:-

> *"Consequently, Ireland's line of argument that the Commission has not adequately established the factual basis for its action must immediately be rejected. As the Commission claimed, since its action for failure to fulfil obligations is concerned with the way in which Directive 85/337 has been transposed, and not with the actual result of the application of the national legislation relating to that transposition, it must be determined whether that legislation itself harbours the insufficiencies or defects in the transposition of the directive which the Commission alleges, without any need to establish the actual effects of the national legislation effecting that transposition with regard to specific projects (see Case C-66/06 Commission v. Ireland)."*

222. As in this case, an examination of the facts will allow an assessment to be made as to whether there was compliance with the rules but any case as to a failure to transpose must be established by a juxtaposition of the EU law and the domestic law, an analysis of the requirements of the former and the effects of the latter, and the identification of the alleged gap.

223. Counsel for the State respondents in their written submissions and Mr. McBride in oral argument analysed the statement of grounds in any attempt to discern what case it was the applicant was making as to transposition.

224. Mr. McBride pointed to para. 8 of the statement of grounds which identified the consultation obligations imposed on the Board and the EPA by the Waste Water Discharge (Authorisation) Regulations, 2007 and asserted that the obligation was mandatory on both sides. The State respondents agreed. Incidentally so did the Board and Irish Water. Mr. McBride submitted, and I accept, that if the applicant's case is that EU law requires a mandatory consultation and that Irish law requires mandatory consultation it is

impossible to discern from the statement of grounds how the transposition is alleged to be deficient.

225. What the applicant has attempted to do in this case is precisely what was deprecated by Costello J. in *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311 and again by McDonald J. in *Sweetman v. An Bord Pleanála (IGP Solar)* [2020] IEHC 39, which is to make a generalised allegation of a failure to transpose against the possibility that the relevant competent authority, in those cases and in this the Board, may be able to demonstrate in an area of law governed by European law that it has complied with its obligations under the relevant Irish law implementing the EU law measure in question.

226. Apart from, and I suppose in the alternative to, his argument that the case against the State was sufficiently particularised, Mr. Collins called in aid the judgment of Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 122. In that case Barniville J. overlooked a general plea that there were lacunae in an appropriate assessment on the ground that the specific deficiencies had been set out in the applicant's affidavit and addressed in the replying affidavits and that it was thereby evident that there was no prejudice to the respondent or the notice party. Startlingly, the reference to *Rushe* came immediately after it was said, by reference to the State respondents' written submissions, that they had misunderstood the applicant's case. The proposition was that the court would or might entertain a point which had not been sufficiently particularised if it was apparent that the respondent fully understood it, but the assertion was that the State respondents had not understood the case which the applicant wished to make.

227. Strictly without prejudice to the objection which had been raised, the State respondents set out to demonstrate that Article 2 of the Directive had been implemented. In oral argument Mr. Collins went through the State respondents' written submissions agreeing with almost all of it, sometimes protesting that he was not making a case contrary to what the State was saying, and sometimes protesting that the State respondents were putting up straw men against him. He recognised, correctly, that the State was saying that the requirements of the Directive were met by the mandatory procedure in article 44 of the 2007 Regulations but suggested that that could not be "*an answer to the problem*" in circumstances in which "*the requirements were not met by the execution of the procedures in this case.*" This was not an argument which was directed to exposing any shortcoming in the transposition but to the observance, in this case, of the mandatory procedures which he and Mr. McBride were agreed were in place, but which Mr. Collins argued had not been followed.

228. The applicant has not identified or established substantial grounds upon which it could be said that there was a failure on the part of the State to properly transpose Article 2 of the EIA Directive.

Public consultation

229. The statement of grounds, as part of the "*Factual Background*" makes three points in relation to the public consultation.

230. It is said that two substantial changes to the proposed development were introduced by Irish Water for the first time during the oral hearing, namely, the introduction of an ultra violet disinfection stage for the effluent and the construction of a 25 m wide culvert to accommodate the meeting of the Mayne river with proposed road widening works. Neither of these proposals, it is said, *"was opened to proper consultation*". The third point is that it is suggested that "*The exhibited EIAR documentation suggests that 6 pages of figure 11.6 marked 'confidential' were not opened to the public."*

231. The ground for this challenge, at para. 18(VII) of the statement of grounds, is that the Board erred in law and acted contrary to Article 6(7) of the EIA Directive in failing to ensure that the time-frame for consulting the public was not shorter than 30 days. The ground is purely technical. There is nothing wrong with that if the point is a good one, but the applicant does not make the case that the revisions are undesirable or that in fact she was disadvantaged in dealing with the revisions. The applicant does not suggest that she was unaware as to what was in figure 11.6.

232. It is the fact that two revisions to the proposal were introduced in the course of the oral hearing. The circumstances in which this came about are set out in the Inspector's report. The relevant passages were usefully identified in the Board's opposition papers.

233. In chapter 4 the Inspector summarised the written submissions that had been made which included, in the case of Fingal County Council, a submission that clarification was needed in relation to the maintenance of excellent bathing water quality and that it was not possible to fully determine the effect on shellfish, and in the case of observers, that the need for a tertiary level of treatment was a common theme.

234. In chapter 5 the Inspector noted that at the oral hearing a proposal for UV treatment had been presented by Irish Water and in chapter 8.4.3.4 set out her consideration of the impacts on bathing waters and shellfish in the operational phase. The Inspector set out the methodology and conclusions in the EIAR and noted that notwithstanding the conclusions of the EIAR, Irish Water, following further consultation with a marine shellfish ecologist had proposed the addition of UV disinfection treatment. Some of the observers had suggested that they had not had sufficient time to consider the proposal, but the Inspector was of the view that Irish Water had made available considerable expertise to the observers and considered that there would be no benefit to rejecting the proposal. The Inspector's conclusion was that the EIAR evidence alone could have been relied on in relation to bathing water protection but that the conclusions in relation to impacts on shellfish, although they appeared to be reasonable, had not been supported by expert evidence on marine shellfish impacts. That expert evidence, when obtained, lead to the proposal of UV disinfection and the Inspector recommended the revision to the Board.

235. The second revision related to a culvert to accommodate the future construction of a road. The applicant's case is that the proposal was made for the first time at the oral hearing to construct a 25 m wide culvert at the crossing of the Mayne River as part of the Clonshaugh site entrance to cater for the new road which was not part of the EIAR and

not opened to adequate public consultation. This description does not give a clear and accurate picture of the revision. The initial proposal was to provide a culvert which would accommodate a planned access road but following an observation this was revised and widened by 5 m so that it could accommodate a distributor road.

236. The applicant's case is that these are substantial revisions which, had they been in the original EIAR, would have been open to public consultation for not less than 30 days. The applicant points to recitals (32) and (33) and Article 5(3) of the EIA Directive which require completeness and accuracy of the EIAR and in particular to Article 5(3)(c) which requires the competent authority, where necessary, to seek supplemental information which is directly relevant to reaching a reasoned conclusion as to the significant effects of the project on the environment. She argues that the information in relation to the UV treatment and the culvert should have been in the original EIAR and that it was necessary to supplement the information in the EIAR to make it complete. The omission of the information, it is said, went not only to the 30 day minimum consultation period but to effective consultation. She relies on the opinion of Advocate General Kokott in Case C-280/18 *Alain Flausch and Others*

237. The Board's answer to this aspect of the case starts with three general observations. It is said firstly, that the EIA does not begin and end with the submission by the developer of the EIAR. Rather the process is an iterative one, and the purpose of the public consultation is to ensure that the Board's assessment of the project is not just based on the EIAR but taken into account all of the information gathered in the course of the process, specifically the information submitted by members of the public and statutory consultees.

238. Secondly, the Board points to the definition of "*environmental impact assessment*" in Article 1(2)(g) of the EIA Directive which requires an examination of the information in the EIAR, any supplementary information, and any relevant information received through public consultations under Articles 6 and 7, and to Article 6(7) as amended which provides:-

> *"7. The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days."*

239. Thirdly, the Board points to what is said to have been the extensive consultation with the public in the present case: in which the developer maintained a website where the application documentation could be accessed; the applicant had and availed of the opportunity to make written submissions; and in which the applicant had and availed of the opportunity to participate in the oral hearings in the course of which the documentation and the authors of that documentation were interrogated. This case, it is said, bears no comparison to C-280/18 *Alain Flausch and Others* which was one in which the complainants had not been reached at all by the public consultation.

240. I acknowledge the considerable assistance of counsel for the Board and for Irish Water in navigating an area with which I am much less familiar than my colleagues who are assigned to the strategic infrastructure development list and who in their previous practice professed speciality in planning, but I have concluded that when the applicant's case is analysed it does not meet the threshold of substantial grounds. The requirement for a minimum consultation period of 30 days is plainly directed to the EIAR and any revised EIAR. The net practical effect of the applicant's argument is that the introduction of any revision or modification of the proposed development would either require the developer to start from scratch or, perhaps, that the oral hearing would be adjourned and, I suppose, the revision re-advertised. While I accept that the requirement in Article 6(7) and the implementing Irish legislation is directed to ensuring effective consultation, it does not follow that effective consultation requires a minimum of 30 days' notice of any proposed revision or modification.

241. As Advocate General Kokott explained in *Alain Flausch and Others* the availability of information is essential to the effective exercise of the right to participate in the decision making procedure. The applicant in her written submissions asserts that the time allowed at the oral hearing for consideration of the new information was insufficient but not why, save that it was shorter than 30 days. The submission at least implicitly acknowledges that the information was made available. There is no evidence as to what, if anything, the applicant might have done with the information if she had had more time, beyond whatever it was that she did do with it. It is not suggested that in all the time which has elapsed since the oral hearing any point had occurred which would have been made at the oral hearing but was not made. It is not suggested that the revisions gave rise to any apprehension of adverse environmental effects, or even that the applicant was or is opposed to the revisions.

242. There is a disconnect in the ground at para. 18(VII). The revisions proposed by Irish Water at the oral hearing were not part of the EIAR, and so could not have given rise to a failure to ensure that the time-frame for consulting the public on the EIAR was not less than 30 days.

243. As to figure 11.6 of the EIAR, there is no indication in the statement of grounds as to what this was, save that it was marked "*confidential*", or any suggestion that the fact that it was not opened to the public undermined the effectiveness of the public consultation. The intended statement of opposition on behalf of the Board identified the document as a document which showed the precise location of Badger setts and pointed to where in the EIAR (section 11.3.4 of Volume 3, Part A) it was explained why this figure was not made publicly available: which was the risk of persecution. Table 11.11 of the EIAR contained indicative information about the location of eight Badger setts which was said to be sufficient to allow the public to consider and the Board to assess the potential impacts of the proposed development on Badger. The complaint that this information had not been published was not referred to in the applicant's written or oral submissions and I take it to have been abandoned.

244. In oral argument Mr. Collins submitted that the information gathered in public consultation must be analysed and evaluated and asserted that it was not. Mr. Collins asserted that there was not to be found "*an assessment of all the matters that were raised in the process*" but did not point to anything that was not addressed. He asserted that there was not to be found "*anything that meets the requirements of the EIA and AA and Habitats Directive*" bit did not identify any gap or lacuna. The widening of the culvert and the addition of UV treatment were clearly dealt with in the Inspector's report and no argument was offered as to how or why the assessment of those issues was allegedly deficient.

245. What did emerge – or perhaps I should say re-emerge – in the applicant's written submissions was a suggestion of a further breach of Article 6(5) and (7) of the EIA Directive. At para. 116 of the applicant's written submissions it is stated it had emerged in the course of these proceedings that Irish Water did not until 17th April, 2020 make available through "*the EIA Portal*" "*raw bird data*" which was requested by the Inspector on an unspecified date during the course of the oral hearing. This, it was said, was in breach of Article 6(5) and 6(7) "*and the applicant reserves her right to make any application necessary to expand the grounds on her leave application in this regard*." Implicitly, I suppose, the complaint is that the information ought to have been put up sooner, but it is not said when it ought to have been put up, or where the obligation to have done so is to be found – other than, perhaps, in the Directive.

246. The applicant does not identify the EIA Portal, but the complaint appears to be directed to Irish Water. The obligation created by Article 6(5) to take necessary measures to ensure that the relevant information is accessible electronically is imposed on Member States, rather than developers, and the submission does not identify the measures taken by the State to comply with the obligation or complain that the necessary measures were not taken. Inferentially, if the complaint is that the material was not made available through the portal sooner, the premise of the complaint is that the portal was set up.

247. The applicant's complaint in relation to the "*raw bird data*" first surfaced in her supplemental affidavit. The data was requested by the Inspector in the course of the oral hearing and provided on or about 22nd March, 2019 in the form of a report called "*Biodiversity (Marine and Terrestrial Ornithology) – Simon Zisman*" and first came to the applicant's attention on an unspecified date after the decision was made when she was reviewing the file in the Board's offices. On some other unspecified date the applicant asked Mr. Paul Lynch, an ornithologist, to review the information and he swore an affidavit on her behalf which criticised Dr. Zisman's methodology and conclusions. In response to the affidavit of Mr. Lynch an affidavit of Dr. Zisman was filed on behalf of the Board refuting Mr. Lynch's criticism of the document and pointing out that it was a very small part of the information included in the EIAR. A supplemental affidavit of Mr. Gerard Egan on behalf of the Board showed where the report was to be found in the evidence presented to the oral hearing.

248. The Board in its legal submissions – attempting to divine what the applicant's case in this regard was – argued that the report was not "*relevant information*" as contemplated by Article 6(5) or 6(7) and invoked the principle of proportionality but its primary answer was that the point had not been pleaded and – by reference to the time at which the applicant had inspected the Board's file – that it was a point (if there was anything in it) that could have been included in the statement of grounds.

249. Irish Water in its legal submissions also makes the point that the information in the Zisman Report had already been included in the EIAR and did not include any new information. More interestingly, Irish Water pointed out that the website the subject of the applicant's criticism was a dedicated website created and maintained by Irish Water, which was not the portal contemplated by the Directive. Article 6(5) of the Directive was transposed into Irish law by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations, 2018 (S.I. No. 296) which inserted ss. 172A to 172C into the Act of 2000. The effective date of that amendment was after the date of application for permission the subject of these proceedings, and the EIA Portal thereby to be established is to be maintained by the Department of Housing, Planning and Local Government. So, it is said, the omission to upload the Zisman Report onto the Irish Water website could not possibly be a breach of the Directive.

250. In the event, although clearly warned of the objection on the part of the Board that the point had not been pleaded, the applicant did not apply to add any ground and I am satisfied that any complaint in this respect is inadmissible.

Regional Biosolids Storage Facility

251. One element of the proposed infrastructure is a biosolids storage facility at Newtown which is intended to serve the Clonshaugh plant and the upgraded Ringsend plant. This facility was part of the application which was made on 20th June, 2018 which led to the grant of the impugned permission on 11th November, 2019 and it was part of a separate application made on 6th June, 2018 for the Ringsend upgrade, for which permission was granted by the Board on 24th April, 2019.

252. The first pleaded ground, at para. 17(V), is that the Board acted unreasonably and illogically in, variously, deciding to grant permission for the RBSF in circumstances in which it had just months previously granted permission for the same development, and/or making the second permission subject to different conditions. Later on, at para. 18 (XIX), it is pleaded that the Board acted contrary to Article 6(3) of the Habitats Directive by granting a consent, condition 12 of which leaves the developer free to determine subsequently certain parameters including the prevention of environmental pollution in the event of fire at the facility, without being certain beyond reasonable scientific doubt that the development consent granted established conditions that were strict enough to guarantee that firewater runoff would not adversely affect the integrity of the Malahide SAC and SPA.

253. The grounds were repeated in the written submissions but not developed, save by an attempt to bolt on a complaint that the grant of the two permissions was *"also an aspect in the pleadings of objective bias."*

254. The case which the applicant would make in relation to the separate permissions for the RBSF is hopelessly confused. It is variously said that they were identical and different. If they were identical, it is variously suggested that it was irrational to have granted the second permission and (although not a pleaded ground) that the granting of the first permission would give rise to a reasonable apprehension of bias in the consideration of the second application. Confusion is heaped on confusion by the reference in the applicant's written submissions to *res judicata* – the proposition, in the same breath, being that the Board having granted the first permission was bound by law to grant the second application and that the second decision, by reason of the first having been already made, was predetermined and biased.

255. The applicant asserts that the first planning application and the second planning application were identical. They were not. The two applications included a common element which would serve either or both of the proposed WwTPs as might be permitted. Both applications were accompanied by the same EIAR in relation to the storage facility element of the applications, so that the assessment of the odour, noise and mitigation measures was the same. It was to be expected, then, that the conditions directed to odour and noise in both permissions would be the same. The applicant asserts that the Inspector's report of 10th October, 2019 on the GDD Project application did not give reasons for recommending a grant of permission that had already been granted but does not even attempt to establish how any such obligation arose.

256. The applicant asserts that the planning permissions have materially different conditions for odour control and are therefore unenforceable, unreasonable and illogical but makes no attempt to justify this or even to point to where in the 9,000 pages of exhibits the relevant permissions are to be found. The submission notes that the Board in its opposition papers denied that the conditions are different and says simply that: "*This is a matter of interpretation".*

257. The onus rests on the applicant to articulate and justify her case and she has not done so.

258. In deference to the industry of counsel for Irish Water, I observe that the basis of the applicant's complaint as to allegedly different conditions attached to the planning permissions appears to be the observation in the sixth of eighteen bullet points at para. 80 of her first affidavit – which incidentally is under the heading of "*First Respondent's Inspector's Report"* rather than planning conditions – that the odour limits which were set as limits in the Ringsend permission were only a "*target"* for the GDD permission. Both conditions specify that *"the adopted odour annoyance criterion of 3 ou/E/m3 as the 98th percentile of hourly averages shall not be exceeded at any sensitive receptor*". The alleged difference between the conditions appears to be that the condition in the impugned permission is prefaced by the words "*the proposed development shall be*

designed and operated to meet the following targets for odour". If "target" is not quite the mot juste, the conditions are perfectly clear, unambiguous and identical.

259. As to the alleged breach of Article 6(3) of the Habitats Directive, the applicant's written submission simply repeats ground at para. 18(XIX) and says that the applicant will rely on Case C-461/17 *Holohan and Others*.

260. The formulation of the ground comes from the judgment of the CJEU in *Holohan and Others*. One of the questions referred in that case was whether it was compatible with the attainment of the objectives of the Habitats Directive that details of a construction phase of a road (such as the compound location and haul routes) could be left to post-consent decision, and if so whether it was open to a competent authority to permit such matters to be determined by unilateral decision of the developer, within the context of any development consent granted, to be notified to the competent authority rather than approved by it. The answer, at para. 47 of the judgment, was:-

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

261. Ms. Butler characterises those matters relating to the construction phase as "*points of detail"* and draws attention to the decision of the Court of Appeal in *People Over Wind v. An Bord Pleanála* [2015] IECA 272. The appellant in that case had been given leave to appeal on the question of the extent, if any, to which it was lawful for the Board to leave over for post consent agreement between the developer and named authorities the mitigation measures required to avoid adverse effects on the integrity of a European Site. Hogan J., for the court, said at paras. 59 and 60:-

> *"59. So far as the issue of delegation is concerned under national law, it is clear from the Supreme Court's decision in Boland v. An Bord Pleanála [1996] 3 I.R. 435 that the delegation of technical matters of this kind is, in principle, acceptable. In Boland the Board had granted permission for the re-development and extension of the ferry terminal in Dún Laoghaire, subject to conditions in relation to the management of ferry traffic and new design plans for traffic access and egress arrangements. The Court held that these conditions were permissible, since they were 'essentially technical matters or matters of detail relating only to one aspect of the development, viz. the control of the flow of traffic': see [1996] 3 I.R. 435, 467 per Hamilton C.J. The Chief Justice further stated that 'what is required to be agreed is merely a matter of detail' and for that reason the conditions which prescribed that these details were to be agreed with the planning authority did not amount to an abdication by the Board of its statutory duties.*

> *60. For our part, we can see no great difference in principle so far as the conditions at issue in the present case are concerned. The Board's statement of principle is crystal clear, namely, that no silt or sediment whatever should enter the run-off thus contaminating the up-stream watercourses. The realisation of that objective is largely a question of designing the appropriate engineering and hydrological solutions under the supervision of an environmental scientist or other similarly qualified professional. Given that the Board's decision has already articulated the relevant principle, the actual design of the mitigation measures is essentially a matter of detail in the sense envisaged by the Supreme Court in Boland."*

262. Condition 12 of the grant of permission in this case provides:-

> *"Prior to the commencement of development, the design details for the proposed Regional Biosolids Storage Facility shall be submitted to, and agreed in writing with the relevant planning authority, for the prevention of environmental pollution in the event of a fire occurrence. Such details shall include an assessment of the risk of environmental pollution due to fire water and any mitigation measures which may be necessary."*

263. The Board and Irish Water divine that the requirement that the details should include *"an assessment of the risk of environmental pollution due to fire water and mitigation measures which may be necessary*" conveys to the applicant that the Board cannot have been sufficiently certain that the permission established sufficiently strict conditions. On its face, I can see that the terms of the condition might have given rise to an apprehension that the Board might not have made an assessment, or a sufficient assessment, of the risk of pollution from firewater runoff but the assertion that the Board did not, and the link between the general assertion in relation to the condition and the Malahide Estuary SAC and SPA, needs to be supported by evidence.

264. I find that the response of the Board and Irish Water that this ground amounts to no more than bald assertion is justified. No attempt whatsoever has been made on the applicant's side to tie the condition to the complaint or the complaint to the evidence.

265. Having registered their objection to the ground, Ms. Butler and Mr. McGrath then set out to show, by reference to the material which was before the Board and the analysis of that information, that there is no substance to the complaint. At p. 226 of her report, the Inspector noted that the requirement to address the vulnerability of projects to major accidents and/or natural disasters under the EIA Directive had been addressed in chapter 22, volume 3 of the EIAR and chapter 15, volume 4 of the EIAR. At p. 230 she concluded that one of the likely significant potential impacts for assessment was the risk of fire at the RBSF – including the risk of fire associated with biosolids – and that the primary mitigation measure regarding the fire safety aspects would largely be covered by separate codes and was amenable to being addressed. That risk was assessed as being low, but in the absence of mitigation measures, serious. The proposed mitigation measures were described in detail. The Inspector had previously, at p. 207, in her

consideration of the impact of the RBSF on hydrology and hydrogeology, identified the potential adverse impacts on local hydrology from firewater runoff and the relevant mitigation of that as the containment of any firewater in an on-site attenuation tank and controlled discharge to a stream by way of a shut-off valve. The Inspector's conclusion, at p. 231, which mirrored that in the EIAR, was that following mitigation measures there would be no major accident which, taking into account the risk of an event in combination with the consequences, would present significant residual impacts or environmental effects.

266. As Ms. Butler puts it, the mitigation measures for a fire occurrence at the RBSF were identified in the planning application, were identified by the Board, and were found to be satisfactory to remove any risk of adverse environmental effects arising from firewater runoff. The agreement required by condition 12 adds a layer of formality but does not introduce any uncertainty as to the absence of adverse effects. Any purported agreement reflecting mitigation measures less than those presented to and considered and approved by the Board would not be in accordance with the permission.

AA Screening

267. The GDD Project, as I have said, is to comprise an orbital sewer running from Blanchardstown to the WwTP at Clonshaugh, and then an outfall pipeline running underground from Clonshaugh to Baldoyle, and from there underwater for just short of 6 km to a diffuser about one km north east of Ireland's Eye. The pipeline is to run in a tunnel under Baldoyle SAC and Baldoyle SPA and about 1.3 km of the pipeline and the marine diffuser are to be located within the Rockabill to Dalkey SAC. Along the way there are to be a number of construction compounds, including two tunnelling compounds located on either side of Baldoyle Bay, but outside Baldoyle Bay SPA.

268. The application to the Board was accompanied by a Natura Impact Statement which identified the Zone of Influence of the proposed project by assessing all of the elements of the project against the ecological receptors within the footprint of the project and all ecological receptors that could be connected with and potentially impacted through overlap/intersection, proximity and connectivity. The report identified a total of 22 European Sites which might be potentially affected by the project under one or more of four themes: water quality and habitat deterioration; airborne noise and visual disturbance; underwater noise and disturbance; and habitat loss. The applicant would make the case that in a number of respects the assessment by the Board of the likely impact of the project on the environment failed to comply with the requirements of Directive 2011/92/EU (the Environmental Impact Assessment Directive), Directive 92/43/EEC (the Habitats Directive) and Directive 2009/147/EC (the Birds Directive) and that the Board failed to give adequate reasons for its decision.

269. The obligations imposed on the Board by Article 6 of the Habitats Directive, as transposed by Part XAB of the Planning and Development Act, 2000 were considered by Finlay-Geoghegan J. in *Eamon (Ted) Kelly v. An Bord Pleanála* [2014] IEHC 400.

270. Article 6 of the Habitats Directive provides, insofar as is material:-

> *"2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as the disturbance of species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*
>
> *3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of the implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site … the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."*

271. As Finlay-Geoghegan J. explained in *Eamon (Ted) Kelly,* Article 6(3), as transposed by ss. 177U and 177V of the Act of 2000, requires a two stage process: first, a screening for appropriate assessment in accordance with s. 177U, and then, if on a screening the Board determines that an appropriate assessment is required, it must carry out an appropriate assessment in accordance with section 177V.

272. The nature and purpose of the screening process was explained in the opinion of Advocate General Sharpston in Case C-258/11 *Sweetman* at paras. 47 – 49 where she said:-

> *"47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect.*
>
> *48. The requirement that the effect be 'significant' exists in order to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.*
>
> *49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken on the implications of the plan or project for the conservation objectives of the site." [Emphasis original]*

273. In *Eamon (Ted) Kelly* Finlay-Geoghegan J. distilled the requirements of an appropriate assessment from the judgments of the CJEU in Case C-127/02 *Waddenzee* [2004] E.C.R. I-7405, Case C-404/09 *Commission v. Spain* [2011] E.C.R. I-11853 and Case C-258/11 *Sweetman*, and from a construction of s. 177V(1) so as to give effect to the Habitats Directive. At para. 40 she said:-

> *"40. It must be recalled that the appropriate assessment, or a stage two assessment, will only arise where, in the stage one screening process, it has been determined (or it has been implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site. Where that is the position, then, in accordance with the preceding case law, the appropriate assessment to be lawfully conducted in summary:*
>
> *(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.*
>
> *(ii) Must contain complete, precise and definitive findings and conclusions which may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.*
>
> *(iii) May only include a determination that the proposed development will not adversely affect the integrity of any European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."*

274. As to the requirement in s. 177V(5) that the Board should give reasons for a determination made under Article 6(3) as to whether a proposed development would or would not adversely affect the integrity of a European site, Finlay Geoghegan J. said, at para. 48:-

> *"48. … First, the essential principle is that the reasons must be such as to enable an interested party assess the lawfulness of the decision and in the event of a challenge being brought, the court must have access to sufficient information to enable an assessment as to lawfulness to be made. On the facts of this judicial review, the challenged decisions are those to grant planning permissions. However, the grounds of challenge include the failure of the Board to carry out a proper or lawful appropriate assessment under Article 6(3) as implemented in Ireland. For the reasons already stated in this judgment, the Board could not make a lawful decision to grant planning permission unless it had reached a lawful*

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

275. The Natura Impact Statement identified 22 European sites within the study area of the proposed project. Of these, two, Glenasmole Valley SAC and Rye Water Valley/Carton SAC, which are situated 14.8 km to the south of the orbital sewer and 8.7 km to the west of the orbital sewer, were identified as having no connecting pathways and so no potential for effects. Of the remaining 20, two were screened out for appropriate assessment, Ireland's Eye SAC and Howth Head SAC.

276. In the course of the public consultation there was discussion as to whether a further site, the Codling Fault SAC, which is 25 km to the east of the site, might have been within the zone of influence and on the submissions of Fingal County Council and the National Parks and Wildlife Service the Inspector recommended that it could clearly be screened out for further assessment.

277. The applicant asserts in her statement of grounds that the Board acted contrary to Article 6(3) of the Habitats Directive in screening out Ireland's Eye SAC for the stated reason that it was designated for coastal and not marine habitats, that there was no hydrological link and no open pathway effect and thus "*no real possibility of likely significant effects*", and that the Board "*wrongly took a similar approach to the Howth Head SAC*." It is said that the Board knew or ought to have known that there is a hydrological link by the sea and tides between the marine outfall pipe and these sites and that there is a recognised degree of maritime influence on the growth of vegetation in these habitats, some of which overlap areas of the reef habitat of the Rockabill to Dalkey Island SAC for which the Board conducted a Stage 2 AA relying on mitigation measures for the minimising of siltation during dredging works for the marine outfall pipe and tidal currents.

278. The written submissions filed on behalf of the applicant do little more than repeat what is stated in the statement of grounds in relation to Ireland's Eye SAC. Of the 218 paragraphs, two are devoted to the complaint of screening out. There is no reference to Howth Head SAC. It is baldly asserted that the Board relied indirectly on mitigation measures when screening out Ireland's Eye, but no attempt is made to identify what

those mitigation measures are said to have been or how they were said to be tied back to the screening out of Ireland's Eye SAC. No attempt is made to identify the alleged overlap with some areas of the reef habitat of the Rockabill to Dalkey Island SAC for which the Board conducted a Stage 2 AA or how or why this is related to the screening out of Ireland's Eye SAC or Howth Head SAC. By reference to Case C-258/11 *Sweetman* the submission points out that the threshold is a low one and it is then asserted that the Board failed to properly apply the threshold in the instant case.

279. In his oral presentation Mr. Collins brought the court to chapter 10 of the Inspector's report which dealt with appropriate assessment. In a table on p. 239 of the report the Inspector identified the conservation objectives of Ireland's Eye SAC as "*to maintain the favourable conservation condition of the perennial vegetation of stony banks and vegetated sea cliffs of the Atlantic and Baltic coasts, which is defined by a list of attributes and targets*" and the qualifying interests as "*perennial vegetation of stony banks and vegetated sea cliffs of the Atlantic and Baltic coasts*". In the panel for *"Location/distance to European site and potential pathways"* the summary is *"1 km south of marine outfall. Designated for coastal not marine habitats. No hydrological link and no open pathways of effect. No real possibility of LSEs [likely significant effects]".* Mr. Collins took no issue with the summary set out in the table save to question what was meant by "*no real possibility*", asserting that "*That is obviously significant effects there, judge."*

280. The argument boiled down to two propositions. The first was that the notion of no real possibility was unknown, there is either a possibility or there is not. The second was that the conclusion that there was no hydrological link and no open pathway of effect was a fairly extraordinary conclusion given that Ireland's Eye is an island surrounded by the sea.

281. The table in the Inspector's report summarised the position in relation to Howth Head SAC on page 242. The conservation objectives were identified as *"To maintain the favourable conservation condition of the qualifying interests which is defined by the list of attributes and targets"* and the qualifying interests as "*vegetated sea cliffs of the Atlantic and Baltic coasts. European dry heaths*." The summary in the panel for "*Location/distance to European site and potential pathways" was "2.6 km to the south of the marine outfall. Designated for coastal not marine habitats. No hydrological link and no open pathway of effect. No real possibility of LSEs."* Again Mr. Collins queried, by reference to the words *"no real possibility"* what standard had been applied and made the case that 2.6 km was very proximate.

282. From the table in the Inspector's report, counsel moved to the summary, at pp. 247 and 248, of the evidence given to the oral hearing in relation to Ireland's Eye SAC and, at pp. 248 and 249, of the evidence in relation to Howth Head SAC.

283. Ms. Aebhín Cawley, an ecological consultant engaged by Fingal County Council, had asked for further clarification in relation to the ruling out of potential significant effects on Ireland's Eye SAC. Mr. Ian Wilson, a marine biodiversity expert who had been engaged

by Irish Water, had reiterated that the site was designated for terrestrial habitats and that there was no connection between the aquifer that supported the soils on the island and the marine works. That was acknowledged to have been correct. There would be no work on the island. Mr. Wilson's evidence was that the plume effects in the construction phase were shown to be negligible in terms of water quality impacts and that the vegetation was on the opposite side of the island to the works and in sheltered areas where there was no likelihood of significant sea spray. He said that in the operational phase it had been shown that the plume would not impact the waters immediately adjacent to the SAC and that there would be no impact from the imperceptible elevations in suspended sediments or nutrients in the unlikely event that sea spray did contact the habitat.

284. The challenge to the screening out of Ireland's Eye SAC was based on the proposition that it is an island surrounded by the sea and that as a matter of common sense in rough sea conditions there was bound to be spray all over the island. The determination was said to be based entirely on the premise that there would not be any sea spray on Ireland's Eye.

285. The challenge to the screening out of Howth Head SAC was based on the same argument: that anyone who has walked the hill of Howth would know that when the sea was rough the spray could reach the top of the hill. So, it was said, it was just an unsustainable proposition to say that the sea was not going to reach the habitats and that seems to be the sole basis on which the sites were screened out. The test, it was said, failed to identify any of the actual likely risks and so failed the test in *Eamon (Ted) Kelly*.

286. In my clear view the argument that Ireland's Eye SAC and Howth Head SAC were screened out solely on the basis that they would not be exposed to sea spray cannot withstand even superficial scrutiny. The Inspector's conclusion, based on the evidence, was that the effects in the short term of the tunnelling plume and in the long term of the operational plume on water quality would be negligible and would have no impact on the conservation objectives of the sites. It is clear from the passages in the Inspector's report relied upon in support of the argument, that the likelihood or unlikelihood of sea spray was entirely secondary. If the sea water quality would not be affected by the plumes, it would make no difference whether any spray reached the qualifying interests. There was no challenge to the conclusion that the water quality of the sea would not be affected.

287. Chapter 10 of the Inspector's report starts with a summary of Article 6(3) of the Habitats Directive and sets out to assess whether in view of the best scientific knowledge the project, individually or in combination with any other plans or projects, is likely to have a significant effect on any European site in view of the sites' conservation objectives. The Inspector makes clear that in considering that section of her report she had regard to the totality of the information presented by Irish Water including the NIS, EIAR, and the written and oral submissions of Irish Water and the observers.

288. The NIS is a 420 page document which, after a brief introduction, moves immediately to an examination of the legislative background for appropriate assessment and a statement of Stage 1: Screening for Appropriate Assessment and Stage 2: Appropriate Assessment. Having described the proposed project in some detail under the headings Receiving Environment, Description of Construction Stage including Techniques and Approaches, and Description of Operational Stage, the report comes to Screening for Appropriate Assessment. The screening threshold is identified as being above a *de minimis* level, which is explained to be a level of effect that is too small to be concerned with when considering ecological effects on habitats or species, and the report quotes from the opinion of Advocate General Sharpston in Case C-258/11 *Sweetman.*

289. Ms. Butler very carefully and methodically brought the court through the identification in the NIS of the European sites within the Zone of Influence; the identification of the source, pathway and receptor; the written submission made on behalf of Fingal County Council; the report of Ms. Cawley querying the reasoning for the screening out of Ireland's Eye SAC; Irish Water's response to those submissions; a statement from the divisional ecologist in the National Parks and Wildlife Service; a very detailed statement by Irish Water's ecologist, Mr. Ian Wilson, explaining why Ireland's Eye had been screened out; and then back to the summary and conclusion in the Inspector's report to which reference was made by the applicant.

290. I am satisfied that the examination of the possible impact of the construction and operation of the pipeline on Howth Head SAC was correctly conducted. The uncontradicted evidence before the Board – and there is no contrary evidence before the court – was that the development would have no appreciable effect on the site. All of the ecologists involved in the process were agreed on this. It is clear from the text of the Inspector's report and from the decision that what was intended to be conveyed by, and what was understood from, the words "*No real possibility of LSEs*" in the table was that there would be no discernible effects from the project and that the site could be screened out for further assessment.

291. Howth Head SAC was screened out in the same way. The issue was not whether the vegetation would be lashed by sea spray but whether the development would give rise to any discernible effect on the quality of the sea water. The assessment, reasoning and conclusion was based on extensive scientific evidence and hydrodynamic modelling and the determination was that the site could be screened out.

292. The applicant has not established any substantial ground on which the screening out of Ireland's Eye SAC or Howth Head SAC might be challenged.

Appropriate Assessment

293. The screening out of Ireland's Eye SAC and Howth Head SAC left eighteen sites which required appropriate assessment. The grounds listed in the statement of grounds challenge the assessments made of the impacts of the development on four sites: Ireland's Eye SPA, Rockabill to Dalkey SAC, Lambay Island SAC, Baldoyle Bay SPA. In

each case the charge is that the Board failed to conduct an appropriate assessment without lacunae, and which failed to contain complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected sites concerned. The grounds as formulated amount to mere assertions. There is no attempt to identify any lacuna or flaw in any of the assessments.

294. The written submissions filed on behalf of the applicant, in about half a page, under the heading "*Failure to conduct Appropriate Assessment*", more or less repeat the grounds and refer to Case C-127/02 *Wadenzee* and Case C-404/09 *Commission v. Spain* as establishing the requirements of an appropriate assessment, and to *Eamon (Ted) Kelly* as authority for the proposition that a failure to conduct an appropriate assessment goes to the jurisdiction of the decision-maker to grant permission. The submission is that:-

> *"On the basis of the facts set out in her affidavits and in the affidavit of Paul Lynch, the applicant pleads that the [Board] acted contrary to Article 6(3) of the Habitats Directive in failing to conduct an appropriate assessment without lacunae and which failed to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected sites concerned in relation to the assessment of the impacts on Baldoyle Bay SPA, Ireland's Eye SPA, Rockabill to Dalkey SAC and Lambay Island SAC."*

295. This is impermissible. The respondents and the notice party are not, and the court is not, to be invited to rummage through a 100 paragraph grounding affidavit or a 48 paragraph affidavit of Paul Lynch which was filed in response to an affidavit of an ecologist sworn on behalf of Irish Water to see what, if any, case there might be on which it might be said that the appropriate assessments were not correctly carried out.

296. In his oral presentation counsel for the applicant brought the court through chapter 10.4 of the Inspector's report where she dealt with Appropriate Assessment.

297. The first criticism was that the sites which had been screened in for appropriate assessment had been screened in without explanation. That is not so. The report says that the eighteen sites were screened in because the potential for significant indirect effects could not be ruled out. The Inspector, at p. 250 of her report, references two tables in the NIS, Table 4.1 and Table 4.3, which identify the 22 sites, their location relative to the proposed works, the qualifying interests or special conservation interests, the potential for likely significant effects, and a conclusion that the possible LSEs cannot be ruled out without further analysis and the application of mitigation as necessary. Table 4.3 sets out very clearly why the eighteen sites were screened in and the Inspector clearly adopted that analysis and those conclusions.

298. The next criticism was that the report set out, without explanation, to consider the sites by reference to the four impact pathways – airborne noise and visual disturbance, water quality and habitat deterioration, underwater noise and visual disturbance, and habitat

loss – which were used in the NIS. That is unfounded. The Inspector said that she was using those four pathways because she considered them to be a full and comprehensive list of impact pathways. If sometimes or usually NIS reports adopt a site by site approach that is not a basis upon which a pathway by pathway approach can properly be criticised.

299. Before getting beyond the introductory paragraph of the section of the report, it was suggested that the Inspector seemed to be constantly reiterating and echoing what the developer had submitted and that there was no independent consideration or analysis. There was no basis upon which such an assertion might properly have been made.

Baldoyle Bay SPA

300. The next objection was to a statement in the Inspector's report that the conservation objectives for Baldoyle SPA related to seven special conservation interests. That, it was said, was disputed because, it was said, all water birds were dealt with in the conservation objectives properly construed.

301. Baldoyle Bay SPA was designated as a Special Protection Area by the European Communities (Conservation of Wild Birds (Baldoyle Bay Special Protection Area 004016)) Regulations, 2010. Schedule 3 lists seven special conservation interests. The applicant's written submissions suggest that the Board failed to conduct an appropriate assessment on the effects of the project on all water birds that utilise Baldoyle SPA or to properly consider disturbance to them. An elaborate submission is made by reference to a National Parks and Wildlife Service document, Case C-418/04 *Commission v. Ireland (Birds case)*, Case C-127/02 *Wadenzee* and so on and so forth which is said to show that the only sensible interpretation of the SCI of Wetland and Waterbirds is that the SCI is for the benefit of all the water birds that use the wetland, and that (unidentified) water bird species that frequent Baldoyle SPA were not considered.

302. The applicant's submission on this point was not part of the oral presentation but when I sat down with my boxes I rapidly came to the conclusion that there is nothing in it. Schedule 3 to the 2010 Regulations identifies seven SCIs. Six are named bird species and the seventh is "*Wetland and Waterbirds*". The instrument identifies the obligation on Member States under Article 4 of the Birds Directive to pay attention to the protection of wetlands and provides "*To this end the wetland habitat that is contained within this Special Protection Area and the waterbirds that utilise this resource are therefore listed as a special conservation interest for this site*". It is quite clear from the instrument that the SCI is for the benefit of all the water birds that use the SPA, and it is quite clear from the Inspector's report that she considered the impact of the development on the wetland habitat, as well as the six named species.

303. The next criticism was of a mitigation measure prescribed to address an identified potential adverse effect on the Light-bellied Brent Goose. The Inspector identified a risk of visual disturbance, which was to be mitigated by the erection of a 2.4 m hoarding around the construction compounds. The applicant submitted that a 2.4 m high

compound could not possibly deal with the visual and noise impacts from the construction "*Because, of course, birds do not fly above 2.4 m*". This misses the point. The Inspector's conclusion was that the Light-bellied Brent Goose was not likely to be affected by noise but could be compromised in the use of lands 205 m. from the compound. The apprehended visual disturbance to the birds was while they would be on the ground and that would be addressed by the hoarding. I am satisfied that the report discloses an evaluation, analysis, and complete, precise and definitive findings.

304. "*Similarly",* as Mr. Collins says, "*with Shelduck*." The conclusion, on the evidence, was that there would be no likely significant effects from noise. The mitigation by the erection of the compound was directed to the likely visual impact of the birds on the ground.

305. The applicant's criticism of the Inspector's summary and conclusions at chapter 10.4 of her report ignores the detailed scientific information set out in the NIS, in particular the estuarine survey referred to Chapter 5 and appended as Appendix A and the report and evidence of Dr. Simon Zisman, to which she refers. The passages referred to are not, as asserted, conclusions without scientific basis, analysis and evaluation.

306. As to Guillemots, Razorbills and Auks, the Inspector identified potential adverse effects and a requirement for mitigation by a vessel management plan which she concluded was appropriate and sufficient to ensure that there would be no adverse effects due to airborne noise or visual disturbance. I reject the submission that the report does not disclose the basis and reasoning which led to the conclusion. The report summarises the vessel management plan and identifies where it is to be found in the NIS and how it would obviate the identified risk of adverse effects.

307. In oral argument counsel criticised the conclusion of the appropriate assessment for North Bull Island SPA that:-

> *"Due to its location 2.3 km south of the marine outfall this site is outside the range of airborne noise and visual disturbance. The possibility of significant numbers of birds from this SPA being impacted by the project is remote as they will not be present in the area. It can be concluded that the conservation objectives of the SCIs of this SPA are not compromised by airborne noise or visual disturbance."*

308. The first point I would make is that the appropriate assessment in relation to North Bull Island SPA was not among those challenged in the statement of grounds.

309. This conclusion was said to fail to take account of the possibility of some species "*relocating and so on*" and the capacity of the subject site to receive them. The fact is that the analysis and conclusion are based on scientific evidence as to where the birds are, while the submission is based on speculation – premised on the accuracy of the scientific evidence – that the established patterns might change.

310. The second criticism of the conclusion in relation to North Bull Island SPA is a fairly common theme of the applicant's case and it is that this site and others were screened in

for reasons which are unclear and then effectively screened out because there are not, after all, any effects along the identified pathways. This, it is said, begs the question why they were screened in in the first place. It seems to me that this submission betrays a failure to understand the scheme of the Directive and implementing legislation which was so carefully explained by Finlay-Geoghegan J. in *Eamon (Ted) Kelly*. The object of the Stage 1 screening is to identify the possibility of effects. It is a trigger. The applicant submits that it is the lightest possible trigger. Given that the object of the Stage 1 screening is to identify possibilities, it stands to reason that the appropriate assessment will answer the question as to likely significant effects one way or the other. I have to say that I am unconvinced by Ms. Butler's argument that the low threshold necessarily means that there will be an examination in detail of a lot of sites in respect of which there is not in fact going to be a problem. It seems to me that in principle the outcome of the appropriate assessments will be dictated by the project rather than the process, but I accept the general proposition that it can come as no surprise that a site screened in may later be shown not to be affected. The sites are screened in because it is not clear that there is no possibility of adverse effects and later ruled out if the outcome of the appropriate assessment is that there is no such possibility. There is simply no basis for the submission that the sites were screened out without any further consideration.

311. The excursus through the Inspector's report and the running critical commentary traversed Malahide Estuary SPA, South Dublin Bay and River Tolka Estuary SPA, Howth Head Coast SPA and so on and so on, none of which was the subject of challenge in the statement of grounds.

312. As counsel, to use his own expression, trawled through the Inspector's report it was repeatedly asserted that there were gaps everywhere but no particular gap was ever identified.

Ireland's Eye SPA

313. While the several grounds directed to the alleged failure of the Board to conduct lawful appropriate assessments of the four identified sites were rolled up in the written submissions, some attempt was made in the statement of grounds to articulate why the assessments were alleged to have been flawed.

314. At para. 18(IX) of the statement of grounds it is alleged that the Board acted contrary to Article 6(3) of the Habitats Directive in failing to conduct an appropriate assessment without lacunae and which failed to contain complete, precise and definitive findings and so on and so on in relation to the assessment of the impacts on Ireland's Eye SPA in circumstances in which the Board had already screened out from further consideration the effects of the development on the conservation objectives of Ireland's Eye SAC being habitats of the birds protected in the SPA.

315. The qualifying interests of Ireland's Eye SAC are perennial vegetation of stony banks and vegetative sea cliffs, in respect of which the Inspector concluded that there was no potential pathway. The qualifying interests of Ireland's Eye SPA are five species of birds,

in respect of which three potential pathways for likely significant effects were identified. The proposition appears to be that the conclusion that there would be no likely significant effects on the vegetation somehow or other precluded or tainted the assessment of the potential effects on the birds or their habitats by the pathways which had been identified. I do not follow. I could contemplate that the assessment of the impacts on the birds might have been tainted by the erroneous screening out of the vegetation, but the alleged erroneousness of the screening out of Ireland's Eye SAC is a separate ground.

316. The applicant in her grounding affidavit says that it seems illogical to have carried out a Stage 2 appropriate assessment (she says a purported assessment) on the SPA without having carried out an appropriate assessment on Ireland's Eye SAC. I do not see why this might be so. Nor do I see how, as the applicant asserts, the conclusion that there would be no likely significant effect on the perennial vegetation might somehow or other give rise to scientific doubt over the assessment of the likely effects on the birds who use that vegetation. If the vegetation will not be affected there can be no effects on the birds.

317. The applicant has failed to identify any substantial ground of challenge to the appropriate assessment in relation to Ireland's Eye SPA or Ireland's Eye SAC.

Rockabill to Dalkey Island SAC

318. At para. 18(X) of the statement of grounds it is alleged that the Board acted contrary to Article 6(3) of the Habitats Directive in failing to conduct an appropriate assessment without lacunae and which failed to contain complete, precise and definitive findings and so on and so on in relation to the assessment of the impacts on the Rockabill to Dalkey SAC by relying on mitigation measures that have inherent scientific doubt.

319. All that is said otherwise in the statement of grounds is that the effluent will be discharged into the Rockabill to Dalkey Island SAC which is an important habitat for the Harbour Porpoise, which is a conservation objective of the Rockabill to Dalkey SAC.

320. There is little more said in the applicant's affidavit. She points to the fact that the diffuser is within the SAC and that the Harbour Porpoise is one of the conservation objectives and refers to the fact that the National Parks and Wildlife Service has prepared scientific literature on the SAC. She exhibits the documents but does not engage with what is in them.

321. At para. 68 of her affidavit the applicant asserts that the NIS did not present complete, precise and definitive findings and conclusions capable of removing all scientific doubt as to the effects of the works on the conservation objective for the Harbour Porpoise. She points to and quotes from the Report on Marine Mammal Surveys dated April, 2017 which is Appendix C to the NIS. The passage quoted is a half-page of recommendations in an 84 page report which recommends that mitigation measures should be in accordance with an NPWS guidance document to ensure that impacts through habitat exclusion or noise impacts are minimised. The applicant asserts that those mitigation measures do not

claim to remove all scientific doubt of the effects of works such as dredging carried out over a period of months. She does not engage with the examination, analysis and conclusions in the Inspector's report.

322. The effects of the proposed development, both in the construction and operational phases, on the Rockabill to Dalkey SAC were carefully examined in the Inspector's report. The qualifying interests were identified as reefs and Harbour Porpoise and the potential pathways as hydrological, underwater noise/disturbance, and habitat loss. The potential impact on water quality and habitat deterioration was considered at para. 10.4.2.3. The impact from underwater noise and disturbance was dealt with at para. 10.4.3.3. Potential habitat loss was considered at para. 10.4.4.4. The qualifying interests, the risks, and the mitigation measures were identified, analysed and assessed and, by reference to the evidence, the conclusion reached that the conservation objectives would be unaffected during either stage.

323. The Inspector recalled that the mitigation measures had been questioned by the observers but was satisfied that they were best practice and would be effective to ensure that there would be no significant adverse effects. The applicant suggests that the purpose of the mitigation measures is to assess if any displacement of the Harbour Porpoise occurs, but the plain object of the proposed mitigation – to restrict vessel movement and to suspend work if and for as long as Harbour Porpoise may be in the area affected by noise – was to ensure that displacement would not occur.

324. The applicant has not established any substantial ground for a challenge to the appropriate assessment of the impacts of the proposed development of the Rockabill to Dalkey SAC.

Lambay Island SAC

325. The Lambay Island SAC ground is at para. 18(XI) of the statement of grounds. It is alleged that the Board acted contrary to Article 6(3) of the Habitats Directive in failing to conduct an appropriate assessment without lacunae and which failed to contain complete, precise and definitive findings and so on and so on in relation to the assessment of the impacts on the Lambay Island SAC in circumstances in which the Board had already ruled out for further consideration the effects of the development on the conservation objectives of Ireland's Eye SAC being also recognised habitats of the seals protected by the Lambay Island SAC.

326. The factual basis for this ground, at para. 13 of the statement of grounds, is that the area of the marine pipeline is an important habitat for the Grey Seal, which is a conservation objective of the Lambay Island SAC located within eight kilometres of the undersea pipeline and the diffusion point.

327. The grounding affidavit of the applicant, at para. 67, suggests that the NIS failed to properly assess the impacts on the growing seal population that is known to occupy Ireland's Eye and forage in the waters near the diffuser and asserts that the failure to

subject the habitats on the Ireland's Eye SAC to a Stage 2 appropriate assessment, including the stony banks and shingle beaches used by the seals, compromises the conclusions presented in the NIS regarding the conservation objectives associated with the Lambay Island SAC.

328. The qualifying interests of Lambay Island SAC are reefs, vegetative sea cliffs, Grey Seals and Harbour Seals. The qualifying interests of Ireland's Eye SAC are perennial vegetation of stony banks and vegetated sea cliffs.

329. The argument appears to be similar to that made in relation to the appropriate assessment of Ireland's Eye SPA. The proposition appears to be that the Board could not lawfully have assessed the impact of the development on the Lambay Island SAC seals because it had already decided that there would be no likely significant effects on the Ireland's Eye SAC vegetation; or perhaps that the Board ought to have added stony banks and shingle beaches, or seals, to the qualifying interests for Ireland's Eye SAC. Whichever it is, I do not understand the logical or legal basis for the ground. If the vegetation would not be affected, the seals could not be affected.

330. The Inspector's report shows that at the oral hearing the applicant voiced her concern for the seals using Ireland's Eye, which might be part of the Lambay Island population. At para. 10.4.3.4 the Inspector identified and assessed the risk of underwater noise and disturbance, the need for mitigation, and the proposed mitigation – which again was adherence to the NPWS Guidance to Manage the Risk to Marine Mammals from Man-made Sound Sources in Irish Waters – which, she concluded, would ensure that there was no risk of adverse noise impacts to the Lambay Island SAC seals, and would be equally effective to prevent adverse effects on those using Ireland's Eye.

331. Earlier in her report, at para. 10.4.2.4, the Inspector had addressed the potential impact on water quality and habitat deterioration during each of the construction and operational phases. By reference to the wide foraging area of the seals, the size of the affected area, and the duration of the construction works, the conclusion was that the conservation objectives would be unaffected. By reference to the modelling evidence of the output and dilution of the operational plume, the conclusion was that there was no reasonable likelihood of effects on the seals. The Inspector accepted the evidence in the NIS that any long term negligible impact would not impact on the conservation objectives of Lambay Island SAC.

332. The applicant had not put forward any substantial ground for her challenge to the appropriate assessment of Lambay Island SAC.

The Quiet Zone

333. The marine section of the proposed pipeline, it will be recalled, is to run in a tunnel under Baldoyle Bay SAC and Baldoyle Bay SPA which is to be made using a combination of micro-tunnelling and under-sea pipe-laying techniques. To facilitate this element of the construction two temporary compounds – identified on the plans as compound 9 and

compound 10 – are to be established on either side of Baldoyle Bay. These compounds are to be located outside but very close to Baldoyle Bay SPA. Compound 9 would be within an area to the west of Baldoyle Bay which is designated under the Portmarnock South Local Area Plan as an ecological buffer zone to protect the integrity of Baldoyle Bay SAC and the special conservation interests for Baldoyle Bay SPA.

334. Four of the grounds in the statement of grounds are directed to the alleged failure of the Board to take account of the special conservation interests for Baldoyle Bay SPA, specifically to the construction, use and remediation of compound 9, and these have been grouped together in the applicant's written submissions under the heading "*The Quiet Zone*".

335. The first of these grounds, at para. 18(XII), is that the Board in granting permission for compound 9 on the quiet zone failed to ensure the prevention of deliberate disturbance of the Bar-tailed Godwit, which is one of the species of birds listed in Annex I in Directive 2009/147/EC, the Birds Directive, and thereby breached Article 5 of that Directive.

336. The second, at para. 18(XIV), is that the Board in granting permission for compound 9 failed to take the appropriate steps to avoid, in the European sites, the deterioration of natural habitats and the habitats of species as well as the disturbance of the species for which the areas have been designated, insofar as such disturbance could be significant in relation to the objectives of the Habitats Directive, and in the exercise of its functions failed to take appropriate steps to avoid disturbance of species for which European sites have been established, insofar as such disturbance could be significant in relation to the objectives of the Birds Directive or the Habitats Directive, contrary to article 27 of the European Communities (Birds and Natural Habitats) Regulations, 2011, as amended.

337. The third, at para. 18(XV), is that the Board failed to take appropriate steps to avoid in the Baldoyle Bay SPA the deterioration of natural habitats or habitats of species as well as the disturbance of species for which the site has been designated, insofar as such disturbance of the species for which the site has been designated could be significant in relation to the objectives of the Habitats Directive, contrary to s. 177S of the Planning and Development Act, 2000, as amended.

338. The fourth, at para. 18(XVIII), is that the Board acted contrary to Article 6(3) of the Habitats Directive by granting a consent condition 14 (*sic*.) of which left Irish Water free to determine subsequently certain parameters relating to the construction phase including the remediation of compound 9, without being certain beyond reasonable scientific doubt that the development consent granted established conditions that were strict enough to guarantee that the remediation of the quiet zone for wading birds could be done in a manner that did not adversely affect the integrity of the Baldoyle Bay SPA.

339. The formulation of the first of these grounds is drawn directly from Article 5 of the Birds Directive; the second from article 27(3) and article 27(5)(c) of the 2011 Regulations; the

third from s. 177S of the Act of 2000 and the fourth from the judgment of the CJEU in Case C-461/17 *Holohan and Others*.

340. The statement of grounds asserts earlier, at para. 13, that no proper appropriate assessment had been conducted under Article 6(3) of the Habitats Directive and that disturbance of the Bar-tailed Godwit, a bird listed in Annex I of the Birds Directive, by the planned construction of a key construction compound in its designated "*quiet zone*" was contrary to Article 5 of the Birds Directive: but there is no indication of how the Bar-tailed Godwit would be disturbed by the compound, or how its habitat or any other habitats would deteriorate, or how or why condition 14 was not sufficiently strict to guarantee that the remediation of the quiet zone for wading birds could be done in a manner that did not adversely affect the integrity of the Baldoyle Bay SPA.

341. The applicant's arguments in relation to the quiet zone were made at paras. 149 to 165 of her written submissions.

342. It is said to be common case that the outfall will be tunnelled under Baldoyle Bay SPA; that compound 9 lies immediately outside the SPA boundary; and that it will occupy about 20% of the quiet zone for the duration of the works, i.e. about three years. That is incorrect. The duration of the construction phase of the entire GDD Project is estimated to be three years but the time for which the compounds will be required will vary according to the work which they are to facilitate. The estimated construction programme for the marine section of the pipeline is twelve months, made up of three months for the establishment of compounds 9 and 10 and nine months for the tunnelling works.

343. Remarkably, the applicant's written submission attempts to answer the Board's opposition rather than explaining in the first place the factual and legal basis of the grounds. The applicant points to the reference in the Board's intended statement of opposition to "*limited use of the quiet zone by relevant bird species*" and to the statements that the birds that use those lands have a degree of habituation to noise and that the noise from piling would be limited to two weeks duration. The applicant points to the affidavit of Mr. Simon Zisman, ecologist, filed on behalf of Irish Water which denies that it sought to diminish the importance of the quiet zone but rather identified those species which could potentially be affected by noise and visual stimuli and assessed those impacts in light of the best scientific knowledge and developed mitigation.

344. The applicant suggests that Irish Water's case is that the birds using the SPA and the quiet zone will become accustomed to the noise after a two week period and will be protected from "*ongoing disturbance*" by the perimeter hoarding. It is submitted that there has been no explanation of the effects of the loss of 20% of the quiet zone and that Irish Water's approach on this application is inconsistent with its approach in an unidentified more recent planning application in the same area in which the NIS included a commitment not to engage in construction works during the overwintering period of migratory birds that use the site.

345. Paragraph 155 of the applicant's written submissions – under the heading "*The Quiet Zone"* – repeated the statement previously made at para. 116 – under the heading "*Consultation with the Public*" – that raw bird data which was requested by the Inspector on an unspecified date during the course of the oral hearing was not put on the EIA Portal until 17th April, 2020. It can be confidently inferred that the applicant thinks that the data should have been put up sooner than it was, but she does not identify any obligation to have done so or suggest what, if any, were the consequences of it not having been done. What is offered as a submission is a bald assertion of fact. I have dealt with this point already at paragraphs 244 to 248.

346. The applicant's written submission continues by repeating the "*quiet zone*" grounds and referring to Articles 4(4) and 5 of the Birds Directive. The applicant points to the provision of the Directive that permits derogation which, it is said, could not be relied on for Annex I species, such as the Bar-tailed Godwit, but does not suggest that the Board purportedly relied on any derogation.

347. From all of this I fail utterly to understand what the applicant's case is as to the apprehended effect of the works on the quiet zone or her complaint as to the assessment made by the Board.

348. The intended statement of opposition on behalf of the Board makes the point that the obligation imposed on the State by Article 5 is an obligation to put in place a system of protection and identifies the national legislation – Wildlife Act, 1976, as amended; European Communities (Wildlife Act, 1976 (Amendment)) Regulations, 1986; and the European Communities (Birds and Natural Habitats) Regulations, 2011 – by which that obligation was fulfilled. The point is made, as illustrated by the judgment of Simons J. in *Redmond v. An Bord Pleanála* [2020] IEHC 151, that a grant of planning permission does not excuse the developer from the requirement to comply with this code. In other words, the grant of planning permission does not permit the deliberate disturbance of the Bar-tailed Godwit or any other species or any of the other mischief apprehended by the quiet zone grounds.

349. These issues were not addressed at all in the applicant's written or oral submissions.

350. The intended statement of opposition on behalf of Irish Water had specifically referenced the wetland birds surveys which had been undertaken to characterise the ornithological interests in Baldoyle Bay SPA and surrounding areas which had not recorded the Bar-tailed Godwit within the footprint of compound 9 and the conclusion of the Inspector, which was adopted by the Board, that the construction of the project would not compromise the targets of the conservation objective for that species and would not cause an adverse effect on site integrity due to airborne noise or visual disturbance. The applicant, however, did not in the statement of grounds or in the written submissions engage at all with the evidence which was before the Board or the Board's evaluation of it. The ground was nowhere laid in fact for what was a mere assertion that the birds

would be disturbed, or their habitats would deteriorate. The reference to derogation was a complete red herring because there was no question of derogation.

351. As to the remediation of compound 9, the applicant's written submission was no more than a copy and paste of para. 18(XVIII) of the statement of grounds and the passage from Case C-461/17 *Holohan and Others* on which it is based.

352. The Board's written submissions pointed out, correctly, that the applicant had not attempted to identify how it was said that the condition for the remediation of compounds 9 and 10 created a risk of remediation of compound 9 which would adversely affect the integrity of Baldoyle Bay SPA. Compound 9, after all, is to be outside the European site.

353. By the way, para. 18(XVIII) of the statement of grounds refers to condition 14 of the permission, which is directed to the protection of trees and hedgerows, and not the remediation of compound 9. I would have ignored the fact that the ground referred to the wrong condition and dealt with any case that the applicant might have made by reference to condition 16(c) which is directed to the remediation of construction compounds 9 and 10 but the applicant's case, such as it was, did not pass the threshold of mere assertion. As the submission on behalf of Irish Water points out, the quiet zone is owned by Fingal County Council and the condition in relation to habitat restoration at construction compounds 9 and 10 is a requirement that this be done in accordance with the requirements of Fingal County Council.

354. The applicant's oral presentation in relation to the quiet zone grounds was part of the running commentary on the Inspector's report to which I have already referred in the context of the appropriate assessment grounds. Counsel pointed to para. 10.4.1.2 of the Inspector's report which identified the potential impact pathway for airborne noise and visual disturbance from compounds 9 and 10; the conservation interests for Baldoyle Bay SPA; *seriatim* the analysis of the likely effects on each of the special conservation interests(including the Bar-tailed Godwit); and the proposed mitigation, which was:-

> *"Mitigation prescribed to address this potential adverse effect on site integrity comprises installation between April and August and under supervision of an ecologist of a 2.4 m high hoarding around the entire perimeter of each compound and any associated access track. This measure would virtually eliminate visual disturbance impacts on birds. The crane which would be used on site would be a low structure (not a tower crane) and would not give rise to a significant visual disturbance. I conclude that the mitigation measure would reduce any impacts on Light bellied Brent Goose to a very low level. I refer later to use of Dublin Port by Brent Geese, where the potential for airborne noise impacts and visual [disturbance] is considered and may be discounted."*

355. The exclusive foundation of the quiet zone grounds is the withering dismissal of the 2.4 m. hoarding as a means of eliminating the disturbance impact on birds in flight. This clearly misses the point that the birds are wading birds and that the purpose of the

hoarding is to mitigate visual disturbance when they are on the ground. It is plain from the Inspector's report that account was taken of disturbance not only on the designated lands but on adjacent non-designated lands, including the quiet zone. It is said that there is no explanation as to how the conclusion was reached that the hoarding would virtually eliminate visual disturbance, but it is obvious. The hoarding will prevent the birds from seeing the work going on. It is said that only the visual impacts are addressed by the hoarding, and not the noise. This is true. But the Inspector's conclusion in relation to airborne noise is based on the evidence that the site is close to two roads and a public beach and the evidence of the numbers of species using the areas likely to be affected. The NIS shows that the site lies on the approach to the main runway at Dublin airport and is regularly overflown. The Inspector deals specifically, by reference to the evidence, with the effect of the development – assessed to be small, and temporary and reversible –on the Bar-tailed Godwit.

356. Incidentally, the assessment was not, as the applicant's submissions suggests, that the birds would become accustomed to the noise after two weeks, rather that the noise from piling which would exceed the levels to which they were habituated would be limited to two weeks.

357. The applicant's oral presentation did not address the issues and arguments raised by the intended statements of opposition of the Board or Irish Water.

358. As to the suggestion that Irish Water's approach on this application is inconsistent with its approach in an unidentified more recent planning application in the same area in which the NIS included a commitment not to engage in construction works during the overwintering period of migratory birds that use the site, the written submissions on behalf of Irish Water identify the other planning application as an application for permission for the construction of the Portmarnock South Pumping Station. The Natura Impact Statements for that project and for the GDD Project, it is said, reached the same conclusions as to the necessity to protect the quiet zone from the impact of the construction work but different conclusions as to the mitigation measures required. The simple and obvious explanation for this is that the scale, complexity and duration of the two projects were different.

359. In my view the applicant has failed to establish any substantial ground under this heading. The applicant has failed to identify any factual basis for an apprehension that the construction of compound 9 might give rise to a risk of disturbance or of deterioration of habitats or any appropriate step which the Board ought to have but did not take to avoid deterioration of habitats or significant disturbance affecting birds.

Land spreading

360. Part of the proposed project, as I have said, is the construction of a 48,000 m3 capacity biosolids storage facility at Newtown which will serve both the WwTP at Clonshaugh and the upgraded facility at Ringsend. The treatment process will remove and treat all solids which are to be brought to Newtown and stored there until they are eventually used as

fertiliser. The applicant's case is that the EIAR did not address, and the Board did not consider, the impact on the environment of the eventual use of the biosolids.

361. The applicant challenges the permission on the ground that the Board erred in law and acted contrary to Article 5(1)(f) and Annex IV of the EIA Directive by failing to consider at all or properly the land spreading of the biosolids and other organic materials, thereby failing to consider the culmination of the effects with other existing and/or approved projects, taking into account any existing environmental problems relating to the areas of particular environmental importance likely to be affected by the use of natural resources.

362. This challenge was not developed in the applicant's written submissions but in the oral presentation it was based on the judgment of White J. *in An Taisce v. An Bord Pleanála* [2015] IEHC 633.

363. *An Taisce v. An Bord Pleanála* was a challenge by judicial review of a decision to grant permission for the continued use and operation of a power station near Edenderry, County Offaly. The power station had been built and operated in accordance with a planning permission granted on 24th December, 1998, limited to the period up to 31st December, 2013, unless by then a further permission for the continuance of the development should have been obtained. The EIS submitted with the planning application for an extension of time recalled that prior to the initial construction of the plant a peat resource study had been carried out to identify and plan where peat to fuel the plant would be sourced for the design life of the plant, which appears to have been about 30 years. The peat theretofore used had been drawn from two bog groups and delivered to the plant by a private railway and the declared intention was that this would continue: but the EIA had not addressed the environmental effects of continuing to extract peat fuel which the applicant contended was a direct and indirect effect of the operation of the plant. The respondent argued that the development the subject of the planning application was confined to the plant, and that the operation of the plant was not contingent upon fuel supplied from the relevant bogs.

364. White J., following *O'Grianna v. An Bord Pleanála* [2014] IEHC 632, applied a functional interdependence test. He found that the thermal power plant the subject of the planning application and the bogs from which the majority of the fuel was to be drawn were separate sites but that it was clear that the use of peat from the bogs could have possible indirect effects on the bogs. He made a declaration that where the environmental effects of extracting the peat fuel source for the power plant were not properly assessed for the purposes of the EIA Directive, the Board was obliged to ensure the effectiveness of the EIA Directive by subjecting those effects to environmental impact assessment before granting permission for the thermal power plant.

365. The applicant submits that this case is virtually identical. She argues that although the peat in the Edenderry case was an input and the biosolids in this case are an output, the land spreading is a direct effect of the project within the terms of the Directive. Counsel refers to a passage from the judgment of Lord Hoffman in *Berkeley v. Secretary of State*

for the Environment [2000] 3 All E.R. 897 which approved a statement in a U.K. publication of the purpose of environmental assessment:-

> *"Perhaps the best statement of this aspect of the EIA is to be found in the U.K. government publication 'Environmental Assessment: A Guide to the Procedures' (HMSO 1989) at p. 4:-*
>
> > *'The general public's interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project's effects, an environmental statement can help allay fears created by lack of information. At the same time it can help to inform the public on the substantive issues which the local planning authority will have to consider in reaching a decision. It is a requirement of the Regulations that the environmental statement must include a description of the project and its likely effects together with a summary in non-technical language. One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached, and to form their own judgments on the significance of the environmental issues raised by the project.'"*

366. In the Edenderry case the Board submitted that the planning permission was sought solely for the continued use of the power station, which was confined to the site on which it stood. That, says the applicant, is precisely the argument which is made here. It is submitted that a very large quantity of material will need to be spread and that the applicant was entitled to know, and so the Board should have considered, where and how it was going to be spread. The applicant submits that there is functional interdependence between the site of the storage facility – or perhaps it is the site of the project as a whole – and the lands on which the material is to be spread and that there are going to be effects from the transport of the material from the facility to the lands on which it is to be spread, and environmental consequences arising from the spreading, wherever that occurs.

367. Mr. Collins insisted on referring to the material as sludge but of course it is not sludge but biologically stable material from which the pathogens will have been removed, making it suitable for use as fertiliser. Nevertheless, as Ms. Butler puts it, it is not a terribly attractive topic to discuss.

368. I am sure that on an *ex parte* application I would have given leave on this ground.

369. While it is common case that the Board did not conduct an EIA or an AA on the land spreading, the Board's position is that it was cognisant of, and took account of, the eventual use of the material both in its planning assessment and its EIA. It is submitted that it would have been impossible to do anything more than that because the customers to which it will be supplied are self-identifying and the lands on which the material is to be spread cannot be known until the farmer comes looking for it.

370. It is acknowledged that the spreading of the material on lands within, or proximate to, or connected with, European sites will very likely give rise to the need for an AA but the need for an AA, it is said, is site specific. What can be done at this stage, and what has been done, is to make a high level Strategic Environmental Assessment of land spreading as an activity. Ms. Butler brought the court through the relevant passages in the Inspector's report.

371. The Inspector's report in chapter 3 described each element of the Proposed Development. At 3.2 it is noted that the facility would be used for the storage of biologically stable treated biosolids from the plants at Clonshaugh and Ringsend. At 7.3, as part of her consideration of Relevant Legislative and Policy Context, the Inspector noted that the Irish Water National Wastewater Sludge Management Plan 2014 – 2016 identified the preferred option for the use of biosolids as re-use on land. At 8.3.1, in her assessment of Need and Alternatives, the Inspector found that the need for the storage facility had been established by the seasonal constraints on land spreading. Noting the observers' objection to land spreading of biosolids, the Inspector concluded that the proposal was acceptable under the regulations and provided for the use of biosolids and the harnessing of the nutrients they contain. At p. 70 of the report the Inspector considered alternatives for sludge treatment and disposal, specifically the option of incineration. She pointed to Chapter 20 of the EIAR which proposed a feasibility study to develop alternative re-use or disposal options. At p. 114 the Inspector addressed the potential of the facility to impact on air quality, specifically by dust from the biosolids, and described the measures which were to be taken to mitigate that risk.

372. At para. 9.7.2.2, as part of her consideration of Likely Significant Effects on Human Health, the Inspector said:-

> *"Potential Impacts – RBSF*
>
> *I address the proposed land spreading of biosolids largely in reaction to water quality impacts. Any health impacts would be considered to be an indirect effect of the RSBF in the event that water pollution gave rise to health impacts as a result of drinking water contamination or in relation to foodstuffs. I am satisfied that there is insufficient evidence to support any conclusion that there would be significant adverse health impacts including through long-term indirect effects on water and food consumed by humans."*

373. At p. 200 of her report, the Inspector assessed the potential impacts of the RBSF on land and soil as moderately positive on the basis that it would avoid land spreading within the periods which are disallowed under the Nutrient Management Plans; at pp. 211 and 212 she looked at the energy requirement of the proposal and the alternative or incineration; and at p. 226 she looked at cumulative impacts.

374. The object of this careful exercise was, it was said, to show that account had been taken of the potential downstream effects of land spreading, which was consistent with national policy.

375. Ms. Butler also emphasised that land spreading itself was subject to controls by the European Union (Good Agricultural Practice for the Protection of Waters) Regulations, 2017 which control the amount of nitrogen and phosphorous that can be applied to land by reference to the quality of the land, the crop to be grown and so on.

376. Acknowledging that the applicant's argument equating the output of solids from this development to the input of fuel into the Edenderry plant was superficially attractive, Ms. Butler submitted that it was wrong for two reasons. The first was that on the facts of *An Taisce v. An Bord Pleanála* there was a particular link between the bogs and the power plant. The second was that in Edenderry no consideration at all had been given to the potential impact of the continued operation of the power station on the bogs.

377. I am satisfied that Ms. Butler's submission is correct. In this case it is impossible to establish a link between the RBSF and the lands upon which the material may be spread because the lands are not, and cannot be, identified until the purchaser is identified. Leaving aside the fact that the only ground of challenge in relation to the land spreading was the failure to carry out an EIA, the necessity and ability to conduct an AA is not linked to the storage of the material but will depend on the location and nature of the land upon which the material is to be spread. Furthermore, I am satisfied that *An Taisce v. An Bord Pleanála* is clearly distinguishable on the basis that in this case the Board identified, assessed, and took into account to the extent that it could the potential indirect effects of the eventual use of the material.

378. I find that while the applicant raised a substantial issue, the Board has convincingly answered it and that the challenge has not been made out.

Reasons

379. Seven of the applicant's grounds, at para. 19 of the statement of grounds, under the heading "*Contrary to Fair Procedures*", allege that the Board failed to give adequate reasons for various elements of its decision, but five of those elements are among those which have been challenged as to their substance. The applicant would make the case, variously, that the decision was invalid because the Board did and did not do what it was required by law not to have done, or to have done, and that the Board erred in law in failing to give reasons for its decision to do or not to do what it was not entitled to do, or was required to do. In principle, it seems to me, this cannot be correct. If the Board did not reach its decision in accordance with law, no amount of reasons could save it. Rather, if the approach was wrong, the reasons would show why it was wrong. This contradiction is apparent in the formulation of the grounds.

380. At para. 19(I) the applicant alleges that the Board erred in law and acted contrary to fair procedures in failing to give reasons for "*declining*" to consider "*reasonable alternatives*"

to the proposed development, including sites below 20 ha for the WwTP and an outfall location suitable for the dilution of volumes from a 500,000 PE plant. For the reasons given, I am satisfied that the applicant has not identified any flaw in the site selection process. The fact is that the Board did not consider "*reasonable alternatives*" to the proposed development but it was not required to do so. If it had been, I cannot see how the Board might have justified its failure to do so. Moreover, I do not think that it can properly be said that the Board declined to consider alternatives which it was not asked to consider.

381. At para. 19(II) the applicant alleges that the Board erred in law and acted contrary to fair procedures in failing to give reasons for its decision to grant a second planning permission for the regional biosolids facility and in failing to give reasons for the conflicting conditions in the two decisions for the development or how they are to be enforced. For the reasons given, I am satisfied that the applicant has not identified any substantial ground in relation to the separate permissions for the construction and use of the regional biosolids facility in conjunction with each of the Ringsend WwTP and the Clonshaugh WwTP, or any inconsistency in the conditions attached to those permissions. The true challenge is that the Board did what it did rather than that it failed to explain why it had done what it had done.

382. At para. 19(III) the applicant alleges that the Board erred in law and acted contrary to fair procedures in failing to give reasons for not conducting an Environmental Impact Assessment on the land spreading of biosolids and other nutrients. Again, it seems to me that the true issue is whether the Board was required to carry out an EIA rather than whether it was obliged to give reasons for not having done what it was required to do. For the reasons given, I am satisfied that it would have been impossible for the Board to have conducted an EIA. The Board was not required to do something which could not have been done but it did correctly take into account the eventual destination of the biosolids.

383. At para. 19(IV) the applicant alleges that the Board erred in law and acted contrary to fair procedures in failing to explain the screening out of Ireland's Eye SAC from any further assessment under Article 6(3) of the Habitats Directive. The proposition that the Board failed to adequately explain the screening out of Ireland's Eye SAC is not necessarily inconsistent with the proposition that the Board concluded that there was no hydrological link between the outfall and the site, but as I have said the only evidence before the Board – and the court – was that there was no hydrological link. This was carefully assessed in the Inspector's report and the conclusion was clearly reasoned.

384. At para. 19(V) the applicant alleges that the Board erred in law and acted contrary to fair procedures in failing to give reasons for its decision not to apply Article 6 of the Habitats Directive to the land spreading operations. As to land spreading, the substantive complaint at para. 18(VI) of the statement of grounds was that the Board failed to comply with the requirements of the EIA Directive, not the Habitats Directive, and that was the only issue addressed in the applicant's written submissions and in oral argument. In my

view, the logical premise of a complaint that the Board failed to give reasons for its decision not to apply Article 6 of the Habitats Directive to the land spreading can only be that the Board somehow or other had a discretion whether to apply it or not: which makes no sense. Moreover, as the Board points out, for so long as the lands on which the material is to be spread remain unidentified it is impossible to identify any European site that might be affected. There is no logical basis for this ground, never mind substance to it.

385. At para. 19(VI) the applicant alleges that the Board erred in law and acted contrary to fair procedures in failing to give adequate reasons for its purported appropriate assessment under Article 6(3) of the Habitats Directive. As formulated, this cannot be a good ground. An invalid appropriate assessment cannot be saved or validated by reasons. On the authority of *Eamon (Ted) Kelly v. An Bord Pleanála* [2014] IEHC 422, an appropriate assessment, in order to be valid, must include an examination, analysis, evaluation, findings and conclusions and a final determination. Any gap in the analysis, evaluation and decision goes to the substantive validity of the decision. The formulation of the ground by reference to a "*purported appropriate assessment*" presupposes that it will already have been found to have been invalid by reason of a failure to set out complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works on the previously identified European sites. I have already dealt with and disposed of the applicant's argument that the appropriate assessment was not sufficiently reasoned, and this ground is duplication.

386. The last of the reasons grounds is also rather peculiar. At para. 19(VII) the applicant alleges that the Board erred in law and acted contrary to fair procedures in failing to give adequate reasons for making a material contravention of the Fingal Development Plan 2017 – 2018 by granting planning permission for a waste management facility (the sewage hub centre) in an area zoned green belt. But it is not elsewhere in the statement of grounds suggested that there was a material contravention, or that the sewage hub centre is a waste management facility, or that a waste management facility is not a permitted development in a green belt.

387. The decision of the Board, under the heading "*Proper Planning and Sustainable Development"* was that the proposed development *"would be in accordance with the totality of all relevant national, regional and development plan level planning policies and objectives".* In simple terms, the Board decided that the development would not contravene the development plan. That being so, the question of giving reasons for making a material contravention simply did not arise, and, as I have said, the applicant dos not directly impugn the decision on the ground that there was a material contravention.

388. The applicant's written submissions suggest that the position of the Board in its intended statement of opposition is that no material contravention was made. That is not strictly correct. While it is true that statement of opposition sets out to justify the decision that the proposed development would not contravene the development plan, that was

expressly done without prejudice to the Board's primary contention that the applicant's argument that there was an absence of reasons was based on a misconception that the Board had decided that the sludge hub centre would materially contravene the development plan, when the fact of the matter was that the Board had decided that it would not.

389. The applicant's written submissions point to pp. 56 and 57 of the Inspector's report where she dealt with the sludge hub centre as part of her planning assessment. The Inspector there identified the issue that the sludge hub centre might be considered to be a *"Waste Disposal/Recovery Facility (High Impact)*" and why, by reference to the fact that it would deal with material from WwTPs elsewhere in Fingal, it might be so considered and why, by reference to the fact that it was to be an integral part of the Clonshaugh WwTP, it might not. The Inspector's recommendation was that the development would not materially contravene the development plan, but she went on to identify the criteria which the Board might have regard to if it considered that there would be a material contravention. The applicant would now criticise the Inspector's and the Board's reasoning and conclusion that the sludge hub centre would not be a material contravention and argue that the reasons given by the Board are not adequate to allow her to determine if or how it was determined that there would not be a material contravention but that is not the ground and there was no application to add any new ground.

390. The written submissions filed on behalf of the Board and on behalf of Irish Water set out a carefully reasoned argument to justify the decision, but the applicant did not attempt to engage with that argument and the court is not to be drawn into a roving inquisition.

391. The challenge to the decision is that the Board failed to give reasons for doing something which it is not alleged that it did, and that fails *in limine.*

Conclusion

392. For the reasons given, I am satisfied that the applicant has established that the Board failed to correctly identify and to comply with the obligation imposed on it by article 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 as amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016 to seek the observations of the Environmental Protection Agency on the likely impact of the proposed development on waste water discharges. On this ground, only, the decision has been shown to have been legally flawed and it must be quashed.

393. The failure of the consultation required by article 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 was argued as a standalone ground but the statement of grounds did suggest that it impacted on the Board's ability to conduct a complete assessment of the development or its impacts on the receiving environment. While the point was not developed, the failure of the required consultation may have wider implications for the validity of the process by which the decision was reached which may go to the question of whether, and if so the basis upon which, the matter might be remitted.

394. I propose to list the matter for mention – remotely – on a date convenient to counsel in the week commencing 8th December, 2020 in the expectation that by then the parties will be in a position to indicate what consequential orders or other orders, including orders as to costs, they say are appropriate and I will then give such directions as may be required as to such further written submissions as may be required in relation to any matters in dispute.