

**THE HIGH COURT**

[2022] IEHC 257

**Record No. 2020/373JR**

**JUDICIAL REVIEW**

**BETWEEN:**

**MARY HARRIET MADDEN**

**APPLICANT**

**-AND-**

**AN BORD PLEANÁLA**

**RESPONDENT**

**-AND-**

**JAMES MCCARTHY AND MARTIN J FAHY**

**NOTICE PARTIES**

**JUDGMENT of Mr Justice Cian Ferriter delivered this 4th day of May 2022**

**Introduction**

1. In these judicial review proceedings, the applicant seeks to challenge a decision of An Bord Pleanála (the "Board") of 27 February 2020 refusing planning permission for the construction of a single dwelling, wastewater treatment system and associated works at Roscam Townland in Galway (the "proposed development").
2. The applicant's statement of grounds advance six grounds of challenge, of which four can be regarded as irrationality/unreasonableness grounds along with a related ground that the Board failed to have regard to all relevant documentation. The other, self-standing, ground is that the Board made a legal error in carrying out a Stage 2 Appropriate Assessment conducted pursuant to Article 6(3) of the Habitats Directive.
3. In summary, the applicant contends that there was a manifestly insufficient evidential basis for the findings of the Board's Inspector (the "Inspector") that there were deficiencies in the Natura Impact Statement ("NIS") prepared by the applicant's expert ecologists as part of the Appropriate Assessment and submitted in support of her application. The applicant's case is that the Inspector's irrational findings and the separate legal error at stage 2 went to jurisdiction and the refusal decision must accordingly fall.
4. The Board's position is that it is an expert decision-maker (being a designated competent authority under s.177S of the Planning and Development Act 2000 (the "2000 Act")); that the standard in *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39 ("*O'Keeffe*") applies and that the applicant's challenge is classically a merits-based objection and not one which surmounts the very high bar set by *O'Keeffe*.
5. The second Notice Party Mr. Martin Fahy (for ease, unless the context suggests otherwise, "the notice party") appeared through counsel at the hearing of this judicial review and made written and oral submissions in support of the Board's opposition. The notice party submitted, in essence, that not only was there material on which the Inspector could validly base his conclusions but that it is clear that the Inspector accepted the detailed submissions which had been made by the notice party on those issues (particularly in relation to the deficiencies in the NIS as regards the absence of a proper bird survey and

the potential for the ground works for the proposed development to impact on groundwater and therefore the protected European sites downgradient from the proposed development site).

6. The Board queries the utility of this judicial review in circumstances where it is open to the applicant to simply making a fresh application for permission in light of the matters identified in the Inspector's report. The applicant says that she has taken a judicial review, as opposed to applying for fresh permission, in circumstances where the Board's decision under challenge represented the outcome of a third application for permission for construction of a dwelling on the lands. She maintains that she is entitled to have her application dealt with lawfully by the Board and that, if the Board has fallen into legal error, she is entitled to appropriate relief. If she is successful in this application, she seeks that the matter be remitted for different consideration by the Board from the stage prior to the appointment of the Inspector, i.e. that a different inspector be appointed and a fresh consideration be given to the application and the appeals at that point. She says that this will save her having to 'run the gauntlet' in respect of a fresh planning application.

#### **Background**

7. This is the applicant's third attempt to get planning permission for the construction of a house on the site.
8. In relation to the decision under challenge, the applicant sought planning permission from Galway City Council (the "Council") to construct a house on the Roscom peninsula, on the coast of Galway Bay. The application was submitted on 26 March 2019 and included an NIS prepared by MKO consultants which considered the potential pathways to the Galway Bay Complex Special Area of Conservation ("Galway Bay SAC" or "the SAC") and Inner Galway Bay Special Protection Area ("Inner Galway Bay SPA" or "the SPA") and concluded that the development would not adversely affect the integrity of these (or any other) European sites within the meaning of the Habitats Directive. In that regard, it is common case that the development would potentially have a significant effect on those European sites i.e. that these sites would not be 'screened out' after stage 1 of the appropriate assessment. The site of the proposed development is 243 metres north of the Galway Bay SAC and the Inner Galway Bay SPA.
9. The Council made a decision to grant permission on 17 May 2019, subject to 23 conditions. Both notice parties lodged an appeal against the Council's decision to grant permission and the second named notice party, in particular, made a detailed submission on 6 June 2019 which took issue with the adequacy of the applicant's NIS.
10. The second-named notice party in his lengthy and detailed appeal submission to the Board specifically highlighted the "extreme proximity" of the site to the Galway Bay SAC and the Inner Galway Bay SPA and cited case law which reflected the precautionary principle. He submitted that "the NIS does not meet the habitats directive threshold test".

11. He submitted that “the relevant CJEU case law has established that Natura impact statements/reports are meant to be scientific assessments which present relevant evidence, data and analysis not just general descriptions and the superficial review of existing data on “nature” within the area” (Commission Notice 2018; and also Case C-304/05 paragraph 69 [Commission v Italy infringement action]), commentaries, lists, tables etc”. The notice party’s submission contained a section headed “the NIS is incomplete” in which, *inter alia*, the following points were made:
- the NIS restricts/limits its assessment to observing protected habitats “on the site”, “within or adjacent to the site boundary” contrary to the intent of the Habitats Directive
  - the European protected sites lie downgradient from the application site and within their zones of influence, heightening the need for a scientific assessment of the likely impacts of the project during its various stages
  - The NIS failed to consider that the proposed development will require extensive excavations to a depth of c.3m below ground levels, estimating that c.1000 cubic metres of rocks, boulders etc will be dug out for the lower level of the dwelling and that these excavation/earthworks would inevitably impact the underlying watercourses given the hydrogeology of the area, creating a very real risk of compromising the European sites
  - there was real potential for changes to groundwater aquifer alteration or contamination given the groundwater vulnerability of the site and surrounding areas and the presence of a karst spring within 300m of the application site
  - the operational impact of this level of excavation has not been adequately addressed
  - no modelling of the impact of the large-scale ground works has been carried out in the NIS
  - in the circumstances, “we cannot be confident beyond all reasonable scientific doubt that the proposed development will not have a significant impact on the EU protected sites”
  - the NIS does not identify all species residing at Roscam Peninsula.
12. It was further submitted that it was of relevance that “no review of the Galway Bay SAC and the Inner Bay SPA, specifically the Roscam Coastline, have been carried out by the NPWS since 2013. The baseline information for the Roscam area upon which the NIS relies is thus out of date (NIS, p.11), and as such it relied on incomplete/lacking [sic] scientific data (C-43/10, para 115). As a minimum, it should have consulted other up-to-date scientific data including the relevant habitats map.”

13. The applicant provided a response to the grounds of appeal in July 2019. This contained rebuttal of the notice party's submissions and submitted an additional letter from the applicant's engineer addressing the ground issues.
14. The Board appointed an inspector who carried out a site visit on 29 August 2019. The Inspector prepared a detailed report dated 17 February 2020 ("the Inspector's Report") which recommended refusal, concluding that:

*"On the basis of the information provided with the application and appeal, and having regard to the deficiencies in the submitted Natura Impact Statement, the Board cannot be satisfied that the proposed development individually, or in combination with other plans or projects, would not adversely affect the integrity of the Galway Bay Complex SAC and Inner Galway Bay SPA, in view of the sites' conservation objectives. In such circumstances the Board is precluded from granting approval/permission."*

15. The Board concurred with that assessment and refused permission by order dated 27 February 2020.

#### **Applicable Legal Principles**

16. Appropriate Assessment ("AA") is a concept derived from article 6(3) of the Habitats Directive ("article 6(3)"). Article 6(3) provides:

*"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site...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."*

17. The reference to the "site" in article 6(3) is a reference to the relevant protected European site (for ease "protected sites"). Article 7 of the Habitats Directive provides that the provisions of article 6(3) are to apply to SPAs under Directive 2009/147/EC (the "Birds Directive").
18. Insofar as relevant to planning applications, Article 6(3) is transposed into Irish law by Part XAB of the 2000 Act. There are two stages involved. The first stage is set out in s.177U of the 2000 Act which provides, in s.177U(1), that "a screening for appropriate assessment of [an] application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site." This is referred to as Stage 1 of the AA process.

19. In the case of an appeal from the planning authority, the Board is the competent authority and is designated as such in s.177S of the 2000 Act.
20. S.177U(4) provides that the competent authority shall determine that an appropriate assessment of, *inter alia*, a proposed development is required "if it cannot be excluded, on the basis of objective information, that the proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site." If such a risk cannot be excluded, it is necessary to move to Stage 2 of the AA: *Waddenzee* [2004] E.C.R. I-07405.
21. Stage 2 is governed by s.177V of the 2000 Act. S.177V(1) provides that an "appropriate assessment ...shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not ...a proposed development would adversely affect the integrity of a European site" and that such appropriate assessment shall be carried out before consent is given for the proposed development.
22. S. 177V(2) of the 2000 Act provides that in carrying out an AA the competent authority shall take into account certain prescribed matters, which includes the NIS and any supplemental or additional information furnished (which in this case would include the appeals by the notice parties as well as the applicant's response to the grounds of appeal). S.177T defines an NIS as"a statement, for the purposes of Article 6 of the Habitats Directive, of the implications of a proposed development, on its own or in combination with other plans or projects, for one or more than one European site, in view of the conservation objectives of the site or sites."
23. S.177V(2) also provides that in carrying out an appropriate assessment under subsection (1) the competent authority shall take into account "(c) if appropriate, any additional information sought by the authority and furnished by the applicant in relation to a Natura impact statement".
24. Fullam J. in *Carroll v. An Bord Pleanála* [2016] IEHC 90, drawing on the analysis of Advocate General Sharpston in her opinion in Case C-258/11 *Sweetman v Ireland* (22 November 2012), summarised the AA process as follows (at paragraph 25):

*"Article 6(3) of the Directive incorporates a two stage test;*

*a. The first stage is to determine whether the project in question is "likely to have a significant effect on the site". If there is a possibility that there would be a significant effect, there will then be a need for an appropriate assessment for the purposes of Article 6 (3). In essence, the first stage acts as a trigger for the requirement to carry out an appropriate assessment. It is not necessary to establish such an effect, just to determine that there may be one. This stage introduces a de minimis threshold to exclude plans or projects that have no appreciable effect on the site. The question at the first stage is simply - should we bother to check?*

*b. The second stage is that an expert assessment must determine whether the plan or project has "an adverse effect on the integrity of the site". This is a substantially higher threshold than the first stage. It is an appropriate assessment of the implications of the project in question for the conservation objectives of the site. The plan or project should be examined on the basis of the best scientific knowledge in the field. The question in the second stage is what will happen to the site if this plan or project goes ahead?- is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned?"*

25. As the competent authority, the Board has an autonomous obligation to ensure that the NIS is informed by sufficient expertise and to itself bring the necessary level of expertise to bear on the assessment of the developer's material for the purposes of the Habitats Directive, regardless of third-party objections: see *Reid v An Bord Pleanála* [2021] IEHC 362 at paragraph 4.
26. The competent authority does not have jurisdiction to grant permission unless it can be satisfied that the proposed development will not adversely affect the integrity of any European sites: see judgment of Finlay Geoghegan J. in *Ted Kelly v An Bord Pleanála* [2014] IEHC 400 ("*Ted Kelly*") at paragraph 34.
27. This was articulated by Clarke C.J. in *Connelly v An Bord Pleanála* [2018] IESC 31 ("*Connelly*") (at paragraph 13.4) as follows: -

*"In that context it is important to note that there are, in reality, two different stages to the process which must take place in an appropriate sequence. First there must be an AA and an appropriate decision must be made as a result of the AA in order that the Board have jurisdiction to grant a consent. Thereafter, assuming the Board has jurisdiction, the Board may go on to consider whether it should, in all the circumstances, actually grant permission and, if so, on what conditions."*
28. The test for a lawful AA was described in paragraph 40 of *Ted Kelly* as follows:
  - (i) *[the AA] 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 requires both examination and analysis.*
  - (ii) *it must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions requires 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) *it may only include a determination that the proposed development will not adversely affect the integrity of any relevant 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."*

29. Clarke C.J. approved that summary at paragraph 8.14 of his judgment in Connelly.
30. In Case C-323/17 *People Over Wind v Coillte Judgment of the Court (Seventh Chamber)* of 12 April 2018, the CJEU stated at paragraph 30 that

*"Article 6(3) of the Habitats Directive also integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites, resulting from the plans or projects envisaged. A less stringent authorisation criterion than that set out in that provision could not ensure as effectively the fulfilment of the objective of site protection intended under that provision."*

31. Accordingly, the Board, as competent authority, must be satisfied that there is no reasonable scientific doubt as to the potential adverse effect of the development on the integrity of the protected sites. This is undoubtedly a stringent test. If there is such a doubt as to whether a development will adversely affect a European site, the Board must refuse permission and has no jurisdiction to do otherwise (save in the exceptional circumstances provided for under Article 6(4) of the Habitats Directive).

#### **The standard of review**

32. Issue was joined on the pleadings and in the parties' written submissions as to the appropriate standard of review in relation to the applicant's irrationality case. The applicant advanced her case on the basis that she could meet the well-established O'Keeffe standard of review but also contended, in the alternative, that it was open to the Court to consider the application of the "manifest error" test in circumstances where the Board was applying principles of EU law and where the question of the proper performance of the Board's obligations to conduct an adequate AA goes to the jurisdiction of the Board.
33. The test of manifest error is one derived from EU law. Fennelly J. in *SIAC v Mayo County Council* [2002] 3 IR 148 (a public procurement and not an environmental/planning case) stated as follows in relation to manifest error (at paragraph 109):

"The passages which I have cited speak of "manifest" error as the test for judicial review adopted by the Community courts. This is the standard which applies to the appreciation of facts by the decision-maker. They do not say that this test must be adopted by the national courts. I would observe, however, that the word "manifest" should not be equated with any exaggerated description of obviousness. A study of the case-law will show that the Community Courts are prepared to annul decisions, at least in certain contexts, when they think an error has clearly been made."

34. While it is one of the most cited authorities in the Irish jurisprudential canon, it is worthwhile setting out what Finlay C.J. said in *O'Keeffe* given its continued relevance to

judicial review challenges in the planning sphere and in order to place in context the applicant's contention as to the potential applicability of a manifest error test in the circumstances of this case:

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

*These considerations, described by counsel on behalf of the appellants as the height of the fence against judicial intervention by way of review on grounds of irrationality of decision, are of particular importance in relation to questions of the decisions of planning authorities.*

*Under the provision of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions on the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.*

*I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."*

35. In support of her contention that a different standard of review to *O'Keeffe* could apply, the applicant relied on the following passage in the third edition of *Simons on Planning Law* (D. Browne, Round Hall Press, 2021) (at paragraph 15-691):

*"It is submitted that, given the strong application of the precautionary principles under the Habitats Directive and the fact that an adequate AA goes to the jurisdiction of the competent authority, a more exacting standard may be expected when a competent authority is conducting an AA. In *Balz and Heubach v An Bord Pleanála*, it was noted by Barton J. that "it is clear that the court has a particular competency and jurisdiction to determine whether the AA was carried out and completed in accordance with law".*

36. In *Carroll v An Bord Pleanála* [2016] IEHC 90, Fullam J. expressly considered and rejected an argument that the manifest error test should be applied in an environmental assessment context instead of *O'Keeffe*, holding, following an extensive review of the

authorities, that the *O’Keeffe* irrationality test remains central in the Irish law of judicial review so far as planning decisions involving environmental assessments are concerned.

37. Fullam J. also considered the argument as to manifest error in the context of the Supreme Court decision in *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 and stated that planning and fundamental rights are at different ends of a spectrum in terms of gravity of outcomes for persons affected by decisions, and, consequently, the deference accorded to the decision-maker is greater in planning cases. He then concluded (at paragraph 42) that

*"the preponderance of authority is against imposing a greater level of scrutiny than is currently required under Irish judicial review law in respect of decisions relating to issues of environmental assessment. An applicant faces an uphill task in establishing substantial grounds warranting a departure from the O’Keeffe test."*

38. Other recent High Court cases in which the *O’Keeffe* irrationality/unreasonableness test was applied in an environmental law planning context include *Rushe v. An Bord Pleanála* [2020] IEHC 122 and *N28 Steering Group v. An Bord Pleanála* [2019] IEHC 929.

39. In *Holohan v An Bord Pleanála* [2017] IEHC 268 Humphreys J. considered the issue as to whether the standard of review in Irish judicial review complied with the EU law requirement of effective review and concluded that it was not necessary to refer that issue to the CJEU. He concluded, following a survey of Irish and EU authorities, as follows (at paragraph 101):

*"the court cannot decide that the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong (or even clearly wrong) on the merits, if there is material to support it and if the conclusion is reached by a logical process, without factual error and supported by reasons, and does not disproportionately interfere with rights."*

40. Humphreys J. had occasion to specifically engage with the application of the *O’Keefe* test in an AA context, albeit *obiter*, in *Reid v. An Bord Pleanála* [2021] IEHC 362. It is worth quoting in full what he said as follows at paragraphs 43, 44 and 45 of his judgment in that case:

*"43. It is worth emphasising that in the O’Keeffe case, Finlay C.J. said (at p. 71) that "[u]nder the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board". However, that has little or no relevance to appropriate assessment because, in the habitats directive context, we are not dealing with a question of "balance". There is a clear EU law requirement that there be no adverse effect on the integrity of a European site and that all reasonable scientific doubt on this point must be excluded.*

44. Admittedly, it seems to have been assumed in the caselaw that O'Keefe applies to appropriate assessment: see e.g. (*N28 Steering Group v An Bord Pleanála* [2019] IEHC 929 Unreported, High Court, 20th December, 2019), at para. 76 and 77, (*Rushe v An Bord Pleanála* [2020] IEHC 122 Unreported, High Court, 5th March, 2020), at para. 195. However, if I may respectfully say so, I think there is a conceptual problem with applying the O'Keefe standard to a situation where one has to exclude all reasonable scientific doubt. To view the matter as one of irrationality might be to say that if reasonable people could disagree about whether there is a doubt then there isn't one. That cannot be correct. If reasonable people could disagree about whether there is a doubt, then there is a doubt, even if each individual viewpoint would in isolation survive O'Keefe scrutiny. Or to put it another way, there might be "material before the decision-maker" that there is no doubt, which would render the decision reasonable on a textbook O'Keefe approach, but there might also be other material going the other way capable of creating a doubt. That would render unlawful a finding of no impact. Thus the traditional, unmodified, O'Keefe wording, that the decision stands if there is material to support it, simply can't be right in the AA context.

45. The test is not whether the applicant has demonstrated that no reasonable decision-maker could have concluded that there was no scientific doubt. The test is whether the applicant has demonstrated that a "reasonable expert" (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker) could have a reasonable scientific doubt as to whether there could be an effect on a European site. One could, as the board in the present case seemed to be suggesting, turn this into a merely semantic issue by redefining the application of O'Keefe to produce a meaning in which it could make sense in the exclude-all-doubt context, but that would be a fairly tortured exercise. Far better in terms of understandability, transparency, clarity, accessibility of the law and all-round credibility of the intellectual process at stake to accept that "some material before the decision maker" just isn't enough when the mission statement of the exercise is not "form a planning judgment" but "exclude all reasonable scientific doubt".

41. I note that Humphreys J. in *Reid* was dealing with a situation where An Bord Pleanála had concluded that there would be no likely adverse impact on the integrity of a protected site (i.e. permission was granted) and the conceptual difficulty of applying the O'Keefe standard of review in that scenario (being that a finding of "no doubt" could survive O'Keefe scrutiny where one reasonable expert believed there was no doubt but another reasonable expert believed there was a doubt; in such a situation of dispute between reasonable experts, there is a doubt and there being doubt, permission should be refused in order to comply with the precautionary principle enshrined in the Habitats Directive). I am dealing with the obverse situation here: the applicant's expert is of the view that there is no doubt; the Board, as expert competent authority, takes the view there is a doubt owing to a deficiency of material in the NIS and refused permission on that basis. On the application of the O'Keefe standard of review, if there was relevant material

before the Board from which it could reach that conclusion as to doubt, then there is doubt and it follows that permission should be refused (which is what the Board has done in this case). Accordingly, the application of the *O’Keeffe* standard in that refusal context does not run the risk of undermining the precautionary principle in the Habitats Directive, such that the concerns identified by Humphreys J. in *Reid* in the grant of permission context do not appear to arise.

42. I should say that it equally seems to me that the same conclusion would be arrived at on the application of a manifest error test or by otherwise assessing whether there was a breach of the applicable EU law test under the Habitats Directive; if the expert competent authority has an objective basis before it to conclude that there is a deficiency of material in the NIS such that the applicant cannot discharge the onus of proof that it is beyond reasonable scientific doubt that there will be no adverse effect on the integrity of the protected sites, it is difficult to see that the competent authority would be guilty of manifest error or to have acted in breach of the test set out in the directive.
43. While I should say that I find the analysis of Humphreys J. in *Reid* to be compelling, particularly in a grant of permission context, given that his comments were *obiter* and that Fullam J. took a different view in *Carroll*, I would prefer to hold over to a case in which the issue identified by Humphreys J. is more directly engaged on the facts before expressing any final view on same.
44. Counsel for the applicant fairly accepted in discussion with the Court at the hearing that the manifest error test does not materially add to his case here, in that the applicant’s case is premised on the contention that there was simply an insufficient evidential basis for the inspector’s decision to conclude that the baseline data in the NIS was fundamentally flawed.
45. I propose therefore to consider the applicant’s case by reference to the conventional *O’Keeffe* test where in any event, in my view, the application of that test to the refusal scenario at issue on the facts here would not be inconsistent in terms of outcome with the application of a manifest error test.
46. The applicant’s counsel submits that his case comes squarely within the conventional *O’Keeffe* test, as most recently articulated by Phelan J. in *Stanley v. An Bord Pleanála* [2022] IEHC 177 at paragraph 77 where she stated that an irrationality review requires the Court “to form a view as to whether there was a sufficient evidential basis for the decision reached or whether it is amenable to challenge as unreasonable for lack of an adequate evidential basis (bearing in mind the high threshold which applies in any challenge of an expert body on rationality grounds)”
47. The applicant also relied in this regard on the recent decision of Twomey J. in *North Meath Wind Farm v An Bord Pleanála* [2018] IEHC 107 (itself a case involving refusal of permission) at paragraph 20, where Twomey J. re-iterated the classic test: “it means deciding whether there was any reasonable basis upon which the Board could make the decision it did, or deciding whether there was any material before the Board which was

capable of supporting that decision. This is a very high threshold for an applicant to reach to be entitled to an order of certiorari.”

48. The applicant also cited *N.M. (DRC) v The Minister for Justice and Equality and Law Reform* [2016] I.E.C.A. 217, where Hogan J. noted as part of his analysis of the scope of irrationality in judicial review (at paragraph 53) that “the court can further examine the conclusions reached and ensure that they follow from the decision-maker's premises.
49. I will apply these principles when considering the applicant’s case.
50. Finally, I should note that it is clear that the applicant bears the onus of establishing that the Board’s decision is vitiated by an error of law/irrationality: see judgment of McDermott J. in *Sweetman v. An Bord Pleanála* [2016] IEHC 277 at paragraph 93.

### **The Inspector’s Report**

51. It is helpful at this juncture to summarise the structure and content of the Inspector’s report.
52. The Inspector commenced his report by summarising the planning authority’s decision, the subject of the appeal, including its finding that the proposal was not considered to give rise to a risk to groundwater. The planning history for the site was then cited, including two previous refusals by the Board based on concerns as to wastewater systems in light of the highly sensitive groundwater environment.
53. The grounds of appeal, including those of the second-named notice party, were then summarised in some detail. Under the heading “appropriate assessment”, the appeals were summarised as follows:

#### *“Appropriate Assessment*

- *Site is c200m from 2 no European Protected Sites*
- *Conclusions of the NIS are in sharp contrast to those made by RPS at the AA Screening Stage of the GDP Material Alterations*
- *At a minimum the application should be reviewed by the NPWS, given that a NIS has been submitted.*
- *A full review and assessment of the application by the NPWS is required.*
- *GCC failed to interrogate the NIS and accepted its contents at face value.*
- *Applicant acknowledges the proximity of the site to the Galway Bay Complex SAC in their various reports.*
- *Site is located inside the precautionary areas of 11 no. EU protected sites.*
- *Application must fully comply with the Habitats Directive and relevant CJEU case law.*

- *NIS assessment is contrary to the intent on the Habitats Directive.*
- *For example consideration of 'Earth Works' is limited to two general statements/Failed to consider the proposed development will require extensive excavations to a depth of 3m/Other excavations will also be required/Will impact the underlying watercourses – real risk of directly compromising the SAC and SPA.*
- *Risk of changes or contamination to the groundwater/Poor working practices/leakage/spillages/noise/vibration/runoff have not been considered/No modelling has been carried out/ Equipment has been seen to leaking hydraulic fluid on the site.*
- *Cannot be confident beyond all reasonable scientific doubt that the proposed development will not have a significant impact on EU protected sites.*
- *NIS does not identify all relevant species/protected species/protected habitats.*
- *Baseline information on which the NIS has relied on is out of date – other up to date scientific data should have been consulted.*
- *NIS relies on best practice as mitigation.*
- *Board must adopt the precautionary principle*
- *Any assessment must take into account data from the EPA National Inspection Plan 2017 which states that inter alia 50% of all septic tanks in Ireland are failing/only 5% of tertiary systems are properly installed.*
- *Impact from the existing houses/from approved development*
- *No assessment of surface water*
- *Inconsistencies within the application documents."*

54. The applicant's response to the appeal submissions was then considered by the Inspector, with a detailed summary of responses set out in section 6.2 of the Inspector's report. This included an "environment and ecology" section which stated as follows:

*"Environment and Ecology*

- *Submitted NIS is based on best practice scientific knowledge and has been undertaken in accordance with the principles detailed in Article 191 of the Treaty of the Functioning of the European Union.*
- *No Annex 1 habitats or potential supporting habitats for Qualifying Interest (QI)/Special Conservation Interest (SCI) Species associated with European Sites present at the development site/consequently there is no potential for direct impact*

*on the conservation objectives of any European Site as a result of the proposed development.*

- *A potential pathway for indirect impact resulting from a deterioration in groundwater quality was identified in relation to Galway Bay Complex SAC and Inner Galway Bay SPA/Considering this pathway a Natura Impact Statement was prepared.*
- *Measures have been put in place to ensure that the construction and operation of the proposed development does not adversely affect the integrity of European Sites.*
- *Will have no adverse direct or indirect impact on any European site/there will be no cumulative/in-combination impact on European Sites."*

55. In the assessment section of the Inspector's report, he first addresses the Stage 1 assessment. In this section, the Inspector states he was satisfied that the wastewater treatment issues had now been overcome, showing a willingness to take on board the applicant's position when satisfied with the evidence in that regard.
56. At paragraph 7.8.9, the Inspector sets out the qualifying interest/species of conservation interest ("QI/SCI") in each of the three sites screened in. The Inspector then rules out potential likely significant effects on the Creggana Marsh site having regard to its conservation objectives.
57. The Inspector concludes, at paragraph 7.8.54, that he considers that significant likely effects on the Galway Bay SAC and the Inner Galway Bay SPA cannot be screened out, having regard to the sites' conservation objectives, and that therefore a stage 2 appropriate assessment was required.
58. The Inspector then sets out his stage 2 AA. He summarises the context and relevant parts of the evidence submitted. He then sets out a number of concerns he had in relation to the NIS. Given their centrality to the issues in this judicial review challenge, I propose to set out the relevant paragraphs in this section of the Inspector's Report in full:

*"7.8.63. I have a number of concerns in relation to the NIS. These are as follows:*

*7.8.64. There was no dedicated bird survey carried out, which is of concern given the site's proximity to the Inner Galway Bay Complex SPA. A number of bird species were identified as being present at the time of the site visit (Robin, Blackbird and Chaffinch) but no reference is made to which site visit is being referred to (i.e. the site survey of 2016 or the confirmation survey 2019). As such it is my view that the baseline data, upon which the NIS is based, is flawed. [relied on for grounds of challenge 1, 2 and 4]*

*7.8.65. The reasoning behind including the Inner Galway Bay SPA within the 'Zone of Impact' is not clear, although reference is made to surface water run-off.*

*However when considering pathways to the Galway Bay Complex SAC surface water runoff was ruled out as a potential pathway, given the lack of connectivity between the development site and Galway Bay SAC. [relied on for ground of challenge 3]*

*7.8.66. The NIS identifies potential pathways to the 2 no. Natura Sites considered to be within the 'Zone of Impact' but appears to give consideration to mitigation measures in order to rule out likely significant impacts on these sites which is contrary to relevant case law on this issue. [relied on for ground of challenge 5]*

*7.8.67. I consider that the assessment of impacts as set out in Section 4 of the NIS is inadequate. The assessment does not consider in detail the nature of potential construction impacts of the development, nor the nature of operational impacts of the development, on the two no. Natura 2000 sites. The third party appeal submissions, and the observers on the appeal, point to the need for significant groundworks to facilitate the development, and note these have not been considered in the NIS, and that these groundworks have potential to impact on groundwater. I concur with these submissions, and a detailed consideration of these groundworks is required in the NIS. Other potential impacts include the potential release of contaminated water and other contaminants, which could find a pathway to groundwater, resulting in potential effects (both temporary and long-term) on the Qualifying Interests/Special Conservation Interests of the two Natura 2000 sites. Potential impacts also include potential loss of feeding grounds as well as potential disturbance to birds (both temporary and long-term), from noise, vibration, physical or visual disturbance resulting in potential effects on the Special Conservation Interests of Inner Galway Bay SPA." [relied on for grounds of challenge 4 and 6]*

59. The Inspector then concludes as follows at paragraph 7.8.68:

*"On the basis of the information provided with the application and appeal, and having regard to the deficiencies in the submitted Natura Impact Statement, as described above, the Board cannot be satisfied that the proposed development individually, or in combination with other plans or projects, would not adversely affect the integrity of the Galway Bay Complex SAC (000268) and Inner Galway Bay SPA (000431), in view of the sites' conservation objectives. In such circumstances the Board is precluded from granting approval/permission."*

**Board's Decision**

60. The Board's order adopts the Inspector's conclusion in near identical terms (the only difference being the wording of the final sentence, which difference is not material for present purposes):

*"On the basis of the information provided with the application and appeal, and having regard to the deficiencies in the submitted Natura Impact Statement, the Board cannot be satisfied that the proposed development individually, or in*

*combination with other plans or projects, would not adversely affect the integrity of the Galway Bay Complex SAC (000268) and Inner Galway Bay SPA (004031), in view of the sites' conservation objectives. In such circumstances the Board is precluded from granting planning permission."*

**The applicant's grounds of challenge**

61. The applicant advances six grounds of challenge to the Inspector's findings, as relied upon by the Board in its decision, and order, as follows :

- (1) Irrational conclusion as to flawed NIS data
- (2) The premise of criticism of a lack of bird survey is irrational
- (3) Failure to have regard to all/relevant documentation
- (4) Erroneous /irrational treatment of consideration of Inner Galway Bay SPA
- (5) Error in Stage 2 AA: Erroneous application of case C-323/17 People Over Wind
- (6) Failure to consider groundwater reports / irrationality

62. Given that grounds 1 to 4 and 6 traverse similar territory, I propose to deal with those grounds first. I will then look at the self-standing ground contained in ground 5.

Grounds 1 and 2: Irrational conclusion as to flawed NIS data/The premise of criticism of a lack of bird survey is irrational

63. The first two grounds relate to paragraph 7.8.64 of the Inspector's report:

*"7.8.64. There was no dedicated bird survey carried out, which is of concern given the site's proximity to the Inner Galway Bay Complex SPA. A number of bird species were identified as being present at the time of the site visit (Robin, Blackbird and Chaffinch) but no reference is made to which site visit is being referred to (i.e. the site survey of 2016 or the confirmation survey 2019). As such it is my view that the baseline data, upon which the NIS is based, is flawed."*

64. The applicant submitted that there was "nothing in this analysis capable of unsettling the more considered analysis in the NIS submitted on the applicant's behalf, which expressly considers whether there are any specific risks and concludes that there are none: see NIS, section 2.3.2".

65. The applicant's fundamental point was that the Inspector in his report had not identified any scientific risk or concern in relation to SCI/QI bird species arising from the proposed development which was a necessary premise to the conclusion that the NIS was deficient in not including a dedicated bird survey. While the applicant accepted that the Board had an autonomous obligation under the Habitats Directive to satisfy itself as to whether it was beyond reasonable scientific doubt that the development would have an adverse effect on the integrity of the European sites, she submitted that this did not obviate the

need for the Inspector to identify a basis for the apprehended doubt in the evidence before him (whether in the evidence before the Board in the appeal or as a matter of expert reasoning and analysis on the part of the Inspector qua expert). Accordingly, the applicant submitted that a rational basis in the sense of a rational premise based in the material before the Inspector for the Inspector's conclusion was absent such that the O'Keeffe standard was satisfied on the facts.

66. The applicant submitted that the logical endpoint of the Inspector's approach is that a bird survey would be required for every development on a site near a European site irrespective of whether any reasonable scientific doubt as to an adverse effect on the integrity of such a site arose.
67. The Board's core submission on this issue was that the Inspector here was concerned with an absence of comprehensive and relevant evidence such as to raise a doubt as to whether the question of lack of adverse effect on the integrity of the sites was beyond scientific doubt. Accordingly, the question was not one of ignoring or failing to accept the applicant's expert evidence. The question was one of the exercise of professional expert judgment on behalf of the Board's inspector (bearing in mind that the Board, as a competent authority, is obliged to have appropriate expertise available to it to conduct AAs). Accordingly, the question was not one of an insufficient evidential basis but, rather, one of the expert judgment of the planner that there was an absence of evidence sufficient to dispel reasonable scientific doubt. This is classically, it was submitted, an area in which deference should be shown to the Board's expert professional judgment.
68. The Board submitted that the Inspector in the exercise of his expert professional judgment had decided that the baseline data, as regards birds, upon which the NIS was based, was flawed. The Inspector specifically stated that the absence of a dedicated bird survey was "of concern given the site's proximity to the inner Galway Bay complex SPA". This absence had been noted earlier in the report at paragraph 7.8.4 where it was stated that:

*"In relation to fauna, it is stated within the NIS that no evidence of Annex II protected species associated with Galway Bay Complex SAC were recorded within or adjacent to the site boundary. No dedicated bird survey was undertaken. Incidental records of Robin, Blackbird and Chaffinch were made during the site walkover. No species as listed as a Special Conservation Interest were recorded during the site visit or breeding or significant foraging habitat for these species were recorded."*

69. In response to the submission that the Inspector was entitled to take the view that the data on the NWPS website as regards SCIs for the SPA in the desktop survey was insufficient, and that this was what the notice party had submitted in his appeal, the applicant said that the Inspector's approach was vitiated by an absence of an empirical basis to reject the data in the NWPS website; it was submitted that counsel for the Board was supplying a potential rationale for this impugned finding which was absent from the report itself.

70. The notice party submitted that the onus was on the applicant to submit evidence including scientific evidence and data to demonstrate that there would be no adverse risk to the integrity of the European sites in light of their conservation objectives and that it was then up to the Board in discharge of its autonomous obligations to decide whether sufficient information had been lodged to meet the strict legal test. It was submitted that this was a classic *O'Keefe* question: the Board was entitled to look at the NIS and, irrespective of whether it had received submissions or evidence from any other party, ask itself the question whether it was sufficient to meet the legal test? The Board takes its own expert view on the material before it and has no obligation to accept that material.
71. The notice party submitted that it was clear that in light of the high threshold that had to be surpassed that the applicant needed comprehensive evidence. The absence of a dedicated bird survey was an entirely legitimate cause for concern because of the proximity of the development site to the European sites. The notice party emphasised the strictness of the test: the Board must refuse an application unless it is satisfied that it is beyond reasonable scientific doubt that there would not be an adverse impact on the integrity of the protected sites. He submitted that the obligation was on the applicant to identify all species potentially affected but there was no specific consideration by the applicant of the potential impact on QI/SCI bird species here.
72. In my view, there was a rational premise for the conclusion reached by the Inspector as to the baseline data in the NIS being flawed as regards impact on birds and that premise was squarely based on the material before the Board, being the NIS which specifically noted that there had been no dedicated bird survey carried out and no conservation bird species identified at the site, and the notice party's appeal which had also highlighted asserted shortcomings in the NWPS bird data (given its antiquity) and the need for a comprehensive assessment of the potential impact on conservation birds resulting from the development, given how close the development site was to the SPA. The Inspector effectively accepted the submission that there was a gap in the applicant's NIS on the issue; that was a conclusion rationally open to the Inspector on the material before him.
73. It needs to be borne in mind at all times that the applicant bears the onus of satisfying the stringent test of it being beyond reasonable scientific doubt that there will not be an adverse effect on the integrity of the protected sites. The Inspector is exercising his expert judgment on that question in light of both the materials before the Board and his own expert assessment of matters. It is not the role of the Court to enter the arena by seeking to weigh the qualitative merits of the respective submissions made on behalf of the applicant and the notice party on the question of the adequacy of the NIS as regards the potential impact of the proposed development on conservation bird species in the SPA. In my view, there was a basis in the materials before the Board for the conclusion reached by the Inspector on the this issue. Conservation birds and the potential impact on them were not addressed in terms in the relevant section of the NIS. The notice party criticised this absence and set out reasons as to why this created scientific doubt. The Inspector in exercise of his expert judgment was entitled to side with the notice party on this issue, or otherwise in discharge of the Board's autonomous obligations under the

Habitats Directive, to take the view that the NIS was deficient in this regard. I see no irrationality in the Board as competent authority, based on the Inspector's findings and recommendation, so concluding.

**Ground 3: Failure to have regard to all relevant documentation**

74. Insofar as the applicant complains that the Board's Inspector failed to take into account all relevant information and documentation in relation to the bird data issue, I do not believe that this is well-founded in light of the contents of the Inspector's report. The applicant's response to the appeal submission is summarised in Section 6.2 of the Inspector's Report and was clearly taken into account and considered by the Inspector. Furthermore, the NIS states it was informed by the desktop study of relevant information, and the NIS itself was expressly referred to in the section of the Inspector's report dealing with the AA.
75. The Board submitted that the applicant's response to the appeal submissions did not contain any new data as regards ecological matters (including the birds issue and the issue of earthworks and analysis of the impact thereof) but rather consisted of rebuttal, with the applicant's ecologists standing over the original NIS.
76. In my view, it is clear from the terms of the Inspector's report that the Inspector considered and engaged with the material tendered to the Board, both on behalf of the applicant (including the applicant's expert reports from Mr Slevin and Mr Langan and the ecologists' NIS) and on behalf of the notice parties and third-party observers. It is clear that the Inspector had regard to the relevant SCIs/QIs for the protected sites: this is expressly set out at paragraph 7.8.9 of his report. The Board as competent authority, acted lawfully in adopting the Inspector's findings.
77. I do not believe this ground is well-founded in the circumstances.

**Ground 4: Erroneous /irrational treatment of consideration of Inner Galway Bay SPA**

78. The Inspector at paragraph 7.8.65 of his Report stated that:

*"7.8.65. The reasoning behind including the Inner Galway Bay SPA within the 'Zone of Impact' is not clear, although reference is made to surface water run-off. However when considering pathways to the Galway Bay Complex SAC surface water runoff was ruled out as a potential pathway, given the lack of connectivity between the development site and Galway Bay SAC."*

79. The applicant submitted that it was simply not clear what the Inspector was seeking to get at in this paragraph and it could not therefore be said that there was a rational basis to hold that there was a deficiency arising from this stated reason.
80. The Board submitted that the NIS itself was unclear as to why Galway Bay SPA was screened in, when one considers the contents of table 3.1 and table 4.1 of the NIS. Ultimately, it was submitted that the point did not go anywhere as the Inspector accepted that the SPA was properly screened in to the stage 2 assessment in any event.

81. In my view, paragraph 7.8.65 simply reflected the Inspector's view as to the lack of clarity in the applicant's own NIS. Earlier in the Inspector's report he had noted that "7.8.59. Inner Galway Complex SPA was considered to be within the 'Likely Zone of Impact', although the reasoning behind its inclusion is not clear from the NIS. It is stated that the potential for surface water run-off to result in deterioration of water quality was considered, but there is no conclusion made in relation to this issue."
82. The contents of paragraph 7.8.65 simply follow that observation through. That seems to me to be an observation legitimately within the Inspector's sphere of judgment in light of the material that was before him. The Board as competent authority was entitled to adopt the Inspector's findings. I do not see any error of law or irrationality in the circumstances.

**Ground 6: Failure to consider groundwater reports / irrationality**

83. Paragraph 7.8.67 of the Inspector's report stated as follows:

*"7.8.67. I consider that the assessment of impacts as set out in Section 4 of the NIS is inadequate. The assessment does not consider in detail the nature of potential construction impacts of the development, nor the nature of operational impacts of the development, on the two no. Natura 2000 sites. The third party appeal submissions, and the observers on the appeal, point to the need for significant groundworks to facilitate the development, and note these have not been considered in the NIS, and that these groundworks have potential to impact on groundwater. I concur with these submissions, and a detailed consideration of these groundworks is required in the NIS. Other potential impacts include the potential release of contaminated water and other contaminants, which could find a pathway to groundwater, resulting in potential effects (both temporary and long-term) on the Qualifying Interests/Special Conservation Interests of the two Natura 2000 sites. Potential impacts also include potential loss and feeding grounds as well as potential disturbance to birds (both temporary and long-term), from noise, vibration, physical or visual disturbance resulting in potential effects on the Special Conservation Interests of Inner Galway Bay SPA."*

84. As regards ground 6, the failure to consider groundwater reports, the applicant's complaint is that the Inspector does not identify any adequate evidential basis for his findings as to potential *lacunae* or shortcomings in the groundwater data. As with her case in relation to the alleged irrationality in relation to the treatment of the NIS as regards potential impact on birds in the protected sites, the applicant relies on the content of the NIS (and separate reports/submissions of its experts, James Langan and Brendan Slevin) and submits that the Inspector did not "unsettle" the expert evidence in that regard, i.e. there was uncontested expert evidence before the Board on these issues and no rational basis has been advanced for rejecting same. This ground is based on the opinion of Mr. Pat Roberts, the applicant's ecologist, that the views expressed in paragraph 7.8.67 of the Inspector's report must have been arrived at in disregard of the information contained in the reports of Brendan Slevin and James Langan of Langan Consulting Engineers in addition to being in disregard of the contents of the applicant's response to the appeal submissions.

85. The applicant submitted that the active notice party, Mr. Fahy, accepted that he was not an environmental expert. He did not tender any expert evidence in support of his appeal. He effectively made a series of assertions as to potential shortcomings in the applicant's NIS without evidencing any scientific basis for same. In contrast, the applicant tendered affidavit evidence from Mr. Roberts, the principal ecologist employed with the consultancy firm MKO Ireland, who led the preparation of the applicant's NIS which was the subject of criticism by the Board's inspector in the appeal under review.
86. In his affidavit, Mr. Roberts expressed the opinion that the Inspector made a number of significant errors in his consideration of the material before him in the conduct of the stage 2 AA. Mr. Roberts pointed to the fact that an EPA site suitability assessment prepared by Brendan Slevin and Associates dated 28 February 2019 had been considered in the NIS as regards the question of an alleged risk to groundwater for construction and operation phases. This site suitability assessment included a trial hole to a depth of 3 m and found there was no evidence of a water table or mottling and that the sub soil was of stiff density. As a result, it concluded that it was not anticipated that groundwater would be directly affected. He also drew attention to a groundwater protection analysis report prepared by Langan Consulting Engineers of March 2019. He expressed the view that the Inspector simply failed to have regard to the relevant documentation consisting of these reports. He also expressed the view that the Inspector "did not have regard to the response to grounds of appeal submission when considering the alleged risks."
87. Mr. Roberts offered his professional opinion that based on his extensive experience the level of analysis in the review conducted for the application site was "far beyond that which would ordinarily be required by a competent authority considering a similar application of a similar size" and sought to make reference to a recent decision granting permission to change a house on an adjacent site. The Board objected, correctly in my view, to the admissibility of this latter evidence which is not relevant to the issues in this case.
88. The Board submitted that Mr. Robert's evidence should not be accorded significant weight in circumstances where he is not an independent expert. The applicant submitted that as there had been no application to cross-examine Mr. Roberts, his evidence must stand as uncontradicted. Counsel for the Board pointed out that it would not have been appropriate to seek to cross-examine Mr. Roberts in circumstances where the Board's deponent simply exhibited the entire Board file.
89. I do not see that I can attach significant weight to the views of Mr. Roberts in circumstances where his views do not qualify as those of an independent expert. In saying that, I do not wish to cast any aspersions over Mr Roberts' experience and expertise. However, ultimately the question I have to consider is whether there was a rational basis, within the meaning of the authorities, for the Inspector's views (as adopted by the Board) as to the deficiencies as regards potential impact of groundworks he believed existed in the NIS as submitted.

90. The Board submits that this ground falls away as it is manifest from the Inspector's report that he did have regard to all of the applicant's documents including his expert reports and his appeal submission responses. This is said to be clear from his acceptance of the applicant's position as regards wastewater treatment which was also addressed in these reports.
91. The notice party submitted that it was entirely open to the Inspector to accept the notice party's submission that the deficiencies in the groundwater impact analysis in the NIS amounted to a flaw which warranted a rejection of the NIS.
92. In my view, there was material before the Inspector in the form of the notice party's detailed appeal submission which sought to articulate real risks to the groundwater on the site stemming from the proposed groundworks for the development. It is not the function of the Court to evaluate the respective merits of the submissions made by the applicant and the notice party on this question. With respect, the applicant's submissions invited me in effect to evaluate the merits of the reports of Mr. Slevin and Mr. Langan and to hold that the Inspector could not or should not have arrived at the views he did, as an expert, in light of the contents of those reports. It is clear that the Inspector did have regard to the reports, including the appeal submission response document, submitted on behalf of the applicant; indeed, he summarises that material in his report and accepts the applicant's submissions based on that material in relation to other issues addressed in his report (such as the wastewater treatment issue). Accordingly, in my view, the findings in this paragraph were ones which were grounded in the materials before the Inspector and contain conclusions which were open to him to reach in light of those materials. I do not see how it could be said that the Board, in adopting the Inspector's findings, acted irrationally in the circumstances.

**Ground 5: Error in Stage 2 AA: Erroneous application of case C-323/17 People Over Wind**

93. Paragraph 7.8.66 of the Inspector's Report states that:

*"The NIS identifies potential pathways to the 2 no. Natura Sites considered to be within the 'Zone of Impact' but appears to give consideration to mitigation measures in order to rule out likely significant impacts on these sites, which is contrary to relevant case law on this issue."*

94. It is common case that, at stage 1 (being the screening exercise for AA), the Board may not take into account mitigation measures. It is equally well established that mitigation measures can be taken into account at stage 2 of the AA. This is because, at stage 2, the competent authority is considering the potential adverse impact that the aspect of the proposed development the subject of the proposed mitigation measures might have on a protected site. Accordingly, it is permissible at that stage to consider whether or not any mitigation measures are sufficient to obviate any risk to the integrity of a protected site. This was confirmed by the CJEU in Case C-323/17 People Over Wind.
95. The applicant contends that the contents of this paragraph demonstrate a clear misunderstanding on the part of the Inspector as to the correct legal position, included in

the stage 2 AA analysis, and, as such, demonstrates an error of law in the conduct of the AA such as to vitiate the AA and to therefore deprive the Board of jurisdiction to thereafter refuse permission by allowing the appeal.

96. The Board, while accepting that the contents of paragraph 7.8.66 of the Inspector's report, appeared to reference a legal test referable to stage 1 and not stage 2, submitted that this was no more than a mere observation which did not of itself have legal consequences.
97. The Board submitted that in any event it would be futile to grant certiorari in respect of this matter alone, emphasising that the other deficiencies identified in the Inspector's report would still remain and that, in consequence, in exercise of discretion I should refuse *certiorari*.
98. In my view, while this sentence is incorrect insofar as it appears in the stage 2 appropriate assessment section of the Inspector's report, I do not believe that the error is one which is sufficiently material to warrant invalidation of the decision. In weighing the materiality of this error, I take into account that the erroneous sentence of the report was not subsequently applied in a legally inappropriate manner e.g. it was not the case that the Inspector in the stage 2 appropriate assessment section of his report refused to consider proposed mitigation measures. I note that the NIS itself addressed both stage 1 and stage 2 of the appropriate assessment exercise. The offending sentence in paragraph 7.8.66 of the Inspector's report may, in fairness, have reflected his view of the test (correctly) applying at stage 1.
99. If I am wrong as to the materiality of the error, it seems to me that it would be futile to grant an order of certiorari based on this error alone. If I were to quash the decision on this basis alone, the applicant will be left in a position where the Board, on a remittal, is still likely to refuse permission on the basis of the materials before the Board in light of the deficiencies as regards the lack of a bird survey and the insufficiency of the groundwater impact analysis which were relied on in the inspector's report to ground a recommendation of refusal of permission, which recommendation was agreed with by the Board. These separate, and lawfully arrived at, views on deficiencies in the NIS would remain if I were to grant the order of certiorari sought on this ground.
100. While the applicant submits that such evidential deficiencies could be overcome by the Board, on a remittal, directing the provision of such further information as it may require to satisfy itself as to the potential adverse impacts on the integrity of the site, I have no power to direct the Board to do same and it would be wrong of me, in any event, to interfere with the Board's expert assessment of the adequacy of the materials grounding the application before it. In the circumstances, I have a real concern that to quash the decision on this sole ground is likely to prove futile from the applicant's perspective.
101. In the circumstances, if I am wrong as to the lack of materiality of this error, in the exercise of discretion on this judicial review application, I would refuse an order of *certiorari*.

**Further Information Issue**

102. The applicant sought to contend that the Inspector/Board erred in law in not seeking further information from the applicant in relation to the question of a bird survey. Section 177V(2) of the 2000 Act (set out at paragraph 23 above) was relied upon in this regard.
103. The Board complained that this point was not pleaded. I believe the Board is correct in that regard. Accordingly, I do not propose to permit the applicant to advance that point. In any event, in my view, the applicant's arguments were not well founded on this point in circumstances where s.177V(2) does not impose any obligation on the Board to seek further information; rather, in the event that the Board chooses in exercise of its discretion to seek further information, it has an obligation at that point to consider that information. This view is, I believe, consistent with the prevailing authority see Barniville J. in *Crekav Trading v An Board Pleanála* [2020] IEHC 400 at paragraph 268 and O'Regan J. in *East Coast Transport v An Bord Pleanála* 2019] IEHC 866 at paragraph 39.

**Conclusion**

104. For the reasons outlined above, I refuse the applicant's application for judicial review.