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Judgment Title: Kelly -v- An Bord Pleanála

Neutral Citation: [2014] IEHC 400

High Court Record Number: 2013 802 JR

Date of Delivery: 25/07/2014

Court: High Court

Composition of Court:

Judgment by: Finlay Geoghegan J.

Status of Judgment: Approved

Neutral Citation: [2014] IEHC 400

THE HIGH COURT

[2013 No. 802 J.R.]

BETWEEN

EAMON (TED) KELLY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

ROSCOMMON COUNTY COUNCIL, GALETECH ENERGY DEVELOPMENTS LIMITED, SKY VALLEY CONCERNED RESIDENTS GROUP, WIND TURBINE ACTION GROUP SOUTH ROSCOMMON, THE DEPARTMENT OF ARTS, HERITAGE AND THE GAELTACHT, SKY VALLEY WIND COMPANY, THE HERITAGE COUNCIL AND THE COMMISSION FOR ENERGY REGULATION, PAUL DONOHUE, JAMES FRANCIS FALLON, THOMAS BURKE, MARIA DONNELLY, TOM AND FIONA FARRELL, LIAM KILDEA SKY VALLEY CONCERNED RESIDENTS GROUP, THE HERITAGE COUNCIL AND THE COMMISSION FOR ENERGY REGULATION

NOTICE PARTIES

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 25th day of July 2014.

1. The applicant, supported by one notice party, namely, the Department of Arts, Heritage and the Gaeltacht ("the Department") in this judicial review, seeks, by way of primary relief orders of *certiorari*, to quash two decisions of the respondent to grant planning permission for wind turbine developments in County Roscommon. The challenged decisions are:

"(1) A decision made on the 9th of September, 2013, to grant permission for a development comprising sixteen wind turbines with a hub height of 85m, rotor diameter of 100m at Croan, Gortaphuill, Mullaghardagh, Dysart, County Roscommon (Appeal Reference PL20.239759 Planning Register Ref. 10/541) ("Phase 1 Decision").

(2) A decision made on the 13th of September, 2013, to grant planning permission for a development comprising nineteen wind turbines with a hub height of 85m, rotor diameter of 100m and overall height of 135m and 85m anemometer mass and 110kv substation a Milltown, Skeavally, Tawnagh, Tobermacloghlin, County Roscommon (Appeal ref. PL20.241069 Planning Register Ref. 11/273) ("Phase 2 Decision").

2. Galetech Energy Developments Ltd. ("Galetech"), a notice party, is the applicant for the planning permissions that are the subject of the Phase 1 and Phase 2 Decisions. It supports the respondent, An Bord Pleanála ("the Board") in opposing the present application.

3. As appears, the applications for planning permission relate to two developments of wind turbines in County Roscommon. The applicant is resident in Dysart, County Roscommon, is the Chairman of a group of local residents called the Wind Turbine Action Group South Roscommon and was an appellant before the Board in relation to each appeal.

Background

4. In 2010, Galetech applied for planning permission for a development comprising 16 wind turbine at Dysart, County Roscommon. In 2011, it applied for permission for the development of 19 wind turbines at Milltown, Skeavally, County Roscommon. The two developments are in the same vicinity and are contended by the applicant to comprise two phases of the same development. They will be referred to as Phase 1 and Phase 2 in

this judgment. Roscommon County Council granted permissions for the two developments and appeals were made to the Board.

5. The proposed developments are in the vicinity of a number of European sites, both Special Areas of Conservation (SAC) and Special Protection Areas (SPA). There are ten conservation sites within 10km of the Phase 1 site. These include three Natura 2000 sites, Loghcroan SAC, Four Road Turlough CSAC and the River Suck Callows SPA. Those sites have important numbers of wetland and water birds, including Whooper Swan, Golden Plover and Greenland White Fronted Geese, all Annex 1 species. Within 15km of the Phase 2 site, there are 14 Natura sites including the three Natura 2000 sites already mentioned.

6. The Board appointed a Planning Inspector to prepare a report on the appeal in relation to Phase 1, Ms. Kelly. Ms. Kelly reported on 11th March, 2012. She recommended refusal of planning permission.

7. The Board appointed Ms. MacGabhann as Inspector in relation to the Phase 2 appeal. Ms. MacGabhann reported on 6th February, 2013. She also recommended refusal of planning permission.

8. The Board considered each of the appeals at a meeting of the Board held on 8th August, 2013, and decided by a majority of 4:1 to grant permission for each of the proposed developments in accordance with reasons, considerations and decisions set out in the respective written decisions. It is those decisions, and the procedure leading to them, that are the subject matter of the present application for judicial review.

Grounds of Challenge

9. The applicant has delivered a lengthy and detailed statement of grounds. Pursuant to directions of the Court, it summarised the legal grounds upon which relief is sought as follows:

“(1) The Environmental Impact Statements (EIS) accompanying the applications for planning permission were inadequate and did not meet the requirements of national and European law. The Board erred in law in considering the statements to be adequate and proceeding to grant permission.

(2) The Natura Impact Statements (NIS) accompanying the applications for permission were inadequate and did not meet the requirements of national and European law. The Board erred in law in considering the statements to be adequate and proceeding to grant permission.

(3) The Board failed to carry out a proper environmental impact assessment of the proposed development as is required under Irish and European law.

(4) The Board failed to carry out a proper appropriate assessment of the proposed development as is required under Irish and European law.

(5) The Inspectors in each appeal recommended a refusal of permission for the proposed development, the Board erred in failing to have any or any proper regard to these recommendations and in particular the scientific doubt expressed in these recommendation.

(6) The Board failed to properly or at all record its conclusions or to give any or any proper statement of its reasons or considerations contrary to

national and European law.

(7) The Board erred in applying an incorrect test in its purported appropriate assessment.

(8) The Board's decision was irrational."

10. At the hearing, counsel indicated that the applicant was not pursuing grounds (1) and (2).

11. The Department supports the applicant on his grounds of challenge which relate to compliance with the requirements of the Council Directive 92/43/EEC (as amended) (the "Habitats Directive") and the relevant implementing national legislation identified in grounds (4), (5), (6) and (7) above.

12. As appears, the primary ground relied upon by both the applicant and the Department is that the decisions of the Board to grant each planning permission were made in breach of the requirements of Article 6(3) of the Habitats Directive as transposed into national law by Part XAB of the Planning and Development Act 2000 (as amended) ("the PDA"). The main contention is that the Board, as competent authority, failed to carry out an appropriate assessment in either appeal in accordance with Article 6(3) and the decisions of the Court of Justice of the European Union (CJEU), or to give reasons for the determination made in the course of the purported appropriate assessments.

13. The applicant pursued ground (3) in relation to the alleged failure by the Board to carry out an environmental impact assessment as required by Directive 2011/92/EU ("EIA Directive") as implemented by the PDA.

14. Whilst I propose, initially, considering the grounds which relate to the alleged breach of the requirements of Article 6(3) of the Habitats Directive, as transposed into Irish law, it is necessary to set out in summary all relevant parts of the Statutory Scheme which applied to the challenged decisions taken by the Board to consider appropriately the Board decisions.

Statutory Framework

15. The ultimate decisions taken by the Board on the appeals were whether or not to grant planning permission for the developments that were the subject of each of the appeals pursuant to s. 37 of the PDA. In taking those decisions, by reason of the nature and location of the proposed developments, there were three separately identifiable requirements deriving from Statute (in part enacted to give effect to EU obligations) with which the Board had to comply:

(i) Consideration of what might be termed normal or general planning requirements under the PDA and compliance with its procedural requirements; and

(ii) The carrying out of an environmental impact assessment required by the EIA Directive as implemented by Part X of the PDA; and

(iii) The carrying out of an appropriate assessment as required by Article 6(3) of the Habitats Directive implemented by Part XAB of the PDA including making a determination.

Planning Requirements

16. The Board assigned an Inspector to report to it on each appeal pursuant to s. 146(1)

of the PDA. The Inspector's Report must include a recommendation to the Board, which it is obliged to consider before determining the appeal (s. 146(2)).

17. In accordance with s. 34(10) of the PDA, the Board must state the main reasons and considerations on which the decision is based. Also, as where, in this case, the decision on the appeal is different to the recommendation in the Inspector's Report, the decision of the Board must "indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission".

Environmental Impact Assessment

18. Where, as on the facts of these appeals, the Board is also obliged to carry out an environmental impact assessment (EIA), the obligations imposed on it by the EIA Directive, as implemented, are set out in Part X of the PDA. Section 171A(1) defines an environment impact assessment, for the purposes of Part X, as:

"An assessment which includes an examination, analysis and evaluation carried out by . . . the Board . . . in accordance with this Part and Regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:

- (a) human beings, flora and fauna;
- (b) soil, water, air, climate and the landscape;
- (c) material assets and the cultural heritage and
- (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c)."

19. Section 172(1H) permits the Board, in carrying out an EIA, to "have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers". This includes its Inspector's Reports.

20. Section 172(1J) obliges the Board, when it has decided whether to grant or refuse consent for the proposed development, to inform the applicant and the public of the decision and to make the following information available to them:

- "(a) The contents of the decision and any conditions attaching thereto;
- (b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;
- (c) having examined any submission or observation validly made:
 - (i) the main reasons and considerations on which the decision is based and
 - (ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by members of the public;

(d) where relevant, description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;

(e) any report referred to in sub-section (1H);

(f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and

(g) the views, if any, furnished by other Member States of the European Union pursuant to s. 174.”

21. The definition of an EIA as being “an examination, analysis and evaluation” carried out by the Board and the obligation of the Board pursuant to s. 172(1J)(b) to make available to the public its evaluation of the direct and indirect effects of the proposed development on the matters set out in s. 171A are of particular relevance to the matters in dispute.

Appropriate Assessment

22. In these appeals, the third statutory requirement imposed on the Board relates to its obligations and in particular the carrying out of an appropriate assessment pursuant to Article 6 of the Habitats Directive as implemented by Part XAB of the PDA. There is some dispute as to the extent of the obligations imposed and in particular the nature of the reasons which must be given by the Board.

23. Whilst the provisions of Part XAB are more detailed than Article 6 of the Habitats Directive, it was common case between the parties at the hearing that they are intended to and do impose similar obligations on the Board to those imposed by Article 6(3) of the Habitats Directive as construed by reference to the case law of the CJEU.

24. Article 6 of the Habitats Directive, insofar as relevant, provides:

“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 disturbance of the 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 its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.”

25. As appears Article 6(3) envisages a two-stage process which is implemented in greater detail by ss. 177U and 177V of the PDA:

(i) a screening for appropriate assessment in accordance with s. 177U;

(ii) if, on a screening, the Board determines that an appropriate assessment is required then it must carry out an appropriate assessment in accordance with s. 177V.

26. There is a dispute between the parties as to the precise obligations imposed on the Board in relation to the stage 1 screening by s.177U but its resolution is not strictly necessary in these proceedings. There is agreement on the nature and purpose of the screening process which is well explained by Advocate General Sharpston in Case C-258/11 *Sweetman* at paras 47-49:

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

48. The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold. 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 [. . .]"

27. The applicant submitted that s. 177U is mandatory and obliges the Board to carry out a screening and make a formal determination as to whether or not an appropriate assessment is required in all cases, and that it did not do so in the appeals, the subject matter of these proceedings. The Board in response does not assert that it conducted a stage 1 formal screening but disputes that it was under an obligation to carry out a screening and issue a formal determination in circumstances where the planning applications were accompanied by a Natura impact statement. It referred to s. 177U(6)(c) and submitted that this is intended to reflect the practical reality of the situation which pertains in these appeals where the requirement to carry out a full appropriate assessment had been established before the planning authority.

28. Sub-sections 177U(1) and (2), in their terms, impose a mandatory obligation on a competent authority, such as the Board, to carry out screening for appropriate assessment before consent is given for a proposed development. These sub-sections, insofar as relevant, provide:

"177U. - (1) 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.

(2) A competent authority shall carry out a screening for appropriate

assessment under subsection (1) before-

(a) . . .

(b) consent for a proposed development is given.”

Sub-section (3) permits the competent authority to request information from the applicant to enable it carry out the screening. Sub-sections (4) and (5) set out the determinations which may be made by the Board in that screening process in the following terms:

“(4) The competent authority shall determine that an appropriate assessment . . . of 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.

(5) The competent authority shall determine that an appropriate assessment of . . . a proposed development, . . . is not required if it can 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.”

29. Sub-section (6) then provides for the notification of a determination made by a competent authority. However, it only expressly requires notification to be given where a competent authority makes a determination that an appropriate assessment is required. When it does so, it must give notice of the determination, including reasons for the determination to the applicant, persons who have made submissions or observations and a party to an appeal. However, sub-section (c) then provides “paragraph (a) shall not apply in a case where the application for consent for the proposed development was accompanied by a Natura impact statement”.

30. Whilst the above statutory scheme appears in its express terms to impose a mandatory obligation under sub-sections (1) and (2) on the Board to carry out a screening for appropriate assessment prior to giving consent for a all proposed developments, sub-section (6), in its express terms, only appears to require notice of its determination with reasons to be given to certain persons where it reaches a positive conclusion that an appropriate assessment is required and then relieves the Board of giving notice of its determination in circumstances where the application for consent was accompanied by a Natura impact statement. As I have already observed, it is not necessary, for the determination of this judicial review application, to decide the proper construction of these provisions as the Board accepted an appropriate assessment was required. It is, however, relevant to the subsequent issues in dispute in relation to the nature of the full appropriate assessment which must be carried out and the reasons which must be given therefor, to note that an appropriate assessment is the second stage of a two-stage process and only arises where the first stage or screening process has either determined (or it was at least implicitly accepted) that the proposed development, alone or in combination with other plans or projects, is likely to have a significant effect on a European site within the meaning of the low threshold set out by Advocate General Sharpston in *Sweetman*.

31. Unlike, in the case of an environmental impact assessment, s. 177V does not contain a stand alone definition of an “appropriate assessment”. Sub-section 177V(1) provides that “An appropriate assessment carried out under this Part 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”. The Board is the competent authority for the purposes of Part XAB in relation to a planning appeal. If as expressly required by s.177V(1) the determination to be made as

part of the appropriate assessment is to meet the requirements of Article 6.3 of the Habitats Directive, it follows that the full appropriate assessment must meet the requirements of Article 6(3) of the Habitats Directive as construed in CJEU case law.

32. Sub-section 177V(1) also expressly requires the appropriate assessment to be carried out before consent is given for a proposed development. Further Sub-section (3) provides that "Notwithstanding any other provision in this Act [and other named Acts]", the Board shall give consent to a proposed development only after having determined that the . . . proposed development shall not adversely affect the integrity of a European site". Sub-section (4) then "subject to the other provisions of the Act" permits consent to be given where modifications or conditions are attached and the Board has determined that "the proposed development would not adversely affect the integrity of the European site if it is carried out in accordance with the consent and the modifications or conditions attaching thereto. On the facts herein no such determination was made in either appeal and s.177V(4) is not relevant to the issues to be determined.

33. As appears, the respective effects on the decision making process of the Board of the environmental impact assessment and the appropriate assessment (where both have to be carried out by the Board prior to taking its planning decision) are quite different. In carrying out an environmental impact assessment, the Board is required to conduct an examination, analysis and evaluation of and identify the direct and indirect effects of the proposed developments on the matters specified in section 171A(1). However, the outcome of that examination, analysis, evaluation and identification informs rather than determines the planning decision which should or may be made. The Board has jurisdiction in its discretion to grant consent regardless of the outcome of the EIA though of course it impacts on how it should exercise its discretion.

34. In contrast, the Board, in carrying out an appropriate assessment under Article 6(3) and s.177V, is obliged, as part of same, to make a determination as to whether or not the proposed development would adversely affect the integrity of the relevant European site or sites in view of its conservation objectives. The determination which the Board makes on that issue in the appropriate assessment determines its jurisdiction to take the planning decision. Unless the appropriate assessment determination is that the proposed development will not adversely affect the integrity of any relevant European site, the Board may not take a decision giving consent for the proposed development unless it does so pursuant to Article 6(4) of the Habitats Directive. It is agreed that the decisions made by the Board herein were not taken pursuant to Article 6(4) of the Habitats Directive. Hence, for the purposes of these appeals, the Board was precluded from granting consent for the proposed developments unless, having conducted an appropriate assessment in accordance with Article 6(3), as construed by the CJEU, it reached a determination that the proposed development will not adversely affect the integrity of the European sites.

Nature of Appropriate Assessment

35. The requirements of an appropriate assessment and of the legal test that the proposed development "will not adversely affect the integrity of a European site" have been considered by the CJEU in a number of cases. In *Waddenzee (Case C-127/02)* [2004] E.C.R. I-7405, at para. 61 of its judgment, it stated:

" . . . under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain

that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.”

36. This formulation as to the nature of the obligations imposed under Article 6(3) of the Habitats Directive has been affirmed and expanded upon in subsequent decisions of the CJEU. In *Commission v. Spain (Case C-404/09)* [2011] E.C.R. I-11853, the CJEU referred again to the obligation to identify the affects of the proposed development on the European sites conservation objectives “in the light of the best scientific knowledge in the field” and referred again to the test that “no reasonable scientific doubt remains as to the absence of such effects”. At paras. 99 and 100, the CJEU stated:

“99. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site’s conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, in particular, *Commission v Ireland*, at paragraph 243).

100. An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned (see, to that effect, Case C-304/05 *Commission v Italy* [2007] ECR1-7495, paragraph 69.”

37. More recently, the CJEU, in *Sweetman (Case C-258/11)*, provided further guidance as to what is required of an appropriate assessment at para. 44 where it stated:

“44. So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must 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 site concerned (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.”

38. Whilst all parties accepted for an appropriate assessment to be lawful it must comply with the requirements set out by the CJEU, as summarised in the above extracts from the relevant judgments, there was some dispute as to what was required by reason, in particular, of the wording of s. 177V(1) which only provides that it 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 the absence of any provision analogous to the definition of an environmental impact assessment as contained in section 171A(1) that such an assessment must include “an examination, analysis and evaluation carried out by . . . the Board”.

39. Section 177V(1) must be construed so as to give effect to Article 6(3) of the Habitats Directive, and hence, an appropriate assessment carried out under the section must meet the requirements of Article 6(3) as set out in the CJEU case law. If an appropriate assessment is to comply with the criteria set out by the CJEU in the cases referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination.

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 and 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 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.

41. Hence in my judgment the full appropriate assessment required by s.177V(1) must include all of the above elements and not just the determination expressly referred to in the sub-section.

42. In *Sweetman (Case C-258/11)*, the CJEU also gave guidance as to the scope of the expression "adversely affect the integrity of the site". It is unnecessary to consider this in detail save to note that the Board is legally constrained as to how it should address the issue. The Court at para. 39 of its judgment, stated:

"Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs in accordance with the Directive."

43. At para. 56, the Advocate General had stated:

"56. It follows that the constructive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is 'why was *this particular site* designated and what are its conservation objectives?' . . ."

Appropriate Assessment and Reasons

44. It is agreed that the Board is under an express obligation pursuant to s. 177V(5) of the PDA to give reasons for the determination made under Article 6(3) of the Habitats Directive as to whether or not the proposed development would adversely affect the integrity of a European site. The dispute relates to the extent or nature of the reasons

which must be given. The applicant and the Department submit that where, as in these appeals, the determination is that the proposed development would not adversely affect the integrity of any European site in view of the conservation objectives of those sites, then the reasons must include complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed development on the European sites in the light of the conservation objectives of the sites. They submit that such reasons are required in order that the Court may, in an application for judicial review, be able to ascertain whether or not an appropriate assessment has been conducted in accordance with the requirements of Article 6(3) of the Habitats Directive, as explained in the case law of the CJEU. They refer by analogy to the purpose of the requirement to state reasons as explained by the CJEU in *Mellor (Case C-75/08)* [2009] E.C.R. I-3799 in relation to an implied duty to give reasons for a negative screening decision under the Environmental Impact Assessment Directive. In that judgment, at paras. 57 to 60, the CJEU stated:-

“57. It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.

58. Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority’s screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.

59. In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15).

60. That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.”

45. They also relied upon the principles stated by Clarke J. in the High Court in *Christian v. Dublin City Council* [2012] IEHC 163, [2012] 2 I.R. 506, in relation to the extent of the obligation to give reasons in Irish law. The underlying rationale and extent of the obligation as explained by Clarke J. appears to me to be similar if not identical to that explained by the CJEU in *Mellor*. In that judgment at p. 540, para. 78, Clarke J. explained it in the following terms:-

“The underlying rationale of cases such as *Meadows v. Minister for Justice* [2010] IESC 3 (in that respect) and *Mulholland v. An Bord Pleanála (No. 2)* [2005] IEHC 306 is that decisions which affect a person's rights and obligations must be lawfully made. In order to assess whether a relevant decision is lawful, a party considering a challenge, and the court in the event of a challenge being brought, must have access to a sufficient amount of information to enable an assessment as to lawfulness to be

made. What that information may be, may vary enormously depending on the facts under consideration or the nature of the decision under challenge. However, the broad and underlying principle is that the court must have access to sufficient information to enable the lawfulness of the relevant measure to be assessed."

46. I note that similar statements of principle have been repeated by Clarke J in the Supreme Court in judgments with which other members of the Court agreed in relation to the extent or type of reasons which must be given in *Rawson v Minister for Defence* [2012] IESC 26 at para 6.8, and *EMI Records (Ireland) & Ors v Data Protection Commissioner* [2013] IESC 34, [2014] 1 ILRM 225, at paras 6.3-6.5.

47. The Board, supported by Galetech, did not dispute the above principles or their applicability to its obligation to give reasons for its determination in the appropriate assessment. It referred, however, to the Irish case law, and in particular, that relating to s. 34 of the PDA and the obligation on the Board where it departs from its inspectors' recommendations to state "the main reasons" for the departure. In particular, the Board noted case law establishing not only the position that the reasons need not be discursive but also that they should be read from the perspective of an intelligent person who has participated in the proceedings and should give sufficient information to enable an appeal of the decision while demonstrating that the decision maker adequately turned his/her mind to the matters in issue (*O'Neill v. An Bord Pleanála* [2009] IEHC 202 at paras. 27 to 34). Also Counsel for the Board tied the interpretative approach urged by the respondent to the judgment of Kelly J. in *Mulholland v. An Bord Pleanála (No.2)* [2005] IEHC 306, [2006] 1 I.R. 453. In particular, he noted the comments of Kelly J. at p. 464, paras. 30 to 32, that while new obligations in respect of when reasons are given were introduced by s. 34 of the PDA, the jurisprudence in respect of the content of reasons given by a planning authority had been left unchanged by the legislature. Counsel submitted this position is indicative of a continuing legal position in Irish law on the content of reasons required to be given by a planning authority and, as such, requires that the same interpretation should be given to the statutory obligations in respect of reasons arising under s. 177V(5) of the PDA.

48. On this issue, I have concluded that the submission made on behalf of the applicant and the Department is correct. 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.

49. Secondly, it appears to me that whilst the requirement for an appropriate assessment has been implemented in Ireland by amendment of the Planning Acts and requires to be carried out *inter alia* as part of the planning process, the determination which must be

made by the Board as competent authority it is not a "planning decision" in the sense used in the judgments relating to reasons relied upon by the Board. In such a planning decision, the Board is exercising a jurisdiction with a very wide discretion. By contrast, the determination it must make as part of an appropriate assessment is significantly narrower and legally constrained as explained in the CJEU cases cited. It also determines the Board's continuing jurisdiction to grant planning consent, and therefore a decision which goes to its jurisdiction. The application of the principles set out by Clarke J. in *Christian, Rawson* and *EMI* to the different types of decision results as envisaged therein in a requirement for reasons of a different order in relation to the different types of decision.

50. In reaching that conclusion, I am not deciding that the findings and conclusions always have to be ones made by the Board itself. Where the Board appoints an inspector to prepare a report, and the inspector carries out an appropriate assessment as part of his or her report, it may be that if the Board, on consideration, accepts the relevant findings made and conclusions reached by its Inspector in his or her report, that the production of the report may satisfy some or all of the obligation of the Board to give reasons for its determination. This would depend upon the relevant facts.

51. It is now intended to apply the above principles and consider the lawfulness of the appropriate assessment including the determination conducted by the Board in relation to each of the challenged decisions and the adequacy of the reasons given for its determinations. It is necessary to consider each decision separately.

Phase 1 Decision and Appropriate Assessment

52. The evidence adduced by the Board in relation to its phase 1 decision and the appropriate assessment conducted in that appeal is primarily the Board decision (PL 20.239759), the Board direction relating to that decision and the Inspector's Report and the documents referred to therein. The Board direction states that the submissions on this file and on the file relating to the phase 2 decision were considered at the same Board meeting of 8th August, 2013. I accept that fact.

53. The structure of the Board's decision is that it commences by stating its planning decision; it then identifies the matters considered; it then appears to include a number of paragraphs relating to the environmental impact assessment, it carried out; and then in two paragraphs identifies the appropriate assessment conducted and its reasons for the determination reached therein before returning to its final planning assessment and then sets out the conditions to be attached to the grant of permission. Counsel on behalf of the Board submitted that this was the structure of the decision. The two paragraphs expressly referring to the appropriate assessment are in the following terms:-

"The Board completed an Appropriate Assessment in relation to potential impacts on Natura 2000 sites and having regard to the Natura Impact Statement submitted including mitigation measures proposed and the reports of the Inspector in relation [to] the current file and to file register reference number PL20.241069, the further information submitted to An Bord Pleanála and to other submissions on file the Board concluded that on the basis of the information available that the proposed development either individually or in combination with other plans or projects would not adversely affect the integrity of any European site in view of the conservation objectives of this sites.

The Board did not agree with the Inspector's conclusions set out in section 32.3.6 of her report regarding the adverse effects of the proposed development on feeding/roosting/commuting area and natural flight lines of certain water birds in the light of the comprehensive additional data in this regard submitted as further information to the Board on the 6th day of June 2013. The Board did not agree with the further conclusion of the Inspector

in relation to the adverse effects of the proposed development on the integrity of European sites at Lough Croan SAC (Site No. 000610) and Lough Croan SPA (Site No. 004139). The Board considered that it could not reasonably be concluded on the basis of the information on ground conditions and other material submitted; the nature of the proposed development and the use of normal good construction practice, that the integrity of these sites would be adversely affected by the proposed development.”

54. Earlier in its decision, the Board had stated in relation to the Inspector’s Report: -
“The Board generally adopted the report of the Inspector except in relation to the following items (see section 44E of the Inspector’s Report):

- landscape and visual impacts
- hydrology and groundwater quality and flows, and
- bird movements in the area, for the reasons set out below.”

55. Section 44E of the Inspector’s Report forms part of the environmental impact assessment conducted by the Inspector. It is not expressly part of the appropriate assessment conducted by her. The landscape and visual impacts are of no relevance to the appropriate assessment. Both hydrology and groundwater quality and flow and bird movements in the area are of direct relevance. The reasons included by the Board in its decision in the context of the environmental impact assessment as to why it did not adopt the report of the inspector in relation to these items are explained in the following terms: -

“The Board considered the subject of hydrology and the potential for adverse impact by the proposed development on groundwater quality and flow in this karst area. The Board is satisfied taking into account the information supplied by the applicant including the resistivity test data submitted to the planning authority at further information stage that subject to normal good construction practice turbine foundations can be developed at this location without significant impacts on the hydrology or hydrogeology of the area.

The Board is satisfied on the basis of the survey information submitted to the planning authority (Chapter 8, EIS) and the further information submitted on 6th day of June 2013 to An Bord Pleanála in relation to bird movements in the area that the proposed development is unlikely to have any significant impacts on avifauna including species of water birds of conservation interest. While the Board reached this view independently of the applicant’s proposed use of a radar detection system as an additional mitigant it is of the view that this system may be of value as an aid to minimising impacts on specific bird species in the area.”

56. I accept the submission made on behalf of the Board that those two paragraphs in the decision should not be considered as part of the appropriate assessment conducted by the Board but rather form part of the environmental impact assessment. However, that does not assist the Board in relation to the validity of the appropriate assessment conducted, save that it should not be considered as evidence of the application of an incorrect legal test as was submitted by the applicant.

57. The two paragraphs included by the Board in its decision in relation to the appropriate assessment must be considered in the context of that part of the Inspector’s Report, which includes the appropriate assessment conducted by her and her findings and conclusion. It assists in identifying the relevant sites, their conservation objectives and

potential impacts of the proposed developments.

58. The Inspector set out the appropriate assessment conducted by her at section 32 of her report. It commences by identifying ten Natura 2000 sites in the area of the proposed development. She then gives a short summary of the five nearest conservation sites, their objectives and the impacts on them in the following terms:-

“32.1.2 The following is a short summary of the five conservation sites nearest the appeal site based on the site synopses.

1. Lough Croan - part turlough / part floating fen; supports multitude of highly diverse vegetation, including Red Data - Northern Yellow Cress; important ornithological site; species using site include Whooper Swan, Golden Plover, Greenland White-Fronted Goose (River Suck population), Shoveler, Bewick Swan, Wigeon, Gadwall, Teal, Mallard, Pintail, Lapwing, Curlew, Blackheaded Gull; wintering water fowl numbers are large and site is especially useful to dabbling duck; important site due to its overall size, birdlife and rare plant communities and the species it supports;
2. Four Roads Turlough - very important site as refuge and feeding area for wildfowl and waders; bird numbers variable; can be very large; extensively used by Greenland White-Fronted Goose (River Suck population); other species include Wigeon, Teal, Shoveler; Bewicks Swan, Golden Plover, Lapwing, Curlew; occasional use by Whooper Swan;
3. River Suck Callows - extensive linear site (70km) that floods each winter; important for Greenland White-Fronted Geese (flock of international importance), Whooper Swan, Golden Plover, Wigeon, Lapwing, Mute Swan, Teal, Pintail, Curlew, Black-headed Gull as well as Otter and Hare. There is a wild fowl sanctuary north of Ballyforan;
4. Lough Funshinagh - classified as turlough; water levels fluctuate significantly; important for wintering waterfowl including Whooper Swan, Bewicks Swan, Golden Plover, Wigeon, Teal, Mallard, Shoveler, Pochard, Tufted Duck, Coot, Lapwing and Curlew and also used by River Suck, Greenland White-Fronted Geese;
5. Lisduff Turlough - important for waders and wintering wildfowl; Bewick Swan, Golden Plover, Dunlin, Pintail, Pochard, Lapwing, Curlew, Snipe.

The conservation objectives for these sites are:

- Lough Croan - (i) maintain Annex I habitat - Turlough; (ii) maintain or restore favourable conservation conditions for Shoveler, Golden Plover and Greenland White-Fronted Geese; (iii) additional conservation interest for Wetlands and Water birds;
- Four Roads - (i) maintain Annex I habitat - Turlough; (ii) maintain or restore favourable conservation conditions for Golden Plover and Greenland White-Fronted Geese; (iii) additional conservation interest for wetlands and water birds;

- River Suck - (i) maintain special conservation interest for Whooper Swan, Greenland White-Fronted Geese, Wigeon, Lapwing, Wetlands and Water birds;
- Louth Funshinagh - (i) maintain Annex I habitat - Turlough;
- Lisduff Turlough - (i) maintain Annex I habitat - Turlough;

32.2 Direct and Indirect Impacts

32.2.1 I consider the main direct impacts will be from

- Displacement of Golden Plover and Lapwing in the short term due to construction noise and loss of habitat and in the long term due to the sight, noise and vibration of turbines;
- Disturbance of feeding/ roosting/ commuting area and interference with natural flight lines of Whooper Swans, Greenland White-Fronted Geese and Golden Plover;
- Bird strikes due to collision with wind turbines;

32.2.2 I consider the main indirect impact in the short and long term will be from

- Change in turlough habitat.”

59. The Inspector then assessed the direct and indirect impacts under each of the above headings as follows:-

“32.3 Assessment

32.3.1 Displacement of Golden Plover and Lapwing within and in the vicinity of the site

32.3.2 Both the notes from the Bird Survey and the NIS state that Golden Plover were regularly observed near the site but not in the immediate area of the proposed development. Some 3,000 were observed in a flock at Lough Croan during the winter surveys and Lapwing were observed during the winter surveys including on wet grassland in the region surrounding Lough Croan. Table 8.5.4.1, (Ornithology Section, EIS) lists both species as being observed in and around the survey area but considered that neither species to be at risk. They are not discussed in the NIS. In view of the extensive, alternative habitat available in the area to this species, I consider that there is unlikely to be a significant long-term impact.

32.3.3 Disturbance of feeding/ roosting/ commuting area and natural flight lines of Whooper Swan, Greenland White-Fronted Geese, Golden Plover and Water birds

32.3.4 The conservation areas in the vicinity of the site support a large population of wintering birds, including Whooper Swan; Greenland White-Fronted Geese, Golden Plover and Water birds. All five are noted as using the River Suck, Four Roads Turlough, Lough Croan and Lough Funshinagh, whilst Lisduff Turlough supports Golden Plover and water birds. Greenland White-Fronted Goose are known to be highly faithful to a site. The Synopses describe them as based on the River Suck, but also note that they regularly

utilise Four Roads Turlough, Lough Croan and Lough Funshinagh.

32.3.5 The conservation areas provide a cluster of wetland areas. They are supported by the non-conservation wetland sites in the area, including Thomas Street Turlough, Lough Feacle Loughs Cuilleenirwan and Coolagarry and the Ballyglass Canal, as well as the smaller flooded area adjoining the site. The data submitted refers to the large number of Whooper Swans at Lough Feacle and along the Ballyglass Canal. I am satisfied from my inspection and other appeal submissions that Whooper Swan also use Thomas Street Turlough and the flooded lands east of the site. Together, these wetlands provide an extensive network of feeding and roosting areas for the Whooper Swan and Greenland White-Fronted Goose.

32.3.6 The surveys do not address the interconnections between the conservation sites and provide no information on the movement of Greenland White-Fronted Geese in the area. The 2007/2008 census indicates that there are still significant numbers on the River Suck, notwithstanding a decline in numbers. Overall, I would be concerned that the level of information provided is lacking in detail, is unduly focussed at Lough Feacle, due to the separate application in this area and does not provide a definitive picture of the flight paths of protected species in the area of the site, as they move between the different wetlands in the area. Furthermore, I do not consider the applicant has provided adequate information to prove beyond reasonable scientific doubt that the wind farm will not impact on the feeding/ roosting/ commuting area and natural flight lines of Whooper Swan, Greenland White-Fronted Geese, Golden Plover and Water birds, and would not have an adverse impact on these protected species and on the integrity of the three conservation sites, River Suck, Lough Croan and Four Roads Turlough, nearest the proposed wind farm.

32.3.7 Bird strikes due to collision with wind turbines

32.3.8 The applicant proposes to install a Merlin Avian Radar System that once trained, will provide constant monitoring of bird movements in the area of the site and eliminate potential bird strike by providing advance warning and allowing necessary turbine shut down. Information submitted (30/01/12) shows that the system is in use at a number of coastal wind farm sites including six in Europe. None of these sites would be similar to the area of the appeal site, which is an inland, moderately undulating site with a-network of wetland systems within a relatively small area, that support important populations of wintering birds. They would also not be similar in terms of weather patterns and topography. A report submitted by Appellant I, which reviews use of the radar system at a site in Sweden, also indicates problems of blind spots, echoes and ground clutter that can mask bird activity. DAHG have also expressed concerns as to the efficacy of the system. . I consider the information provided to date has not demonstrated that the use of a radar system can effectively mitigate bird strikes at the site.

32.3.9 It is argued that Whooper Swan generally fly at heights well below the minimum rotor sweep of 35m proposed and that the risk of collision is therefore very small. A reduction in turbine height and concomitant reduction in rotor sweep will increase the risk of bird strike. I do not consider the proposed turbine height is acceptable in the mixed hilly, flat farmland, where the development is located and consider, therefore that this argument is not acceptable. Overall, I consider the applicant has not proven beyond reasonable scientific doubt that adverse effects on the integrity of the site with respect to its impact on conservation species in

terms of bird strike will not occur.

32.3.10 Changes in turlough habitat

32.3.11 Four of the conservation sites nearest to the appeal site are turloughs. Turloughs are seasonal lakes found in karstified limestone areas where rainfall disappears directly underground through the fissures and conduits in the rock. They fill when the groundwater rises in the autumn and empty as water levels fall in the spring and some are also fed by rivers and streams flowing into them. The water flow rate through karstified rock can be quite rapid and water from a turlough may flow underground to a spring at a rate of 1 00m per hour or more. They have a unique flora and can be important bird haunts, in particular Greenland White-fronted Geese, Whooper Swan, Widgeon, Teal and many waders. Turloughs are priority Annex I habitat (3180) and the habitat is almost unique to Ireland.

32.3.12 There are a number of turloughs on the lower lands immediately below the site as well as the cluster of conservation sites in the wider area. The nearest turlough conservation site is Lough Croan. It is an extensive, linear wetland about 1.1km from the nearest turbine. The turlough habitat, which underpins the conservation species in the area, and the potential impact of the development on the habitat is not discussed in the NIS.

32.3.13 The site is located on karst limestone and all rainwater falling on the site recharges directly to groundwater through the fissures and conduits in the underlying bedrock. The results of 2-D resistivity testing indicate that further investigations are required to determine the depth to competent rock and inform the design of the base, at ten of the turbine sites. At a number of sites, excavation may extend below groundwater level. The potential to alter the pattern of recharge within the site as a result of the depth of excavation into the karstic layer or by the proposals to discharge surface water throughout the site is not addressed in the application. It is stated that these matters will be addressed following further investigations necessary to determine the detailed design of the turbine base. Turloughs are a relatively shallow habitat. A small alteration in the pattern of recharge has the potential to have a significant impact on the ecology of the area. Furthermore, given that turloughs generally occur in an area with an extensive groundwater system and where water can flow rapidly over significant distances, I consider that a higher burden of proof is required to demonstrate that the development will not have adverse impacts on Lough Croan the nearest conservation site to the proposed development. I consider that the development raises significant concerns, and it has not been established beyond reasonable scientific doubt that adverse effects on the integrity of Lough Croan will not occur.

32.3.14 On the basis of the Appropriate Assessment, I consider it reasonable to conclude, on the basis of the information available, that the proposed development would adversely affect the integrity of the European sites Lough Croan Turlough SAC, Site No. 000610 and Lough Croan Turlough SPA, Site No. 004139 in view of these sites' conservation objectives."

60. As appears from the above, the appropriate assessment conducted by the Inspector cannot be considered as one which includes complete, precise and definitive findings and conclusions that are capable of removing all scientific doubt as to the effects of the proposed development on at least the five closest European conservation sites concerned. On the contrary, her assessments under the headings of:

(i) disturbance of feeding/roosting/commuting area and natural flight lines

of Whooper Swan, Greenland White Fronted Geese, Golden Plover and water birds;

(ii) bird strikes due to collision with wind turbines; and

(iii) changes in turlough, habitat,

either identify *lacunae* in the information provided in the NIS or reach negative conclusions.

61. Subsequent to the Inspector's Report, the Board obtained further information. That information was a wintering bird survey undertaken between January and March 2013. It was furnished in response to a letter seeking further information from the Board dated 7th December 2012. The survey related to Whooper swans and Greenland white-fronted geese. Whilst, in the course of the hearing, there were submissions made by counsel for the Department and the Board for and against the adequacy of the survey as a response to the request dated 7th December, 2012, and in particular, the absence of any survey of Golden Plover, that issue need not be decided as part of the present consideration of the lawfulness or otherwise of the appropriate assessment conducted by the Board.

62. Returning to the evidence before the Court of the appropriate assessment conducted by the Board, taking into account the appropriate assessment conducted by the Inspector, it consists only of the four sentences in the two paragraphs in the Board Decision, together with what is stated by the Inspector in section 32 of her report, insofar as the Board has not disagreed with same. There is uncertainty as to how much of the appropriate assessment conducted by the Inspector or the findings made or conclusions reached by her is accepted by the Board in its decision by reason of the general statement of acceptance save in relation to matters the matters specified but not by reference to the appropriate assessment part of the Inspector's report.

63. In the Board's own appropriate assessment, set out in its Decision, the first sentence is simply the statement of its determination and the identification of the material upon which the determination was based. Of the material identified, the only part which may constitute evidence of an assessment made by or on behalf of the Board, as distinct from information which the Board might have taken into account in making its assessment, is the Inspector's Report.

64. One of the consequences of the absence of any formal screening for an appropriate assessment pursuant to s. 177U as to whether the proposed development is likely to have a significant effect on the European site is that there is no identification, in advance of carrying out the appropriate assessment, of the reasons for which it is has been determined that the proposed developments meet the, admittedly low, threshold of being likely to have a significant effect on the European sites, having regard to their conservation objectives and require an appropriate assessment. On the facts herein, the Inspector, in her report, identified the potential direct and indirect effects in relation to wintering waterfowl and waders under the headings of 'Displacement', 'Disturbance of Feeding/Roosting/Commuting Areas and Interference with Natural Flight Lines and Bird Strikes', and in addition, a change in turlough habitat, the latter being by reason, principally, of the karst limestone underlying the site of the proposed development, the extensive ground water system and potential to alter the pattern of recharge.

65. In relation to the potential impact on the water fowl and waders by reason of disturbance of feeding/roosting/commuting area and interference with natural flight lines and potential bird strikes, the only evidence of any assessment conducted by the Board itself is its statement in its decision that it "did not agree with the Inspector's conclusions set out in s. 32.3.6 of her report regarding the adverse effects of the proposed development on feeding/roosting/commuting area and natural flight lines of certain water

birds in the light of the comprehensive additional data in this regard submitted as further information to the Board on the 6th day of June 2013". There is no evidence of any analysis or evaluation conducted by the Board of the further information or findings made by it.

66. In relation to the effects of potential changes in the turlough habitat identified by the Inspector in paras. 32.3.11 to 32.3.13 of her report, the Board does not, in its Decision, provide any evidence of any further or different assessment conducted by it and simply states it did not agree with the conclusion reached by the Inspector at para. 32.3.14 of her report that the proposed development would adversely affect the integrity of three of the named sites in the light of those sites' conservation objectives and then adds its conclusion "that it could not reasonably be concluded on the basis of the information on ground conditions and other material submitted; the nature of the proposed development and the use of normal good construction practice, that the integrity of these sites would be adversely affected by the proposed development".

Conclusion on Phase 1 Appropriate Assessment

67. My conclusion is that, on the evidence before the Court, the Board has failed to carry out an appropriate assessment which meets the requirements of Article 6(3) of the Habitats Directive, as explained by the CJEU. There is no evidence before the Court of an assessment conducted by the Board (or through its Inspector) which meets the criteria set out at paragraph 40 of this judgment and identifies, in the light of the best scientific knowledge in the field, all aspects of the proposed development which, by itself, or in combination with other plans or projects which affect the European sites and contains complete, precise and definitive findings and conclusions which the Board considers capable of removing all reasonable scientific doubt as to the effects of the proposed development on the integrity of a number of Natura 2000 sites close to the site of the proposed development.

68. For the reasons set out earlier in this judgment, the determination made by the Board that the proposed development, individually or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives of those sites cannot be considered lawful unless such determination is made as part of an appropriate assessment which is lawfully conducted. Further, in the absence of such a lawful determination, the Board did not have jurisdiction to grant planning permission for the proposed development pursuant to s. 177V(3) of the PDA. It follows that the applicant is entitled to an order of *certiorari* of the Phase 1 decision.

69. I have also concluded on the same evidence that the Board failed to give reasons for its determination in the appropriate assessment which meets the requirements set out earlier in this judgment.

Phase 2 Decision and Appropriate Assessment

70. The evidence adduced by the Board in relation to the Phase 2 Decision is primarily the Board Decision (PL20.241069), the Board Direction relating to that Decision, and the Inspector's Report of Ms. Deirdre MacGabhann, which, whilst dated 6th February, 2012, it is agreed was, in fact, finalised on 6th February, 2013 and the documents referred to therein.

71. The Board Decision follows the same format as that in Phase 1. The Department and applicant laid emphasis upon the fact that, unlike the Decision in relation to Phase 1, there is no reference to the additional information by way of bird survey furnished to the Board on 6th June, 2013, either in the list of matters to which the Board had regard or in those paragraphs of the Decision which appear to constitute the appropriate assessment. I will return to this.

72. In relation to the appropriate assessment, the Board stated, in its Decision:

“The Board completed an Appropriate Assessment in relation to potential impacts on Natura 2000 sites and, having regard to the Natura Impact Statement submitted, including mitigation measures proposed and the reports of the Inspector in relation [to] the current file and to file register reference number PL20.239759, the further information submitted to the planning authority on the 8th day of June, 2012 and to other submissions on file, the Board concluded, on the basis of the information available, that the proposed development, either individually, or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives of those sites.

The Board did not agree with the Inspector’s conclusions, as set out in section 11 of her report, regarding the adverse effects of the proposed development on bird species utilising the site in the light of the comprehensive data in this regard submitted with the application as referenced above. With regard to impacts on karst limestone bedrock the Board considered that it could not reasonably be concluded, on the basis of the information on ground conditions and other material submitted, the nature of the proposed development and the use of normal good construction practice, that the integrity of these sites would be adversely affected by the proposed development. Finally, with regard to the impact of the proposed development on bats, the Board noted the substantial survey work completed prior to the application as well as the further information submitted to the planning authority on the 8th day of June, 2012 and considered that, subject to the implementation of the proposed mitigation measures, the residual impacts of the proposed development on bats would be minimal.”

73. Firstly, insofar as relevant to dispose of the question as to whether the Board indicated that it did have regard to the bird survey furnished in relation to the Phase 1 appeal in June 2013, it appears to me that whilst there is no reference to this in the first paragraph above, it may be that it is being referred to in the first sentence of the second paragraph. The further information was provided to the Board in connection with the Appeal Reference No. PL. 20.239759, and this appeal appears to be referred to in the first sentence of the second paragraph as “the application as referenced above”. I am accepting, for the purposes of this judgment, that the Board did have regard to that additional data.

74. Similar to Phase 1, there is no formal screening determination. However, also similarly, the Inspector (who was a different Inspector to that appointed in respect of the Phase 1 appeal) conducted an appropriate assessment from paras. 10.124 to 10.163 of her report. The Inspector states at para. 10.128 that she followed the Department of Environment’s guidance document on appropriate assessment and the European Commission’s advice on appropriate assessment. She also refers to the earlier part of her report which, she states, sets out much of the information required for the appropriate assessment and then summarises the key aspects of the development as it relates to the appropriate assessment. The Inspector considers in some detail the short and long-term, indirect and cumulative impacts which are likely to arise from the construction and operational phases of the development from paras. 10.136 to 10.153. She then considers certain mitigation issues. It is unnecessary to set these out in full. She identifies the residual impacts and states her appropriate assessment conclusion at paras. 10.160 to 10.163 in the following terms:

“10.160 Based on my assessment above, I consider that two key residual impacts remain. Firstly, in the absence of:

- a. Detailed geo-technical investigations regarding the construction of the proposed turbine bases and sub-station in areas of karstified limestone and
- b. Detailed design solutions for the site specific disposal of surface water arising on site,

10.161 There is a risk that the construction of the wind farm will impact on groundwater flow paths within the karst landscape which may in turn affect the hydrology/hydrogeology of the network of designated wetland systems (notably turloughs) in the vicinity of the site and their associated habitats and species.

10.162 Secondly, in the absence of detailed survey information on the use of the appeal site by bird species listed of Conservation Interest in the surrounding network of SPA's there is a risk that the proposed development will adversely impact on these species by virtue of disturbance, barrier effects to movement and collision risk arising from the construction and operation of the wind farm. These impacts could disrupt factors which maintain the favourable conditions for the species in the wider environment and in the network of SPAs in particular.

10.163 In view of the above, I consider that it is not reasonable to conclude on the basis of the information available that the proposed development would not individually, and in combination with other projects, adversely affect the integrity of the European sites in the vicinity of the appeal site (Lough Croan Turlough SPA, site code 004139; Four Roads Turlough SPA, site code 004140; River Suck Callows SPA, site code 004097) in view of the site's conservation objectives."

75. The Inspector, finally, in s. 11 of her report, sets out her overall summary and conclusions which, obviously, go beyond the appropriate assessment. Paras. 11.1 to 11.3 and 11.6 relate to the appropriate assessment:

"11 SUMMARY AND CONCLUSION

11.1 International and national policies actively support and encourage the growth of renewable energy sources and wind energy development in particular. However, the government's guidelines on wind energy development state that the implementation of renewable energy policies must have regard for the environment, specifically the legally binding requirements of the EU Directives on Birds and Habitats.

11.2 The appeal site lies within 15km of 14 statutorily designated European sites as part of the European Natura 2000 network and the site itself hosts bird species of national Importance and bird species which are listed of Special Conservation Interest in the 3 no. Special Protection Areas in the vicinity of the site. On the basis of the information provided by the applicant, I am not satisfied that the applicant has demonstrated that the proposed development will not adversely impact on bird species utilising the site, by way of disturbance, barrier effects to movement and collision risk arising from the construction and operation of the

wind farm. In particular, these impacts could disrupt factors which maintain the favourable conditions for the species in the wider environment and in the network of SPA's in particular.

11.3 The appeal site is underlain by karstified limestone bedrock and within the same groundwater bodies as the network of designated wetland

habitats within 15km of the site. I do not consider that the applicant has adequately demonstrated that the proposed development will not adversely impact on groundwater flowpaths within the karst landscape or indirectly therefore the groundwater regime of the designated wetland habitats in the vicinity of the site.

. . .

11.6 In summary, I consider that the proposed development should be refused for the two above substantive reasons set out above, impact on

hydrology/hydrogeology of related designated wetland systems and impact on bird species of Special Conservation Interest occurring on the site and in the surrounding network of Special Protection Areas.”

76. The Board, in the Phase 2 Decision, also expressly stated that it:

“. . . generally adopted the report of the Inspector except in relation to the following items (see section 11):-

(1) hydrology and groundwater quality and flow, and

(2) bird movements in the area,

for the reasons set out below.”

77. For the reasons already set out, whilst the Board is entitled to rely upon an appropriate assessment conducted by its Inspector, and whilst it has generally adopted the Inspector’s Report, the findings made and conclusions reached by the Inspector in relation to the matters identified as potentially affecting the integrity of the Natura 2000 sites concerned, are such that the appropriate assessment in the Inspector’s Report could not support a determination that the proposed development would not adversely affect the European sites concerned, having regard to their conservation objectives when considered by the Court in accordance with established judicial review principles.

78. Again, the first paragraph of the Board’s Decision relating to the appropriate assessment is no more than its determination or conclusion that the proposed development, either individually or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives.

79. In the first sentence of the second paragraph, the Board again simply disagrees with the Inspector’s conclusions regarding the adverse effects of the proposed development on the bird species using the conservation sites. There is no evidence of any assessment conducted by the Board which includes complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed development on the Natura 2000 sites concerned, having regard to their conservation objective of supporting the wintering wild fowl and waders identified.

80. In relation to the potential hydrological/hydrogeological impacts of the construction of the proposed development on Natura 2000 wetlands systems in the vicinity of the site, and in particular, certain turloughs, the Board has not conducted any assessment which includes complete and precise findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the works proposed on the habitat of the Natura 2000 sites in the light of its conservation objectives, having regard, in particular, to the potential indirect effects and lacunae in the information supplied identified by its own Inspector.

Conclusion on Phase 2 Decision

81. My conclusion is that on the evidence before the Court the Board has not lawfully conducted an appropriate assessment in accordance with Article 6(3) of the Habitat Directive capable of supporting its determination. It follows, for the reasons already set out, that by reason of its failure to do so, it did not have jurisdiction to grant permission for the proposed development and the applicant is entitled to an order of *certiorari* of the Phase 2 Decision.

82. I have also concluded that it failed to give reasons for its determination in the appropriate assessment in the Phase 2 Decision in accordance with the principles set out in this judgment.

Other Issues

83. By reason of the conclusions reached on the principal issues in dispute, it is unnecessary to consider the further issues raised by the applicant.

Relief

84. There will be orders of *certiorari* of each of the decisions of the Board set out in paragraph 1 of this judgment.

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