[2019] IEHC_84

THE HIGH COURT
JUDICIAL REVIEW
COMMERCIAL

[2017 No. 883 J.R.]

BETWEEN

EOIN KELLY

PLAINTIFF/APPLICANT

AND

AN BORD PLEANÁLA

DEFENDANT/RESPONDENT

AND

ALDI STORES (IRELAND) LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 8th day of February, 2019

Introduction

1. The applicant in these proceedings is a structural engineer who resides in Bettystown, Co. Meath. He previously resided in Laytown, Co. Meath. His parents' family home is also in Laytown. Bettystown is approximately 1.5 kilometres north of Laytown. The applicant has brought these proceedings in order to challenge a decision of the respondent, An Bord Pleanála (the "Board") which was made in September 2017 to grant permission to the notice party, Aldi Stores (Ireland) Limited ("Aldi"), for the development of a "*discount foodstore (to include off-licence use)*" at Strand Road, Laytown, Co. Meath.

2. The applicant obtained leave from the High Court (Noonan J.) to challenge the Board's decision on several grounds, on 13th November, 2017. The proceedings were subsequently admitted to the Commercial List on Aldi's application. The applicant decided not to pursue a number of the grounds for which leave had been obtained. The grounds on which the applicant now seeks to challenge the decision fall under three general headings. The first set of grounds alleges various breaches of the EC Habitats Directive (Council Directive 92/43/EEC) (the "Habitats Directive"). The applicant challenges, in particular, the screening for appropriate assessment carried out by the Board under Article 6(3) of the Habitats Directive and Section 177U of the Planning and Development Act 2000 (as amended) (the "2000 Act"). The second ground concerns the retail impact assessment carried out by the Board and, in particular, the acceptance by the Board and its inspector of what the applicant contends was a materially flawed sequential test in respect of the contested development. The third ground of challenge advanced by the applicant is that the Board failed to specify in its decision the matters which it considered and to which it had regard in determining the application for permission.

3. Both the Board and Aldi have resisted the applicant's application and have contended that there is no basis for impugning the decision on any of the grounds advanced by the applicant. As well as disputing the substance of the applicant's contentions under the three headings summarised above, both the Board and Aldi have objected to certain of the grounds which the applicant has sought to advance on the basis that they were not pleaded in the manner required under, and did not comply with, Order 84 Rule 20(3) RSC and well established case law of the Irish courts.

4. For reasons which I set out in detail in this judgment, I have concluded that the applicant has failed to sustain any of the grounds advanced by him and that, as a consequence, the applicant's application should be refused and the proceedings dismissed.

Structure of Judgment

5. I will adopt the following structure in this judgment. First, I will summarise the relevant factual background. That will include a description of the contested development, the planning status of the site, the history of Aldi's application and the issues and material before the planning authority and the Board. In this context I will refer to the report of the inspector appointed by the Board and the decision of the Board itself. Second, I will outline the grounds now relied on by the applicant in the proceedings and the evidence relied upon by him to challenge the Decision as well as the evidence relied on by the Board and Aldi in response. Third, I will consider each of the grounds relied upon by the applicant in greater detail, setting out my conclusions in relation to each ground as I deal with the relevant ground. Finally, I will summarise my conclusions at the end of the judgment.

Relevant factual background

6. The factual background outlined below is based on the uncontested evidence before me.

7. On 8th April, 2016 Aldi applied to the planning authority, Meath County Council (the "Council"), for permission for a development comprising, *inter alia*, the demolition of a building and construction of a single storey discount foodstore to include off-licence use, car parking and all associated site works at Strand Road, Laytown, Co. Meath. Aldi's application was accompanied by a number of reports including a screening report dated April 2016 compiled by Openfield Ecological Services ("Openfield*")("Screening Report for Appropriate Assessment for discount food store at Laytown, Co. Meath*") (the "screening report") and a retail impact statement and attached sequential test dated April 2016 prepared by John Spain Associates (the "retail impact statement").

8. As noted by the Board's inspector in her report, five Natura 2000/European sites were considered potentially relevant to the development. They are: The River Nanny Estuary and Shore Special Protection Area (SPA), which is located approximately 30 metres away to the east and south of the site of the development; The Boyne Estuary SPA and Boyne Coast and Estuary Special Area of Conservation (SAC), which are located 4 kilometres north of the site of the development; The River Boyne and River Blackwater SAC and River Boyne and River Blackwater SPA, which lie approximately 12 kilometres east/north east of the site. The screening report considered the potential impact of the development upon these Natura 2000/European sites.

9. The retail impact statement considered, amongst other things, the site location and description (the site was accommodated by a nursing home which closed in 2011), a description of the proposed development, an explanation of the "Aldi concept" and the nature of its business and set out in some detail the planning policy and local planning policy contexts relevant to the development. The report noted that the site is zoned for "*B1 Commercial/Town or Village Centre"* development in the East Meath Local Area Plan

2014-2020 (the "East Meath LAP") with the objective of such zoning being "*to protect, provide for and/or improve town and village centre facilities and uses*" and permitted uses including convenience outlet, supermarket/superstore and shop use. The retail impact statement also addressed the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government in April 2012 (the "Retail Planning Guidelines") and the sequential approach to development provided for under those guidelines. In addition, the retail impact statement considered the Meath County Development Plan 2013–2019 (the "Development Plan") and the Meath Retail Strategy 2013-2019 (the "Meath Retail Strategy"), which is contained in Appendix 5 to the Development Plan. The retail impact statement then provided a qualitative and quantitative assessment in respect of the development and attached, at Appendix 1, the sequential test referred to in the Retail Planning Guidelines.

10. The applicant lodged an observation with the Council on 11th May, 2016. He raised a number of concerns in that observation. Those concerns included the scale of the proposed building, the fact that there were unoccupied retail units in Bettystown and that the Bettystown Town Centre (a mixed use development in Bettystown) would be adversely affected by the proposed development, traffic impacts and the accuracy of a traffic survey undertaken by Aldi.

11. The applicant made no complaint in relation to the retail impact statement or the sequential test attached to it. Nor did the applicant raise any concerns in relation to the Habitats Directive.

12. Following a request by the Council in May 2017 for further information, Aldi furnished further information, including a revised sequential test in November, 2016. The applicant submitted an observation to the Council in respect of the further information in December 2016. In that observation, the applicant quoted from the Meath Retail Strategy and referred to perceived threats to retailing in the Bettystown area. He submitted that sufficient retail provision is required in Bettystown to prevent undue leakage to surrounding competing centres and that the unfinished Bettystown Town Centre is a threat to the vibrancy and vitality of the centre itself. The applicant did not raise any concerns in relation to the adequacy of the retail impact statement or the revised sequential test submitted by Aldi in this observation. Nor did the applicant raise any concerns in relation to the Habitats Directive.

13. As appears from the report of the inspector appointed by the Board in respect of the appeals from the decision of the Council to grant permission to Aldi for the proposed development, a total of 165 submissions were received by the Council objecting to the proposed development. A number of prescribed bodies submitted observations. None raised any concerns in relation to the Habitats Directive.

14. The Council's planning officer considered a number of issues in its initial assessment. They are summarised in the inspector's report (at para 4.1.1). As summarised by the inspector, the planning officer noted that the Meath Retail Strategy recognises Bettystown as the "*prime retail service centre for the settlement, although there is an*

acknowledgement of the need to support the provision of small to medium scale convenience retail development in Laytown to serve the needs of the local community". The planning officer was of the view that the "*principle of the development is acceptable in the context of the zoning objective and matrix for this site and its location along a public transport corridor"*. As regards the retail issues raised, the inspector summarised the planning officer's initial assessment as follows:

> *"The retail expenditure leakage from the settlement is high and the settlement is under – performing. The PA [Planning Authority] supports the provision of the development which would serve to reverse this trend. The site is 'edge of town' and a sequential test is required and has been undertaken but further information is required."*

15. With regard to the Habitats Directive and appropriate assessment, the planning officer was of the view, as summarised by the Board's inspector, that *"the development would not have any adverse impact on the qualifying interests of the Natura 2000 network*".

16. Following the further information provided by Aldi, the planning officer further assessed the application and, as summarised by the Board's inspector (at para 4.2.1 of her report), concluded that the development *"represents a logical development on a disused derelict site, on lands which had been identified as suitable for town centre retail purposes and of the development accords with the Retail Planning Guidelines 2012*." The planning officer, therefore, made a recommendation to grant permission.

17. On 8th December, 2016 the Council granted permission for the proposed development subject to 21 conditions.

18. On 12th January, 2017 the applicant appealed the decision of the Council to the Board. There were eight other third party appeals. The Board appointed an inspector for the purpose of the appeal. As appears from the inspector's report (at para 7.2), the grounds raised by the appellants centred around "*planning policy, retail impact, traffic, design and residential amenity".* In his appeal, the applicant questioned how permission for the development would be consistent with the Meath Retail Strategy. He questioned the alternative sites put forward in the retail impact statement. He also questioned the visual impact of the development and referred to a previous decision of the Board refusing permission for an Aldi store in Dunshaughlin, Co. Meath. The applicant did not raise any issues in relation to the adequacy of the retail impact statement or the revised sequential test submitted by Aldi.

19. As summarised by the inspector in her report (at para 7.2.1), the appellants contended that the Aldi foodstore was too large in scale for the appropriate development of Laytown and would impact on existing family run smaller scale retail premises. It was further contended by a number of the appellants that the type of development proposed should be integrated into Bettystown. A number of appellants contended that the development would be contrary to local and national planning policy. They also made submissions in

relation to retail impact. The inspector summarised those submissions at para. 7.2.3 of her report as follows:

> *"Retail impact*
>
> - *Notwithstanding the suitable land-use zoning, it is clear that a supermarket on such a scale would be inappropriate. 'Shop-Local' is defined in the zoning matrix of the Meath CDP as a convenience retail unit of not more than 200 sq.m;*
>
> - *The 'out of town centre' is too large for Laytown where retail policy seeks to create and sustain appropriately scaled top-up shopping and supports small to medium scale convenience retail development to support local communities;*
>
> - *Laytown is well served with village scale shops and businesses and development would have detrimental effect on existing local shops and result in job losses;*
>
> - *Vacancy space available in Bettystown is high (c. 10,000 sq.m of vacant and under- construction retail space) and there is ample space therefore available to accommodate such a development and to deliver on policy to strengthen the town's retail offer. Sequential test submitted by applicant was inadequate and did not demonstrate flexibility in appraising sites in Bettystown as required under the Retail Planning Guidelines. Proposal should be integrated in Bettystown. Further town centre health checks should be carried out in Laytown and Bettystown before any new proposed retail development is considered".*

20. Neither the applicant nor any of the other third party appellants raised any issue or concern with respect to the Habitats Directive. In particular, neither the applicant nor any of the other third party appellants took issue with the screening report which had been submitted by Aldi to screen the proposed development for the purposes of the Habitats Directive and to determine whether an appropriate assessment was required.

21. In its response to the appeals, the Council noted, *inter alia*, that the site of the proposed development is zoned B1 which permits supermarket/superstore and shop uses and that the Meath Retail Strategy identifies areas in Laytown with the potential for retail development including along the Strand Road (where the proposed development is located). In its response, Aldi noted that the site of the proposed development is within an area zoned "*Commercial/Town Centre*" in the East Meath LAP, that the site would be classified as "*edge of centre*", that no suitable sites are available in the "*Bettystown retail core*", that the site satisfies the sequential test approach and that the development is supported by local and national retail planning policies. Aldi further submitted that significant effects to the integrity of the Natura 2000 network would not arise from the proposed development. Further observations were submitted in respect of the appeal

which largely raised issues covered by the appeals with some additional issues summarised by the inspector in her report.

22. The inspector carried out a site inspection on 15th March, 2017 and furnished her report dated 12th April, 2017 to the Board. In s.6.0 of her report, the inspector considered the policy context relevant to the proposed development. In this regard she referred to the Retail Planning Guidelines and summarised the relevance of those guidelines to the proposed development (at para 6.1) as follows:

"• *Laytown/Bettystown would fit a Level 4 tier within the national retail hierarchy (in the 1,500 to 5,000 population category). This tier is one in which it is stated that retail provision is likely to be mainly in the convenience category, either in small supermarkets or convenience shops and in some cases, would provide comparison shopping;*

• *The guidelines require retail development to be appropriate to the scale and function of the settlement within which it is located. It also requires development to promote city/town centre viability through a sequential approach to development, with the overall preferred location for a new retail development within city and town centres. Unlike earlier guidelines, the current guidelines do not differentiate between 'discount stores' and other 'convenience' good stores".*

23. The inspector referred to the Development Plan and noted, inter alia:

"• *Bettystown/Laytown/Mornington East is designated a 'small town' – Table 2.1;*

• *Within the retail hierarchy for the county, Bettystown/Laytown is designated a Level 3 – Town and/or District Centre and Sub-County Town Centre;*

• *S.3.4.5 (small towns including Bettystown/Laytown/Mornington East)- Retail is likely to be mainly in the convenience category, with a small supermarket and possible local centres serving only the town and its local catchment area; …"*

24. The inspector then summarised what she saw as the relevant aspects of the Meath Retail Strategy as follows:

"• *Laytown/Bettystown is designated a Level 3 centre. These towns perform an important sub county retail role/function and generally include a good range of convenience provision and a modest provision of comparison offer;*

• *S.8.4.7 - Key objectives in respect of Laytown include: Recognise the association of Laytown with Bettystown, which is the primary retail service centre in the Laytown-Bettystown-Mornington cluster and support the provision of small to medium scale convenience retail development in Laytown to support the needs of the local community;*

- *S.5.6.32 – The location of the town on the Strand means that there is limited opportunity for the expansion of the town centre. It is expected that retail growth will be primarily directed towards Bettystown. In the event that retail development is pursued in Laytown, the following should be investigated:*

  (i) Infill developments along Alverno Terrace and Strand Road;

  (ii) Potential development at the surface car park and adjoining greenfield site opposite Alverno Terrace.

- *Bettystown is performing relatively poorly in terms of its role as a Level 3 Sub-County town in conjunction with Laytown. In order for Bettystown to function in accordance with its role there will need to be a considerable strengthening of the town's retail offer, particularly its comparison offer".*

25. The inspector then referred to the East Meath LAP as follows:

"- *Site is zoned B1, 'to protect, provide for and/or improve town and village centre facilities and uses'. In respect of B1 zoned lands, the plan states: 'It is intended to accommodate the majority of new commercial and retail uses in towns and villages within B1 lands' and 'There shall be no restriction to the definition of B1 land use zones';*

- *TVC POL 3: To encourage the development of the retail and service role of Laytown/Bettystown as a Level 3 Sub County Town Centre in accordance with the County Retail Strategy;…*

- *Section 4.3 has an aim to support proposals to create and sustain appropriately scaled top-up shopping and local service provision;…*

- *SE POL 2: To strengthen the role of Laytown/Bettystown as a Level 3 retail centre thereby sustaining its ability to attract new businesses and meeting the retail and service needs of the area (etc)."*

26. In her assessment of the appeal, the inspector considered that the key issues to be determined were retail impact, design and visual amenity, traffic and car parking, residential amenity and appropriate assessment. She considered the question of retail impact and appropriate assessment in some detail. I will consider those parts of her report when dealing with the relevant grounds advanced by the applicant in relation to them. In summary, however, the inspector recommended that the development should not be refused on the basis of retail impact. With regard to appropriate assessment, the inspector agreed with the conclusion set out in the screening report and considered that the proposed development, individually or in combination with other plans or projects, would not be likely to have a significant effect on any of the European sites listed in the screening report and that, therefore, an appropriate assessment (and the submission of a Natura Impact Statement) was not required. The inspector recommended that permission should be granted for the reasons and considerations set out by her in s.10.0

of her report and that such permission be granted subject to 15 conditions which were set out in s11.0.

27. The Board considered the appeals at a meeting on 19th September, 2017. The Board considered the submissions on file and the inspector's report and decided to grant permission *"generally in accordance with the inspector's recommendation"* for the reasons and considerations set out in the Board direction dated 19th September, 2017 and the Board order dated 21st September, 2017. The permission was granted by the Board subject to compliance with sixteen conditions. The Board included a condition referable to noise level (condition 5) which had not been included in the conditions recommended by the inspector. The Board slightly varied another condition (condition 5 recommended by the inspector which is condition 6 in the Board's order). It was for that reason the Board direction noted that the Board had decided to grant permission "*generally in accordance with the inspector's recommendation".*

28. The Board direction further noted that had it decided to grant such permission for the *"reasons and considerations and subject to certain conditions which were then set out".* Under the heading "*reasons and considerations*", the Board direction stated that it had regard to a number of matters, namely:-

    (a) The Retail Planning Guidelines;

    (b) The policies and objectives of the Development Plan and the East Meath LAP *("including the 'B1-Commercial Town or Village Centre' zoning attributed to the site with the stated objective to 'protect, provide for and/or improve town and village centre facilities and uses' and the uses normally acceptable under this zoning which include 'shop-local and shop-major'; and to the action/recommendation set out in the Meath Retail Strategy 2013 – 2019 to support the provision of small to medium scale convenience retail development in Laytown to support the needs of the local community*.";

    (c) The brownfield nature of the site and the pattern of development in the area; and

    (d) The nature, scale and design of the proposed retail development,

29. Having regard to these matters the Board considered that, subject to compliance with the conditions, the proposed development would be an appropriate form of development at the particular location. The Board concluded, that the proposed development would be in accordance with the proper planning and sustainable development of the area.

30. The Board order dated 21st September, 2017, recorded that the Board decided to grant permission for the proposed development for the reasons and considerations and under and subject to the conditions set out in the order. Under the heading "*Matters Considered*", the Board order stated:-

    "In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was

required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions."

31. Under the heading "Reasons and Considerations", the Board order referred again to the Retail Planning Guidelines, the policies and objectives of the Development Plan and the East Meath LAP, the brownfield nature of the site and the pattern of development in the area and the nature, scale and design of the proposed development and recorded the conclusions which the Board had set out in the Board direction.

The Proceedings

32. The applicant sought and obtained leave to seek certain reliefs by way of judicial review in respect of the Board's decision to grant permission for the proposed development by order made by the High Court (Noonan J.) on 13th November, 2017. The reliefs sought by the applicant and the grounds on which such reliefs were sought were set out in the statement required to ground the applicant's application for judicial review. The applicant sought an order of *certiorari* and a number of declarations directed to the grounds on which the applicant contended that the Board's decision was invalid. The applicant's application was grounded on an affidavit which he swore on 13th November, 2017. He exhibited a large volume of material to that affidavit. The applicant swore a supplemental affidavit on 21st December, 2017. In response and for the purpose of verifying their respective statements of opposition, an affidavit was sworn on behalf of the Board by Pierce Dillon on 8th March, 2018, and on behalf of Aldi by John Spain (Managing Director of John Spain Associates, Chartered Town Planning Consultants and Chartered Surveyors), Pat Crowe (a director of property of Aldi), and Padraic Fogarty (an ecologist and director of Openfield) on 5th March, 2018. One further affidavit was sworn on behalf of the applicant by Peter Downey, a solicitor with Eagleton Downey, the applicant's solicitors. Mr. Downey swore an affidavit on 18th April, 2018, for the sole purpose of exhibiting the technical guidance document for the "*Greater Dublin Strategic Drainage Study Regional Drainage Policies".* While the affidavits were being exchanged, the proceedings were admitted in the Commercial List on the application of Aldi by order made on 29th January, 2018.

Grounds of Challenge Relied on by the Applicants

33. As noted earlier, while the applicant initially raised a number of other points or grounds of challenge, he now relies on three such grounds or sets of grounds to challenge the Board's decision. First, the applicant contends that the decision breached the provisions of the Habitats Directive in two respects. Second, the applicant contends that the revised sequential test which was submitted by Aldi and which was accepted by the Board was fundamentally flawed as it incorrectly classified the site as "edge of centre" rather than "out of centre". Third, the applicant contends that the Board failed to specify in its decision, the matters considered by it and to which it had regard in determining Aldi's planning application.

34. Initially both the Board and Aldi raised objections to the standing of the applicant to rely on certain of the grounds advanced. However, having regard to the withdrawal by the applicant of those grounds, neither the Board nor Aldi maintained their objections to the

applicant's standing to advance the grounds on which the applicant continues to rely. They do allege that in respect of certain of the grounds, the applicant has not complied with O. 84 r 20(3) RSC and that he should not be permitted to rely on those grounds.

35. I will deal with each of those grounds in turn.

Habitat Directive Grounds
General

36. The applicant advances two distinct grounds for impugning the Directive as being in breach of the Habitats Directive. Both grounds concern alleged infirmities in the screening for appropriate assessment carried out by the Board under Article 6(3) of the Habitats Directive and s. 177U of the 2000 Act. First, the applicant contends that the Board failed to apply the correct test for screening for appropriate assessment as required under Article 6(3) of the Habitats Directive and s. 177U of the 2000 Act. Related to this ground, the applicant further contends that there are gaps or lacunae in the screening for appropriate assessment carried out by the Board, in particular, in relation to the assessment of the presence and potential impacts on a European site (the River Nanny and Estuary SPA) of concrete which will be present on the site during the construction phase and of sediment run off from the site during that phase. The second ground advanced by the applicant under the Habitats Directive heading is that it is claimed by the applicant that the Board took account of mitigation measures at the screening stage for appropriate assessment, something which is impermissible under Article 6(3) of the Habitats Directive, as recently interpreted by the Court of Justice of the European Union (CJEU) in *People Over Wind and Sweetman v. Coillte Teoranta (Case C-323/17)* ECLI:EU:C:2018:244 ("People Over Wind"). The particular mitigation measures which the applicant claims the Board improperly took into account at the screening stage for appropriate assessment are the Sustainable Urban Drainage Systems (SUDS) methods incorporated into the project design.

37. The response of the Board and Aldi to these grounds, in summary, is as follows. First, they maintain that the Board (and its inspector) correctly identified and applied the test for screening for appropriate assessment as required by Article 6(3) of the Habitats Directive and s. 177U of the 2000 Act and concluded, as it was entitled to do, that the proposed development, individually or in combination with other plans or projects, would not be likely to have a significant effect on any of the European sites listed in the screening report. Second, they deny that there are any gaps or lacunae in the screening for appropriate assessment carried out whether in relation to concrete or sediment run off, for various reasons. Third, as regards the ground advanced concerning the alleged impermissible reliance upon mitigation measures at the screening stage, both the Board and Aldi object to the applicant's reliance upon this ground as it was not pleaded with the necessary particularity in the statement of grounds as required by O. 84, r. 20(3) RSC. They urge me not to consider the applicant's contentions in relation to this ground. Without prejudice to that, the Board and Aldi say that it is clear from the material before the Board that no mitigation measures were put forward in the screening report and considered by the Board and its inspector in screening for appropriate assessment and that the SUDS measures incorporated in the design for the development are not

mitigation measures of the type which are precluded from consideration at the screening stage as interpreted by the CJEU in *People Over Wind*. In particular, they contend that the SUDS measures are not "*measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned*", as defined by the CJEU at para. 26 of its judgment.

(1)(a) Screening: incorrect test applied?

38. The applicant contends that the Board, through the acceptance and endorsement by its inspector of the screening report submitted by Aldi with his application, incorrectly screened the development the subject of the application for appropriate assessment by applying the wrong test for screening. In order to consider and assess this ground of challenge, it is necessary to identify what the correct test is and when to consider how that test was applied by the Board. The first part of that analysis involves a consideration of the relevant provisions of the Habitats Directive and the 2000 Act, as those provisions have been considered by the CJEU and the Irish Courts. It is then necessary to consider the approach taken in the screening report submitted by Aldi and its consideration by the Board's inspector.

39. I start by referring to a number of the relevant provisions of the Habitats Directive. The tenth recital to the Directive provides that:

> *"Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future"*

40. Appropriate assessment is provided for in Article 6(3). Article 6(3) provides as follows:

> *"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."*

41. The reference to the "*site*" in Article 6(3) is a reference to the protected European site and includes a site which is designated as a SAC. Article 7 of the Habitats Directive provides that the provisions of, *inter alia*, Article 6(3) are to apply to SPAs under Directive 2009/147/EC (the "Birds Directive"). Article 6 of the Habitats Directive was implemented into Irish law by Part XAB of the 2000 Act.

42. Article 6(3) provides, so far as is relevant for present purposes, for a two stage process. The first stage involves a screening for appropriate assessment (and is often referred to as a "stage 1 screening"). The second stage (often referred to as "stage 2 appropriate

assessment") arises where, having screened the application for the development, the Board (or planning authority) determines that an appropriate assessment is required, in which case it must then carry out that appropriate assessment. These two stages were considered by the High Court (Finlay Geoghegan J.) in *Kelly v. An Bord Pleanála* [2014] IEHC 400 ("*Kelly*"), the leading High Court judgment in this area. *Kelly* was discussed in detail and approved recently by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] ILRM 453 ("*Connelly*"). Both the High Court in *Kelly* and the Supreme Court in *Connelly* made clear that the Board does not have jurisdiction to grant permission for development unless the appropriate assessment provisions are correctly applied.

43. As noted above, Part XAB of the 2000 Act implemented Article 6 of the Habitats Directive into Irish law. The stage 1 screening stage in Article 6(3) was implemented by s. 177 U of the 2000 Act. The stage 2 appropriate assessment stage was implemented by s. 177 V. This case is concerned only with the stage 1 screening stage.

44. Section 177 U (1) provides as follows:

> *"A screening for appropriate assessment of a draft Land use plan or application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site."*

45. Under s. 177 U (2), a "*competent authority*" is required to carry out a screening for appropriate assessment under s. 177 U (1) before consent for a proposed development is given. The term "*European site"* is defined in s. 177 R (1) to include SACs and SPAs. I intend to use that term when referring to the relevant SACs and SPAs at issue in this case. Under s. 177 S (2) the "*competent authority*" in the State, for the purposes of Part XAB and Article 6 and 7 of the Habitats Directive is, in the case of a proposed development, the planning authority or the Board, as the case may be. The Board is clearly the relevant "*competent authority*" for the purpose of this case. Finally, in this context, s. 177 U (8) provides that: "*consent for the proposed development*" in s. 177 U (1) means, *inter alia*, a decision of the Board to grant permission on a planning application or an appeal (s. 177 U (8)(b)).

46. Article 6(3) and s. 177 U (1) are similar in terms insofar as they concern the stage 1 screening stage. Both require the screening to consider whether the particular development is "*likely to have a significant effect*" on the relevant European site "*individually or in combination*" with other plans or projects.

47. The CJEU considered the meaning of the test "*likely to have a significant effect"* on the relevant protected site in a number of judgments. Many of these judgments were discussed by Finlay Geoghegan J. in *Kelly*.

48. In *Waddenzee (Case C- 127/02)* [2004] ECR I-07405 ("*Waddenzee*"), the CJEU noted that the requirement for an appropriate assessment of the implications of a plan or project is "*conditional on its being likely to have a significant effect on the [European] site*" (para. 40).

49. The court noted that it was not necessary, in order to trigger the requirement to carry out an appropriate assessment, that the plan or project considered "*definitely has significant effects on the site concerned" but such an obligation "follows from the mere probability that such an effect attaches to that plan or project*" (para. 41).

50. The court then went on to consider what is meant by "likely" in the context of significant effect. It stated (at para. 43):

> *"It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment as to the implications of a plan or project to the condition that there will be a probability or a risk that the latter will have significant effects on the site concerned."*

51. Having referred to the requirement for a "*probability*" or a "*risk*", the court then went on to refer (at para. 44) to the precautionary principle and stated that, in light of that principle, "*such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned*". The court further stated that "*in case of doubt as to the absence of significant effects such an assessment must be carried out*" (para. 44).

52. The CJEU answered the relevant question referred to it as follows:

> *"… the first sentence of Article 6(3) of Directive 92/43 [the Habitats Directive] must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."*

53. In *Sweetman & Others v. An Bord Pleanála (Case C-258/11)* ECLI:EU:C:2012:743 ("*Sweetman*"), a case mainly concerned with the stage 2 appropriate assessment stage, Advocate General Sharpston commented further on the "*likely to have a significant effect"* screening test in Article 6(3).

54. She referred (at para. 46 of her opinion) to the different language versions of that expression and noted that the (non-English language) versions suggest that the test "*is simply whether the plan or project concerned is capable of having an effect*" and that it is in that sense that the English "likely to" in Art 6(3) should be understood (para. 46).

55. Advocate General Sharpston continued:

> *"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."* (para. 47).

56. The Advocate General continued:

> "*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*." (para. 48).

57. The Advocate General, therefore, concluded that the threshold at the first stage of Article 6(3), namely, the stage 1 screening stage is "*a very low one*" and operates "*merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site*." (para. 49).

58. The Advocate General then considered the purpose of the appropriate assessment itself. She stated that the threshold at the second stage (i.e. the stage 2 appropriate assessment stage) is "*noticeably higher than that laid down at the first stage*." In that context, she stated that the threshold at the first stage is "*should we bother to check?"* (para. 50).

59. The judgment of the CJEU in *Sweetman* concentrated on the Stage 2 appropriate assessment stage itself rather than on the screening stage.

60. The CJEU has consistently adopted the approach taken in *Waddenzee* in a great number of cases. It is unnecessary to refer to all of those cases. However, significantly, for present purposes, it did so recently in *People Over Wind*, where (at para. 34), it was stated that it is *"settled case law that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that the plan or project in question will have a significant effect on the site concerned" and that, in light of the precautionary principle, "such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned …*". The court further stated (also para. 34) that:

> *"The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to that effect, judgment of 21st July, 2016, Orleans and others., C-387/15 and C-388/15, EU; C:2016:583, paragraph 45 and the case-law cited)."*

61. As Finlay Geoghegan J. noted in *Kelly* (at para. 23), whilst the provisions of Part XAB of the 2000 Act are more detailed than Article 6 of the Habitats Directive, the parties to that case agreed that Part XAB was intended to and in fact imposed 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. I agree that that is the case.

62. While s. 177 U (1) directly adopts the terminology used in Article 6(3) of the Habitats Directive, in terms of the test for screening, of considering whether the particular application for development was "*likely to have a significant effect*" on the European site, ss. 177 U (4) and (5) expand on this in light of the interpretation given to the test in *Waddenzee* and applied in several subsequent decisions of the CJEU, including *People Over Wind*.

63. Section 177 U (4) provides that:

> *"The competent authority shall determine that an appropriate assessment of a draft Land use plan or a proposed development, as the case may be, is required if it cannot be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site."*

64. Conversely, s. 177 U (5) provides that:

> *"the competent authority shall determine that an appropriate assessment of a draft Land use plan or a proposed development, as the case may be, is not required if it can be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.".*

65. It can be seen, therefore, that ss.177U (4) and (5) seek to give effect to the interpretation by the CJEU in *Waddenzee* of the requirement to screen an application for development for appropriate assessment by assessing whether the relevant development is "*likely*" to have a "*significant effect*" on the protected site by considering whether such a "*significant effect*" either can or cannot be "*excluded*". If a "*significant effect*" on a European site cannot be excluded then s.177U (4) requires the competent authority to conduct an appropriate assessment of the proposed development. If a "*significant effect*" on a protected site can be excluded, then the competent authority is required to determine that an appropriate assessment of the proposed development is not required.

66. A significant feature of the applicant's challenge to the test applied by the Board and its inspector in screening for appropriate assessment is his reliance on the fact that neither the screening report submitted by Aldi nor the inspector's report, in concluding that it was not necessary to proceed to the stage 2 appropriate assessment stage, expressly stated that a "*significant effect*" on a European site could be "*excluded*" as he contends is required under s.177U (5). I will shortly consider this argument in greater detail in the context of what was actually said in the screening report and in the inspector's report.

Before doing so, I should refer to the relatively recent judgment of the High Court (Haughton J.) in *Alen-Buckley v. An Bord Pleanala* [2017] IEHC 541 ("*Alen-Buckley*") which is relevant to this issue. One of the issues raised in that case concerned the test applied by the Board in screening the proposed development for appropriate assessment (i.e. the stage 1 screening stage). The applicants had submitted that the test which the Board should have applied was whether there was a "*possibility*" that the development could effect a European site. They contended that that was the test which was approved by the High Court (Finlay Geoghegan J.) in *Kelly* and that in order for an appropriate assessment to be required, it was only necessary for there to be a possibility of an effect. Having considered the relevant provisions of the Habitats Directive and s.177U (1) of the 2000 Act and the judgments of the CJEU in *Waddenzee* and *Sweetman* (albeit the order in which those judgments are referred to is slightly, but for present purposes, insignificantly, out of sequence) and the judgment of Finlay Geoghegan J. in *Kelly* as well as the opinion of Advocate General Sharpston in *Sweetman*, Haughton J. rejected the applicant's contentions on this point. He stated:

"83. It is very clear from this passage [in para. 46 of her opinion] that Advocate General Sharpston was not proposing a higher standard for Stage 1 than that which was set out in the legislation but was in fact defining the existing standard as being lower than the general definition of 'likely'". Upon reading the Opinion as a whole, it is clear that Advocate General Sharpston was of the view that the test to be applied at the screening stage is whether there is likely to be a significant effect, that the word "likely" should be read as being less than a balance of probabilities standard and that there need not be any hard and fast evidence that such a significant effect was likely, it merely had to be a possibility that this significant effect was likely.

84. The judgment in Kelly when read as a whole clearly supports this view as at para.40, Finlay Geoghegan J. states:

> *'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.'*

This reaffirms that the test being applied by Finlay Geoghegan J. was that which was used by the Inspector in the present case […]. The inspector was not applying a threshold of probability – rather he was, correctly, seeking to identify potential likely effects/significant effects; he was thus screening the capacity of the project to have likely effect/significant effect, which is in line with Advocate General Sharpston's interpretation of Article 6(3). Any argument on behalf of the applicants that a different test with a lower threshold, based on mere possibility of significant effect and without reference to any likelihood, was established or applied in Kelly is unsustainable in the light of the above. Furthermore, the applicants have not presented to the Court any case law which suggests any deviation from the present

legal position. It appears that their entire submission in this regard is based on a misinterpretation of Advocate General Sharpston's judgment in Sweetman". (paras 83-84).

67. I agree with the conclusion reached by *Haughton J.* as to the approach to be taken at the screening stage and with his interpretation of the views expressed by Advocate General Sharpston in her opinion in *Sweetman*. It is also clear from the passage from the judgment of Finlay Geoghegan J. in *Kelly* (at para 40), referred to by Haughton J. at para. 84 of his judgment in *Alen-Buckley*, that the threshold to be applied at the screening stage in determining whether appropriate assessment is required is whether the proposed development, individually or in combination with another plan or project, is "*likely to have significant effects*" on a European site. That passage in the judgment of Finlay Geoghegan J. *Kelly* was referred to with approval by Clarke C.J. in the judgment he delivered for the Supreme Court in *Connelly* (at p. 471, para. [8.14]). It is true, as the applicant has pointed out in the present case, that the judgment of Haughton J. in *Alen-Buckley* did not make express reference to subs. (4) and (5) of s.177U. However, as noted by Finlay Geoghegan J. in *Kelly* (at para.23) it was common case between the parties in that case that the more detailed provisions of Part XAB (including s.177U (4) and (5)) are intended to, and do, impose similar obligations on the Board to those imposed by Article 6(3) of the Habitats Directive, as construed in the case law of the CJEU. As I have indicated earlier, I agree that that is so. I will shortly consider whether the omission of any express reference to s.177U (4) and (5) or to the interpretation of the test for screening in *Waddenzee* provides a basis for invalidating the screening conclusions reached by the Board and its inspector. For present purposes, I observe that Haughton J. refused to grant a certificate granting leave to appeal under s.50(A)(7) of the 2000 Act and, in a determination made by the Supreme Court on 27th March 2018, that court refused leave to appeal under Articles 35.5.4 of the Constitution ([2018] IESCDET 45).

68. It seems to me that for present purposes, the following principles applicable to the screening stage for appropriate assessment (stage 1 screening) can be derived from Article 6(3) of the Habitats Directive, as interpreted and applied by the CJEU, and from s.177U of the 2000 Act, as interpreted and applied by the Irish courts:

    (1) The threshold test in Article 6(3) of the Habitats Directive and s.177U (1) of the 2000 Act is that an appropriate assessment will be required if the proposed development is "*likely to have a significant effect"* on the protected site (i.e. a "European site" under part XAB of the 2000 Act), either individually or in combination with other plans or protects. That this is the threshold test is clear from the decision of the High Court (Finlay Geoghegan J.) in *Kelly* (at para. 40), as approved by the Supreme Court in Connelly (at para. 8.14).

    (2) It is not necessary, in order to trigger the requirement to proceed to stage 2 appropriate assessment, that the proposed development will "*definitely*" have significant effects on the protected site but such a requirement will arise if it is a

"*mere probability*" that such an effect exists (*Waddenzee*, para.41). This was developed by the CJEU in *Waddenzee* (at para.43) where the court stated that the requirement to carry out an appropriate assessment will be satisfied if there is a "*probability or a risk*" that the development will have "*significant effects*" on the protected site.

(3) In light of the precautionary principle, such a "*risk*" will be found to exist if "*it cannot be excluded on the basis of objective information*" that the particular development "*will have significant effects*" on the protected site (*Waddenzee*, para. 44)(see also *People over Wind*, para. 34).

(4) Under s177U(4) of the 2000 Act an appropriate assessment will be required if, on the basis of objective information, a "*significant effect*" on a European site "*cannot be excluded".*

(5) Under s177U(5), an appropriate assessment will not be required if, on the basis of objective information, a "*significant effect*" on a European site "*can be excluded*".

(6) In the case of "*doubt as to the absence of significant effects*" an appropriate assessment must be carried out (*Waddenzee*, para. 44). The requirement to conduct an appropriate assessment will arise where, at the screening stage, it is ascertained that the particular development is "*capable of having any effect*" (albeit this must be any "*significant effect*") on the European site (para.46 of the opinion of Advocate General Sharpston in *Sweetman*).

(7) The "*possibility*" of there being a "*significant effect*" on the European site will give rise to a requirement to carry out an appropriate assessment for the purposes of Article 6(3). There is no need to "*establish*" such an effect and it is merely necessary to determine that there "*may be*" such an effect (para. 47 of opinion of Advocate General Sharpston in *Sweetman*).

(8) In order to meet the threshold of likelihood of significant effect, the word "*likely*" in Article 6(3) and S. 177U(1) should be read as being less than the balance of probabilities. The test does not require any "*hard and fast evidence that such a significant effect was likely*". It merely has to be shown that there is a "*possibility*" that this significant effect is likely (per Haughton J in *Alen-Buckley*, para. 83).

(9) The assessment of whether there is a risk of "*significant effect*" on the European site must be made in light, *inter alia*, of the "*characteristics and specific environmental conditions of the site concerned*" by the relevant plan or project (see, most recently, *People Over Wind*, para. 34).

(10) Plans or projects or applications for developments which have "*no appreciable effect*" on the protected site are excluded from the requirement to proceed to appropriate assessment. If all applications for permission for proposed developments capable of having "*any effect whatsoever* "on the protected site were

to be caught by Article 6(3) (or s.177U) "*activities on or near the site would risk being impossible by reason of legislative overkill*" (Opinion of Advocate General Sharpston in *Sweetman*, para. 48).

(11) While the threshold at the screening stage of Article 6(3) and s.177U is "*very low*" (Opinion of Advocate General Sharpston in *Sweetman*, para.49; judgment of Finlay Geoghegan J. in *Kelly*, para.30), nonetheless it is a threshold which must be met before it is necessary to proceed to the stage 2 appropriate assessment stage.

69. I now turn to the screening exercise actually carried out by the Board. Aldi submitted a screening report prepared by Openfield with its application for permission to the Council. Aldi relied on the screening report for the purpose of the appeals before the Board. The inspector appointed by the Board carried out the screening exercise for appropriate assessment, namely, the stage 1 screening stage, on behalf of the Board. The inspector did so on the basis of the screening report. Since the applicant contends that the screening report, and in turn the screening exercise carried out by the Board, through its inspector, on the basis of that report, applied an incorrect test for screening, it is necessary to consider the screening report in a little detail. Having done so, I will then turn to consider the manner in which the screening report was considered by the inspector in her report.

70. Among the arguments advanced by the applicant in support of his contention that the screening report applied an incorrect test and, insofar as the inspector relied on the screening report, the inspector applied an incorrect test for screening, is that no reference was made in the screening report or in the inspector's report to the interpretation of the test contained in Article 6(3) given by the CJEU in *Waddenzee* or to s. 177 U (4) and (5) of the 2000 Act. Specifically, it is contended that neither the screening report nor the inspector in her report approached the task of considering whether it was likely that the proposed development would have a significant effect on a European site by reference to a determination as to whether there was a risk that the proposed development would have such an effect in the sense that such a risk could not be excluded on the basis of objective evidence. The applicant contends that nowhere in the screening report, or in the inspector's report or indeed in the Board direction or Board order, is there any consideration as to whether it could be excluded on the basis of objective information that the proposed development would have a significant effect on a European site. Bearing those contentions in mind, I now turn to the screening report itself.

71. It is stated at the outset of the report (on p. 3) under the "*methodology*" heading that the methodology adopted in the report is that set out in a publication by DG Environment of the European Commission in 2001 entitled *"Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC"* (Oxford Brookes University, 2001)(the "Commission Guidance"). Guidance from the Department of the Environment, Heritage and Local Government entitled "*Appropriate assessment of Plans and Projects in Ireland"* (2009)(the "Department Guidance") is also referred to in the report. The report states

that in accordance with that guidance the methodology used in the report was adopted in accordance with that guidance. The methodology is then set out, consisting of some four steps: step 1 being a consideration as to whether the project is necessary for the conservation management of the European site in question; step 2 being a description of the aspects of the project that may have an impact on the relevant European site; step 3 being the identification of the conservation aspects of the European site and a determination as to whether negative impacts can be expected as a result of the particular project with such potential effects being identified including those that may act alone or in combination with other plans or projects; and step 4 being an assessment as to whether an effect is significant or not in the context of whether the project is likely to have an effect on the integrity of the European site in question. I would observe here that the reference in the context of step four of the screening process set out in the methodology section of the screening report to the likelihood of an effect to the "integrity" of the relevant European site is somewhat confusing in that a consideration as to whether there is an adverse effect on the integrity of a European site is something which is considered at the appropriate assessment stage (namely, the stage 2 appropriate assessment stage) rather than at the screening stage. At the screening stage the test is to determine whether it is likely that the proposed development will have a significant effect on the European site. Notwithstanding the reference to a consideration as to the effect on the integrity of the European site at step four of the described methodology, the screening report goes on immediately to state that if the analysis conducted "*shows that significant effects are likely*" then a full appropriate assessment will be required. It is the case, therefore, that the authors of the screening report are aware that the likelihood of significant effects on the European site is the relevant test.

72. Having concluded that the particular plan is not necessary for the management of any European site and that, therefore, step 1 in the methodology is not required, the screening report goes on to step 2 and provides a brief description of the proposed project. I have considered the entirety of that section of the screening report and it is unnecessary to reproduce all of its contents here. Some reference is, however, appropriate. It is noted in this section of the screening report that there are no water courses on this site and that the site is not located within the catchment of any significant river. It is further noted that drainage of surface water will be through *"ground infiltration and diffuse surface run-off directly to the sea*". The screening report then continues (on page 7):

> *"Surface water from the project footprint will drain via a new drainage network to connect with the public drain. Rain run-off will be separated from foul waste water within the site. Sustainable drainage systems (SUDS) are to be incorporated into the project design and this will include a suitable sized soakaways. Run-off will pass from this tank and through a class 1 oil/grit inceptor and flow limiting device prior to discharge to the public surface water drain on the R150. In this way outfall rates will be maintained at a 'greenfield' rate".*

73. It is further noted that fresh water supply for the development will be via a mains supply and that water is supplied by an abstraction point along the River Boyne. It is stated that the site of the proposed development is not located within any Natura 2000 area (SAC or SPA) i.e., it is not within any European site. It is, however, noted that the River Nanny Estuary and Shore SPA is within 2km (in fact it is much closer than that) and that the point at which the Drogheda waste water treatment plant discharges into the Boyne estuary is within a SPA as well as the Boyne Coast and Estuary SAC and that the abstraction point for fresh water lies along the River Boyne, which is within the River Boyne and River Blackwater SAC and SPA. Those four areas are considered in the report to be the only relevant European site areas falling within the zone of influence of the project. It is further noted in the report that the site of the development is separated from the River Nanny Estuary and Shore SPA by the R150 road and, further to the east, amenity grassland and a car parking area. It is stated that there are no habitats on the site that are associated with habitats or species for which SACs or SPAs are generally designated and that there are no water courses on or near the site that may be of fisheries value.

74. The screening report then states, (at page 9):

> *This project will not result in greater levels of air emissions. Surface water run-off during the operation phase is to be maintained at a 'greenfield' rate…Drogheda Waste Water Treatment Plant is running within its design capacity and is compliant with its licence emission limit values. There will be a small demand for fresh water although this is likely to be substantially less than that for the nursing home which previously operated on the site. During the construction phase there will be use of concrete (which is highly toxic to aquatic life) and other potentially polluting substances. There will be extensive earth works which will result in sediment run-off from the site."*

75. Considerable stress is placed by the applicant on the reference above to the fact that during the construction phase there will be the use of concrete (and, in particular, the statement that such is "highly toxic to aquatic life") and other potentially polluting substances and extensive earth works, which will result in sediment run-off from the site. It should be noted, however, that as pointed out on behalf of the Board, these observations are contained in the section of the screening report which provides a brief description of the proposed project and not in any section considering the likelihood or indeed the risk or possibility of any significant effects on a European site from any of these matters.

76. The screening report then provides a brief description of the relevant European sites. In this context, it notes that a number of factors must be considered including the potential impacts arising from the project, the location and nature of the European sites and the pathways between the development and the relevant European sites. The report notes that the site is not located within or directly adjacent to any European site, that at its closest the site is approximately 30 metres from the boundary of the River Nanny Estuary

and Shore SPA; that there is a pathway to the Boyne Coast and Estuary SAC and Boyne Estuary SPA via the discharge of waste water; that the River Boyne and River Blackwater SAC and SPA are connected to the development site via the extraction of fresh water; and that these are the only European sites considered to fall within the zone of influence of the project.

77. The screening report then goes on to consider each of the European sites considered to fall within the zone of influence of the project and describes those sites and the species and habitats for which these sites have been designated as European sites. With particular regard to the River Nanny Estuary and Shore SPA, the features of interest for the SPA are detailed in Table 1 and comprise a number of different bird species. The conservation objectives set for each of the bird species relate to maintaining a population trend that is stable or increasing and maintaining the current distribution in time and space. There is then a specific consideration of the bird species protected. The same exercise is done in relation to the other SPAs and SACs within the zone of influence of the project. It is noted, for example, that there is no conservation objective set in respect of any of the European sites within the zone of influence in relation to water quality.

78. Having described the European sites within the zone of influence of the proposed development and the particular features of interest and conservation objectives in respect of them, the screening report then refers to the data collected in order to carry out the screening assessment. These data are summarised on pages 16-17 of the screening report. In that context, the screening report notes (on page 17) that there is "*no evidence that poor water quality is currently negatively affecting the conservation objectives of Natura 2000 areas in either the Boyne or Nanny Estuaries" and that "water quality is not listed as a conservation objective for these SACs or SPAs"*.

79. The next section of the screening report (which falls within step 4 of the methodology referred to above) consists of the assessment of the significance of effects. That section of the report seeks to "*describe how the project or plan (alone or in combination) is likely to affect the Natura 2000 site*" (page 17 of the screening report). The report states that:

> *"In order for an effect to occur there must be a pathway between the source (the development site) and the receptor (the SAC or SPA). Where a pathway does not exist an impact cannot occur".*

It then observes that the proposed development is not located within or adjacent to any SAC or SPA. The screening report then assesses the effects and their significance arising from "pollution from waste water during operation", *"pollution from surface water during operation", "pollution during construction"* (at pages 17-18 of the screening report). Having regard to the importance of these issues, in the context of the contentions made by the applicant, it is appropriate to set out what the screening report says in relation to them.

80. As regards "*pollution from waste water during operation*", the screening report states:

"There is a pathway from the site via waste water flows to the Boyne Estuary. The volume of waste water from the operation of the supermarket is likely to be substantially lower than that from the nursing home which was previously on this site. Meanwhile the treatment plant at Drogheda is operating well within its design capacity and is fully compliant with its licenced treatment standards. For these reasons…there can be no effect to water quality arising from this development, and consequently no significant effect to the status of the SAC or SPA in the estuary.

81. With regard to "*pollution from surface water during operation*", the screening report states:

> *"The new surface water infrastructure will maintain discharge rates to 'greenfield' levels while incorporating standard SUDS techniques. There is no discharge to fresh water bodies which may be sensitive to the likely pollutants associated with this type of run-off. There can therefore be no impact on conservation objectives for the River Nanny Shore and Estuary SPA".*

82. With regard to "*pollution during construction*", the screening report states:

> *"During construction there will be extensive earth movement however there are no water courses on this site which could act as a pathway to any Natura area. Run-off during this period is likely to be absorbed to ground. The release of sediment to the shoreline, should it occur, can have no negative effect on the habitat here. There can consequently be no effect to Natura areas along the shore".*

83. I interject at this point to note that Mr. Fogarty of Openfield swore an affidavit in response to the applicant's application for judicial review. He points out (at para. 14 of that affidavit) that the screening report finds that there are no potential pathways to enable interaction between any sediment run-off from the development site during the construction phase with the River Nanny Estuary and Shore SPA as there are no water courses on the site. As regards the concern expressed by the applicant in relation to the presence of concrete during the construction phase and any potential that this could form part of a sediment run-off from the site to the shoreline, having noted that the applicant expressed no such concern during the planning process, Mr. Fogarty stated (at para. 15 of his affidavit) that as is indicated in the screening report there is no direct pathway for concrete to reach the shoreline due to the absence of water courses. As regards the concern expressed by the applicant in relation to sediment run-off from earth works during the construction phase, again while noting that this concern was not raised by the applicant during the planning process, Mr. Fogarty stated that estuaries and shorelines are "*naturally rich in sediment and particulate matter (mud, sand etc.) and are not in any way sensitive to sediment run-off from earth works, unlike rivers, where sediment can affect fish spawning habitat*" (para. 16 of Mr. Fogarty's affidavit). He also stated that rain water will generally percolate to ground and, as pointed out in the screening report, there is "*no direct pathway for it to reach the shoreline in the present case due to the absence of water courses"*.

84. These averments are not contradicted by any affidavit by or on behalf of the applicant.

85. Returning to the screening report, it then considers the question of abstraction and light and noise, issues not relevant to these proceedings.

86. The screening report then considers whether there are other projects or plans which together with the particular development being assessed, could affect the site and concludes that there are not.

87. The screening report then sets out its "*conclusion and finding of no significant effects*". The applicant is particularly critical of the manner in which this conclusion is expressed and contends that it does not accurately record and apply the correct test for screening for appropriate assessment. Under the heading "*conclusion and finding of no significant effects"* (at page 20 of the screening report), it is stated:

> *"This project has been screened for AA under the appropriate methodology. It has found that significant effects are not likely to arise, either alone or in combination with other plans or projects that will result in significant effects to the integrity of the Natura 2000 network. A full appropriate assessment of this project is therefore not required."*

88. The applicant criticises the manner in which this conclusion and finding has been expressed. He contends, first, that there is no recognition in the finding that the test to be applied is that contained in Article 6(3) of the Habitats Directive as interpreted by the CJEU in *Waddenzee* and contained in s.177U (4) and (5) of the 2000 Act. In particular, he says that the screening report does not recognise the requirement to exclude, on the basis of objective information, that the proposed development will have a significant effect on the relevant site. Second, he contends that the test is not whether the development "*will result in significant effects to the integrity of the Natura 2000 network*" but rather whether it is likely to have a significant effect on the relevant European site itself.

89. The inspector conducted the stage 1 screening exercise at s.8.6 of her report. She considered the screening report in the course of that exercise. She noted that the screening report identified the relevant European sites within the zone of influence of the development, observing that the River Nanny Estuary and Shore SPA was the closest site, located approximately 30 metres away to the east and south, that the Boyne Estuary SPA and Boyne Coast and Estuary SAC are located four kilometres to the north of the site and that the River Boyne and River Blackwater SAC and SPA are approximately twelve kilometres east/north east of the development site. In carrying out the screening exercise, the inspector noted that the screening report assesses the proposed developments in the context of the conservation objectives and potential threats to the qualifying interests designated for the European sites within the zone of influence.

90. At para. 8.6.3 of her report, the inspector stated:

> *"The appeal site is 30m from the boundary of the River Nanny Shore & Estuary SPA and is separated by the public road so it is submitted in the report that no direct interference or loss of habitat would occur as a result of the development. Recognising that there is a pathway from the site via waste water flurries to the Boyne Estuary, it is stated that the volume of waste water from the operation of a supermarket would be lower than the previous use on site (nursing home) and that the Drogheda WWTP is operating well within its design capacity and compliant with its licence treatment standards. Accordingly, it is submitted that there can be no effect to water quality arising from this development and that no significant effects on the status of the SAC or the SPA are likely. During operation, the surface water infrastructure would maintain discharge rates to 'greenfield' levels, incorporating Suds techniques. Run-off during construction is likely to be observed to ground as there is no water course on the site which could act as a pathway to any Natura area. Because of the separation distance from the site to the River Boyne and River Blackwater SAC and SPA, significant effects can be discounted. It is concluded that the proposed development, either alone or in combination with other plans or projects would not result in significant effects to the integrity of the Natura 2000 network."*

91. In that paragraph the inspector was purporting to summarise the conclusions in the screening report. The applicant takes issue with the accuracy of the summary and also with what he regards as an inaccurate statement of the test set out in the conclusions in the screening report. I am satisfied that the inspector has accurately summarised the conclusions reached in the screening report. I consider the applicant's contention that the screening report inaccurately described and applied an incorrect test for screening below.

92. Having summarised the screening report, the inspector proceeded (at para. 8.6.4 of her report) to set out her conclusions at the stage 1 screening stage. She stated:

> *"I would agree with the conclusions set out in the screening report and I therefore consider that it is reasonable to conclude that on the basis of information on the file, which I consider to be adequate in order to issue a screening determination, that the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on any of the European sites listed in the screening report and a stage 2 appropriate assessment (and a submission of a NIS) is not therefore required."*

93. To complete the factual position in relation to this aspect of the applicant's claims, it is necessary to refer to how the Board dealt with the question of screening. Neither the Board direction nor the Board order contains any reference to the Habitats Directive or, in particular, to screening for appropriate assessment in respect of the development. However, the Board direction expressly states that the submissions on the file and the inspector's report were considered by the Board at its meeting on 19th September, 2017 and that the Board decided to grant permission "*generally*" in accordance with the inspector's recommendation.

94. While the applicant has not advanced as a direct ground of challenge to the Board's decision the contention that the Board did not in fact carry out a screening exercise as it did not refer to having done so in the Board direction or in the Board order the applicant is nonetheless critical of the manner in which the Board dealt with the question of screening for appropriate assessment. I address this point briefly later in the judgment. In short, however, such a challenge could not succeed as the Board clearly agreed with the inspector's reports and her recommendations (although slightly changed one of the conditions and added another, which is not relevant for present purposes).

95. The essential points made by the applicant in support of this ground of challenge is that the screening report referred to and applied an incorrect test for screening. It made no reference to the decision of the CJEU in *Waddenzee* or to the provisions of s. 177 U (4) and (5) and, did not consider whether the potential risks to any of the relevant European sites, but, in particular, the River Nanny Estuary and Shore SPA, could be excluded at the screening stage. He further contends that the author of the screening report did not understand, recite or apply the correct test as in the conclusion and finding section of the report, it was concluded that significant effects were not likely to arise, either alone or in combination with other plans or projects, that would result in significant effects to the *"integrity of the Natura 2000 network",* which the applicant contends is not the correct test for screening. The applicant further contends that insofar as the screening report was accepted and endorsed by the inspector in her screening exercise on behalf of the Board, and by the Board, insofar as it accepted the inspector's report, they too applied the incorrect test for screening.

96. In response, both the Board and Aldi urged me to consider carefully the relevant context of this application. They note that the applicant raised no environmental or ecological concerns in the course of the planning process. Nor did the National Parks and Wildlife Service (NPWS), one of the relevant prescribed bodies in the process, raise any such issues. They contend that the screening report, and the inspector, did in substance apply the correct test set out in Article 6(3) and s. 177 U (1) in that each concluded, in substance, that the proposed development was not likely to have significant effects on any of the European sites within the zone of influence of the project. They urge me to consider the contents of the screening report and of the inspector's report in full and argue that those documents are not to be interpreted as if they were provisions of a statute. They further contend that it was not necessary for the screening report or for the inspector in her report to make specific reference to case law (such as the decision of the CJEU in *Waddenzee*) or to use the precise statutory language contained in s. 177 U (4) and (5) of the 2000 Act. Finally, they stress that the onus of proof in challenging the decision of the Board on this issue rests with the applicant and assert, in the absence of any environmental or ecological evidence from the applicant or from any expert on his behalf, that the applicant has failed to discharge that onus of proof.

97. The importance of the competent authorities complying with the provisions of Article 6(3) of the Habitats Directive and ss. 177 U and 177 B of the 2000 Act cannot be overstated. As is clear from the decision of the High Court (Finlay Geoghegan J.) *Kelly* and from the

recent decision of the Supreme Court in *Connelly*, both of which dealt with the stage 2 appropriate assessment stage rather than the screening stage, that compliance with those provisions, whether at the screening or assessment stage, is essential in order to confer jurisdiction on the competent authority, in this case, the Board, to grant consent for the proposed development. If the competent authority does not correctly apply those provisions, then it will not have jurisdiction to grant consent in respect of the development. It is necessary to consider, therefore, whether, in deciding to grant permission for the development at issue in this case, the Board applied the correct screening test. If it did not, and if it ought to have concluded that an appropriate assessment was required, then the Board did not have jurisdiction to grant permission for the development.

98. I have reached the conclusion that the applicant's contention that the Board did not apply the correct screening test in considering this development has not been made out. I am satisfied that the screening report did, in substance, correctly apply the test, as did the Board's inspector and, since the Board accepted the inspector's recommendation, so too did the Board. I set out earlier in my judgment the principles which can be derived from Articles 6(3) of the Habitats Directive and s. 177 U of the 2000 Act and from the case law of the CJEU and from the Irish courts concerning the correct test to be applied in screening a development for appropriate assessment. Despite the dizzying array of descriptions of the screening test contained, in particular, in the CJEU cases, the essential test is that contained in Article 6(3) and s. 177 U (1) namely, if the particular development is likely to have a significant effect on a European site, either individually or in combination with other plans or projects, it must be subjected to appropriate assessment. Equally, if the development is not likely to have a significant effect on a European site, an appropriate assessment is not required. As outlined earlier, the CJEU in *Waddenzee* and in subsequent cases, and the Oireachtas in s. 177 U (4) and (5), have interpreted or elaborated upon what is meant by the term *"likely to have a significant effect".* A development will be "likely to have a significant effect" where a risk of such a significant effect cannot be excluded. Conversely, such a risk will be found not to exist if it can be excluded on the basis of objective information.

99. I entirely accept the submission made on behalf of the Board, and supported by Aldi, that in considering the screening report and the inspector's report, the court does not read or construe the contents of the reports as if they were statutory provisions. It is not appropriate to read those reports as if they were statutes or even contractual provisions. In my view, the correct approach for the court to take is to consider the substance of the reports and not to approach what is said in the reports with an excessive degree of formalism. I agree with what was said by the High Court (McGovern J.) in *O'Grianna v. An Bord Pleanála (No. 2*) [2017] IEHC 7 (*"O'Grianna (No. 2)")* where he stated, in the context of Environmental Impact Assessments under the EIA Directive as follows:

> *"The principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible. This involves the courts being astute to ensure the*

objectives of the Directive are met but not in an overly pedantic way." (per McGovern J. at para. 38, p. 16).

100. Further support for the conclusion I have reached, which is that it is necessary to consider the substance of the screening report and the inspector's report rather than to focus on the particular use or rather non-use of certain words, can be found in a series of decisions to which I now make brief reference. In *Dublin County Council v. Eight Five Developments Limited (No. 2)* [1993] 2 I.R. 392, McCarthy J. in the Supreme Court, in considering the consequence of the failure by the planning authority to use the precise wording in a section so as to exclude compensation, held that it was not necessary to do so. He stated:

> "*Certainly, it is desirable that, where appropriate, a reason which fits within the precise wording of [the section] should be expressed in the words of the section - that is what Keane J. said. The failure to do so, however, does not mean that the section does not apply to the reason, however stated, if it is clearly within the section. … One must look to the wording used and determine whether or not it is a reason which, construed in its ordinary meaning, would be understood by members of the public without legal training, as well as by developers and their agents, as being within the relevant exclusion.* …" (per McCarthy J. at pp. 402-403).

101. A very similar approach can be seen in the decision of the High Court (Cregan J.) in *Buckley v An Bord Pleanála* [2015] IEHC 572 ("*Buckely*"). In that case it was contended that the Board had not carried out an EIA as it had only "*noted*" the inspector's report and did not expressly "*adopt*" it in accordance with s. 172 (1H) of the 2000 Act. Cregan J. rejected that contention. He held that it was necessary to focus on the substance of what the Board had done rather than on the precise words used. Having found that the Board adopted all of the conditions set out in the inspector's report and that this led to the inescapable inference that the Board had "*adopted*" the inspector's report and the EIA, Cregan J. stated:

> "*Thus the applicant's case then becomes one based on the narrow, linguistic proposition that, because the Board decision used the word 'noted' - rather than the word 'adopted' - the Board did not adopt an Environmental Impact Assessment and therefore it is in breach of its statutory obligations. I do not agree with that submission. The legal requirement on the Board to adopt an Environmental Impact Assessment is one of substance. I am satisfied that, in substance, the Board did carry out an Environmental Impact Assessment through its inspector and that it adopted his report*." (per Cregan J. at para. 105, pp. 38-39).

102. Later in his judgment, Cregan J. stressed:

> "*Moreover, having regard to the line of authorities set out earlier in my judgment, it is clear that the court looks to the substance, rather than the form, of the Board's decision. It is true that the Board used the word 'noted' in relation to the Inspector's Report but having considered the decision in its entirety I am satisfied*

that the Board did indeed adopt the Inspector's Report,…" (per Cregan J. at para. 44, p. 50).

103. A similar approach was taken by the High Court (Haughton J.) in *Alen-Buckley* where the court examined the substance of the inspector's report concerning screening for appropriate assessment in terms of its compliance with the requirements in Article 6(3) and s. 177 U rather than on the use or non-use of any particular statutory terms. I take the point, however, that in that case no specific reference was made in the judgment to s. 177 U (4) and (5). It is clear, however, that the court had carefully considered all of the relevant case law of the CJEU which interpreted the screening requirement in Article 6(3).

104. In my view, these cases amply demonstrate that the approach which the court should take in considering the screening report and the inspector's report, insofar as it deals with the question of screening for appropriate assessment, is to examine the substance of what is said in those reports rather to focus on the use or non-use of particular statutory words or phrases. In particular, I am satisfied that, consistent with these authorities, it was not necessary for the screening report, or for the inspector in her report, expressly to refer to the decision of the CJEU in *Waddenzee* or to s. 177 U (4) and (5) or to slavishly reproduce the terms of the judgment of the CJEU in that case or the words used in those statutory provisions in order to comply with the screening obligation contained in Article 6(3) and s. 177 U. That screening obligation will be complied with where it is clear from the substance of the reports that the risk of the development having a significant effect on the European site concerned can be excluded on the basis of objective information. It is not necessary, in my view, to reproduce the exact words contained in the judgment in CJEU in *Waddenzee* or in s. 177 U (4) and (5) if, in substance, the screening report, and the inspector in her report, have complied with the requirements referred to therein.

105. In considering whether, in substance, the screening report, and the inspector in her report, have complied with those requirements, it is relevant again to bear in mind that nobody, including the applicant or the NPWS, expressed any concern for the River Nanny Estuary and Shore SPA, or any of the other European sites within the zone of influence of the development or raised any other ecological concerns, either before the planning authority or an appeal before the Board. The Board, and its inspector, were not provided with any evidence to contradict or challenge the evidence and objective information contained in the screening report. Nor was any such evidence provided by or on behalf of the applicant in the proceedings. I believe that this is relevant in assessing whether the screening exercise carried out by the Board, through its inspector, complied with the requirements of Article 6(3) of the Habitats Directive and s. 177 U of the 2000 Act. Indeed, the stark absence of any countervailing evidence sets this case apart from many of the cases in this area in which significant ecological concerns arising in relation to the Habitats Directive have been raised both in the planning process and in proceedings before the court, some of which were mentioned in submissions at the hearing of these proceedings.

106. Bearing all of this in mind, I am satisfied that the screening report did provide a valid basis on which the inspector could screen the proposed development for appropriate assessment and that it provided a valid basis for the inspector to conclude that the proposed development, individually or in combination with other plans or projects, would not be likely to have a significant effect on any of the European sites within the zone of influence of the development.

107. I have described the contents of the screening report in some detail earlier in the judgment. It is clear from the report that the author was well aware of and set out to comply with the guidance provided by DG Environment of the European Commission and by the Department of the Environment, Heritage and Local Government in relation to screening for appropriate assessment. The screening report described the proposed project in some detail, provided a description of the relevant European sites and their conservation objectives and then assessed the significance of the potential effects on each of the relevant European sites. I have set out, earlier in the judgment, the conclusions in that regard reached in the screening report in relation to the potential pollution from waste water during operation, the potential pollution from surface water during operation and the potential pollution during construction. The conclusions in relation to each of those issues is that, for the reasons set out in the relevant parts of the screening report, there can be no impact or effect on the relevant European sites from the various identified aspects of the development. While the "*conclusion and finding of no significant effects*" at the end of the report misstates the test in terms of referring to significant effects to the "*integrity of the Natura 2000 network",* it is necessary to read that conclusion in the context of the precise findings made earlier in the report in the context of the assessment of the potential likely effects on the relevant European sites. The conclusion cannot, in my view, be read in isolation and must be read by reference to the earlier substantive provisions of the report. I have concluded that the substance of the screening report and its conclusions, notwithstanding the incorrect summary of the test in the conclusions section, amply supports a conclusion that the risk of any significant effect on any of the relevant European sites can be excluded on the basis of objective information. That is the import and effect of the screening report, as I read it.

108. The inspector in her report considered the screening report and noted important aspects of it. While the applicant has criticised the summary of the screening report contained in para. 8.6.3 of the inspector's report, I do not accept that there is any substance to that complaint. The inspector was attempting to summarise the screening report and it was not reasonable to expect that, in summarising the report, the inspector should in effect, have reproduced the entirety of the report. The inspector had clearly read and considered the entirety of the report in reaching her conclusions. Insofar as the inspector states, at para. 8.6.4 of her report, that she agrees with the conclusions set out in the screening report, it seems to me that this must be properly read and understood as indicating the inspector's agreement with the conclusions contained in the entirety of the screening report and not merely those contained in the final section of that report under the heading "*conclusion and finding of no significant effects*". The screening report contains conclusions in relation to each of the potential effects from the development on

the relevant European sites. It seems to me that the proper reading of para. 8.6.4 of the inspector's report is that she was agreeing with each of the conclusions set out in the body of the screening report.

109. Furthermore, the inspector's conclusion that the information on the file (including the screening report) was adequate in order to issue a screening determination (which was accepted by the Board in granting permission) is one which she was entitled to draw on the basis of the information before her. It is a matter for the Board (and its inspector) to consider the adequacy of the information available to it in carrying out its screening determination (particularly in the absence of any countervailing evidence). By analogy, the High Court (Haughton J.) in *People over Wind v. An Bord Pleanála* [2015] IEHC 271 ("People Over Wind (Ire)") stated that the Board was "*entitled to determine, as it did, that it had information before it (including the NIS and EIS) sufficient to carry out an AA*." (at para. 258).

110. I agree that that approach is also applicable to the assessment by the Board (and its inspector) as to the adequacy of information before it to carry out a screening determination.

111. I am also satisfied that the conclusion reached by the inspector, on the basis of the information before her, that the proposed development, individually or in combination with other plans or projects, would not be "*likely to have a significant effect*" on any of the European sites as described in the screening report and that a stage 2 appropriate assessment was not, therefore, required is one which the inspector was entitled to draw in light of the evidence before her, and, particular, in light of the screening report. I do not believe that the inspector can be criticised for expressly applying the test contained in the first sentence of Article 6(3) of the Habitats Directive and in s. 177 U (1) of the 2000 Act. Having regard to the substance of the screening report and the conclusions reached in that report, in my view the inspector was perfectly entitled to reach the conclusions which she reached in her report. I am also satisfied that she correctly applied the test notwithstanding the fact that she did not specifically refer to the decision of the CJEU in *Waddenzee* (or the elaboration of the test contained in that judgment) and notwithstanding that she did not specifically refer to the provisions of ss. 177 U (4) and (5) or the contents of those provisions since in substance the screening report had applied the correct test and the inspector was relying on that report and the conclusions reached in it.

112. As I observed earlier, while neither the Board direction nor the Board order expressly referred to screening for appropriate assessment, and to that extent neither is a model of its kind, the Board had clearly considered the inspector's report (and the screening for appropriate assessment contained in that report) and was agreeing with the report and deciding to grant permission generally in accordance with the inspector's recommendation (the term "*generally*" being used as a result of the inclusion of an additional condition and a change to one of the conditions recommended by the inspector). It would undoubtedly have been preferable if the Board had (as it often does) expressly referred to the

screening for appropriate assessment in its direction and order. However, it is perhaps understandable why it did not do so in the present case since none of the many appellants and those who had submitted observations on the appeals had raised any ecological issue or any issue concerning any alleged potential impact or effect on any of the European sites within the zone of influence of the development.

113. Consequently, reading the Board's direction and the Board order in conjunction with the inspector's report (as the authorities, including the recent decision of the Supreme Court in *Connelly* permit) I conclude that the correct test for screening was applied by the Board and that the applicant's complaints in relation to this aspect of the decision must be rejected.

(1) (b) Screening: Gaps/Lacunae?

114. A subsidiary argument advanced by the applicant in challenging the screening assessment carried out by the Board is that it is alleged that the screening report failed properly to consider the consequences of the use of concrete and of sediment run-off from the site during the construction phase. It is contended that the screening report gave no indication as to how the concrete (described in the screening report as being "*highly toxic to aquatic life")* and the sediment run-off would be prevented from interacting with the closest European site, namely the River Nanny Estuary and Shore SPA. The applicant alleges that the screening report failed to address at all the consequences of the use of concrete during the construction phase and failed to provide any basis for the conclusion that if sediment run-off impacted upon the shore line it could have no negative effect on the habitat there. Consequently, the applicant contends that the screening report contained gaps and lacunae and lacked complete, precise and definite findings and conclusions based on the latest scientific information capable of excluding the possibility, applying the precautionary principle, of significant impacts on European sites from the proposed development at the screening stage.

115. Both the Board and Aldi reject the contention that the screening report contained any gap or lacuna in relation to the presence of concrete or the possibility of sediment run-off, during the construction phase. They contend, first, that the inspector was satisfied that she had sufficient information on the file (including the screening report) to issue a screening determination and that such a conclusion was a matter for the inspector which could only be reviewed on the basis of the test contained in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 ("*O'Keeffe*") and *People Over Wind (Ire).* Second, they rely on the evidence contained in the screening report and the conclusions drawn in that report, both in relation to both concrete and sediment run-off during construction, as demonstrating that there are no gaps or lacunae in the screening report. They further rely on the evidence contained in the affidavit sworn on behalf of Aldi by Mr. Fogarty of Openfield. Consequently, they contend that there are no gaps or lacunae in the screening report.

116. I am satisfied that the applicant's contentions on this issue are misplaced and that there is no basis for his assertion that the screening report contains gaps or lacunae, whether in relation to concrete or sediment run-off during construction or otherwise. First, I agree that it is primarily a matter for the Board or its inspector to determine whether it has

sufficient information before it in order to carry out its functions at the stage 1 screening stage. The Board's inspector expressly stated in her report (at para.8.6.4) that she had sufficient information on the file (including the screening report) to enable her to carry out a screening determination. In my view, the Board's inspector was entitled to reach that conclusion on the basis of the evidence before her. The position is somewhat analogous to that which existed in *People Over Wind (Ire)* (referred to above) albeit that in that case the court was considering the information before the Board at the stage 2 appropriate assessment stage. I also agree that a finding that the inspector has adequate information before her in order to issue a screening determination is one which can be challenged on the grounds set out in *O'Keeffe*. It would be open to an applicant to point to obvious deficiencies in the information before the Board in mounting a challenge on those grounds. However, in my view, there were no such deficiencies in the present case and no basis for impugning the inspector's conclusion that she had sufficient information before her to carry out a screening determination.

117. Second, I have reviewed the screening report and the conclusions contained within that report in detail and I am satisfied that there are no gaps or lacunae in the report either with regard to concrete or sediment run-off during construction or otherwise. I agree with the submissions made on behalf of the Board that these contentions are made by the applicant on the basis of a misreading or incomplete reading of the screening report. With regard to concrete, it is true that in the brief description of the proposed development in the screening report, reference is made (at page 9) to the fact that, during the construction phase, concrete will be used and that concrete is *"highly toxic to aquatic life*" as well as "*potentially polluting*". It is also said that there will be *"extensive earth works which will result in sediment run-off from the site".* It is not, however, said in that part of the screening report that there will be any potential pathway or route for concrete to escape from the site during construction. When one turns to the section of the report dealing with the assessment of how the development might affect the relevant European sites, the screening report states that in order for an effect to occur there must be a pathway between the source (the development site) and the receptor (the particular European site, in this case the most relevant one being the River Nanny Estuary and Shore SPA). It states that where a pathway does not exist, an impact cannot occur. No pathway for the potential escape of concrete during construction is identified and the clear inference from that part of the report is that no such pathway exists. When dealing with sediment run-off, it is said that while there will be extensive earth movement during construction, there are no watercourses on the site which could act as a pathway to any European site and that run-off during the construction phase is likely to be absorbed into the ground. The report then says that the release of sediment to the shoreline, should it occur, can have no negative effect on the habitat there, and that there would, therefore, be no effect on the River Nanny Estuary and Shore SPA. The basic point is that there is no pathway for the sediment run-off by reason of the absence of any watercourse. Even if, contrary to that finding, sediment run off was to be released to the shoreline, the report concludes there would be no adverse effect on the European site from that sediment run-off. No evidence has been adduced by the applicant to contradict that statement. Moreover, the statement is supported by evidence from Aldi in the form of

Mr. Fogarty's affidavit. I have summarised the relevant parts of Mr. Fogarty's affidavit on this issue earlier in the judgment. At the risk of repetition, he identifies the absence of any potential pathways by reason of the absence of water courses on the site at para. 14 of his affidavit. As regards concrete, he notes that there is no direct pathway for concrete to reach the shoreline due to the absence of water courses (at para. 15). As regards sediment run-off from earth works, he explains (at para. 16 of his affidavit) that estuaries and shorelines are naturally rich in sediment and particular matters such as mud and sand and are not "*in any way sensitive to sediment run-off from earth works*" unlike the position of rivers. As regards rainwater, he states that it will generally percolate into the ground and, as pointed out in the screening report, there is no direct pathway for it to reach the shoreline due to the absence of water courses.

118. Third, the inspector was clearly satisfied with the conclusions in the screening report on these issues as she notes (at para.6.3) the absence of any watercourse on the site which could act as a pathway to any European site.

119. Fourth, the applicant has not put forward any evidence, whether from an expert or otherwise, to contradict the findings contained in the screening report or the evidence of Mr. Fogarty. Notably, the applicant does not assert or provide any evidence of the existence of a water course or any pathway from the development site to the European site across the road.

120. Fifth, I would further observe that the conservation objective in respect of the particular European site close to the development, namely the River Nanny Estuary and Shore SPA is the protection of certain species of birds and not aquatic life (to which it is said in the screening report concrete is highly toxic).

121. In those circumstances and for these reasons, I do not accept that there are any gaps or lacunae in the screening report which was considered by the Board's inspector in screening the development for appropriate assessment. Therefore, I am not satisfied that there is any infirmity in the Board's decision on this point.

122. I am satisfied in the circumstances that the applicant has failed to discharge the onus of proof which rests on him (see for example *Harrington v. An Bord Pleanála* [2014] IEHC 232 ("*Harrington*") and *An Taisce v. An Bord Pleanála* [2015] IEHC 633 ("*An Taisce*")) to show that there were gaps or lacunae in the screening report relied on by the Board's inspector to screen the application for this development for appropriate assessment.

(2) Mitigation measures at the screening stage

123. The final argument advanced by the applicant under the Habitats Directive heading is that Aldi, in the screening report, and the Board's inspector, in carrying out her screening determination on the basis of that report, relied on mitigation measures in breach of Article 6(3) of the Habitats Directive. The applicant relies in support of this ground on the Commission Guidance referred to earlier, namely, "*Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC*" (2001) and the recent decision

of the CJEU in *People over Wind*. The particular measures which the applicant contends constitute mitigation measures and which he asserts Aldi impermissibly relied upon in the screening report, and the Board's inspector impermissibly relied in screening the development for appropriate assessment, are the SUDS measures incorporated in the development design as referred to in Aldi's planning submission report to Council's engineering and in the screening report. The applicant asserts that these are measures which were impermissibly taken into account by the Board's inspector at the stage 1 screening stage.

124. The response of the Board and Aldi to this ground of challenge is this. First, they object to the applicant's reliance on this ground on the basis that it was not properly pleaded by the applicant as required by O. 84 r. 20(3) RSC. While a general allegation was made in the statement of grounds to the effect that the screening report, and the Board's inspector, impermissibly relied on mitigation measures which they were not entitled to do, no particulars or details of the measures allegedly wrongfully relied up were provided by the applicant until a brief mention was made of SUDS in the affidavit sworn by Mr. Downey, the applicant's solicitor, on 18th April, 2018 and in the applicant's written submissions. Second, and without prejudice to that fundamental objection, the Board and Aldi contend that there was no reliance on mitigation measures in the screening report or in the screening determination made by the Board's inspector. They submit that there was no reference in the screening report or in the inspector's report to mitigation measures at all. Third, they contend that SUDS are not mitigation measures but rather standard drainage systems required to be incorporated in all new developments (with limited exceptions) and that they were not included in the design for this development for the purpose of mitigating any impact of the development on any European site. They contend, therefore, that the SUDS measures do not amount to mitigation measures as that term was described and considered by the CJEU in *People over Wind.*

125. In assessing this ground of challenge advanced by the applicant, I will start by considering the sort of mitigation measures which a competent authority, such as the Board, is precluded from considering at the stage 1 screening stage. Having done so, I will then consider how the applicant has pleaded his case on this issue and determine whether it was open to the applicant to raise the argument at all in light of the pleadings. Depending on my conclusion on that latter issue, it may be necessary for me to consider whether the screening report and the Board's inspector did take into account mitigation measures which they were not entitled to take into account under Article 6(3). In that regard, it may be necessary for me to consider whether SUDS are mitigation measures, as that term is properly understood for the purposes of the Habitats Directive.

126. The applicant relies on the Commission Guidance document referred to above. At para. 2.6 of that document, in the context of mitigation, it is stated:

> *"However, it is important to recognise that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project*

or plan on a Natura 2000 site. … To ensure the assessment is as objective as possible, the competent authority must first consider the project or plan in the absence of mitigation measures that are designed into a project. Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported. It will then be for the competent authority, on the basis of consultation, to determine what type and level of mitigation are appropriate".

127. The uncertainty which existed in Irish (and English) case law as to whether mitigation measures could be relied upon at the stage 1 screening stage was conclusively resolved by the CJEU in *People over Wind*. The judgment of the CJEU in that case was given on foot of an Article 267 reference from the High Court (Barrett J.) in the context of a dispute between the applicants in the case and Coillte Teoranta ("Coillte"). Coillte had instructed consultants to screen for appropriate assessment a project involving the connection of a wind farm to the electricity grid by cable. If the screening exercise resulted in a determination that an appropriate assessment was required, the project in question was not an exempted development and planning permission was required. The screening report prepared by Coillte's consultants concluded that the works at issue would not have a significant effect on the relevant European sites and that as a consequence no appropriate assessment was required. The High Court found that the decision that an appropriate assessment was not required was based on certain "*protective measures"* referred to in the screening report. The High Court referred the following question to the CJEU for a preliminary ruling:

> *"Whether, or in what circumstances, mitigation measures can be considered when carrying the screening for appropriate assessment under Article 6(3) of the Habitat's Directive?"*

128. In its judgment, the CJEU, having considered the provisions of Article 6 of the Habitats Directive and case law of the CJEU, and having noted that there is no reference in Article 6 to any concept of a "*mitigation measure*", stated that the term mitigation measures should be understood as denoting:

> *"measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned".*

The reference to the "*site concerned*" is a reference to the relevant European site potentially affected by the development at issue.

129. The CJEU, therefore, had to consider whether Article 6(3) of the Habitats Directive had to be interpreted as meaning that "*in order to determine whether or not it is necessary to carry out subsequently an appropriate assessment of a project's implications for a site concerned, it is possible, at the screening stage, to take account of the measures intended to avoid or reduce the project's harmful effects on that site*". (para. 27).

130. The CJEU proceeded to analyse Article 6(3) and the stages provided for in that Article and then considered whether "*measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned can be taken into consideration at the screening stage* …" (para. 31).

131. It then considered the settled case law of the court in relation to the test for screening under Article 6(3) and noted:

> *"… the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment pre-supposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out."* (para. 35).

132. The CJEU was clearly considering in that case measures which are intended to avoid or reduce the harmful effects of a particular development on the European site or sites which are potentially significantly affected by the development at issue.

133. The court went on to conclude that a full and precise analysis of such measures must be carried out, not at the screening stage, but at the appropriate assessment stage. Otherwise, the court concluded the practical effect of the Habitats Directive, in general, and the assessment stage, in particular, would be deprived of its purpose and an essential safeguard provided for by the Habitats Directive would be circumvented (para 37).

134. In light of its conclusions, the CJEU answered the question referred as follows:

> *"…Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site."* (para. 40).

135. As noted above, it is clear from the repeated references contained in the passages quoted above from the judgment that the measures which are not permitted to be taken into account at the screening stage are those which are "*intended to avoid or reduce the harmful effects*" of the particular plan or project on the relevant European site. Furthermore, it is evident from the judgment that measures which are not so intended are not ruled out from consideration at the screening stage. It is necessary, therefore, to consider in the case of measures which are said to be ruled out from consideration at the screening stage, whether they are "*intended to avoid or reduce the harmful effects"* of the development on the relevant European site. If they are, then the measure is a mitigation measure which may not be considered at the screening stage. If they are not, then they are not ruled out from consideration under Article 6(3) as interpreted by the CJEU in *People over Wind.*

136. Having set out what the test is for determining whether a measure is a mitigation measure which is not permitted to be considered at the screening stage, it is necessary to determine the issue as to whether it is open to the applicant to advance this ground of challenge at all in these proceedings. The applicant pleaded the point very generally in para. E(11) of the statement of grounds. In support of his claim that the Board had breached the Habitats Directive, the applicant pleaded as follows:

> *"11. It is further the applicant's case that the screening report relied upon by the notice party and the respondent impermissibly incorporated and relied upon mitigation measures in this regard which it was not entitled to do and contrary to the requirements of the Directive and para.2.6 of the Guidance of the European Commission thereon".*

137. The applicant did not specify in the statement of grounds what mitigation measures he was referring to and how those measures were allegedly impermissibly relied upon in the screening report by the Board's inspector. Notwithstanding that the applicant swore two affidavits (one on 13th November, 2017 and the other on 21st December, 2017), the applicant made no reference whatsoever to the issue of mitigation measures in those affidavits.

138. Both the Board and Aldi in their statements of opposition and affidavits objected to the manner in which this ground of challenge was pleaded by the applicant. At para.13 of its statement of opposition, the Board denied that the screening report incorporated and relied upon mitigation measures as alleged. It then pleaded that the applicant had failed to identify the mitigation measures alleged to be contained in the screening report and asserted that the applicant's plea was *"too vague to permit a proper reply".* The Board then denied that the manner in which the screening for appropriate assessment had been carried out was contrary to the requirements of the Habitats Directive or of the Commission Guidance document. At para.13 of the affidavit which he swore on behalf of the Board on 8th March 2018, Pierce Dillon referred to this ground of challenge and asserted that the applicant had not specified the measures contained in the screening report which he alleged to be mitigation measures and that in the absence of further specification the Board was reserving its entitlement to reply to any specific points that may be made by the applicant on this point in any future affidavit.

139. A similar point of objection was made by Aldi at para. 8 of its statement of opposition. There was a general denial that the screening report incorporated and relied on mitigation measures as alleged. It was then pleaded that the applicant had not advanced any grounds in support of the "*vague and generalised plea*" made by him. In particular, it was pleaded that the applicant had not identified what mitigation measures were allegedly taken into account. Aldi pleaded that the applicant had failed in the manner in which he pleaded this point to comply with the requirements of O. 84, r. 20(3) RSC. The issue was also addressed at paras. 91-21 of Mr. Fogarty's affidavit. While noting that the applicant had not identified the mitigation measures which he claimed had been impermissibly relied upon and that, as a consequence, he did not know precisely what mitigation

measures the applicant was referring to, Mr. Fogarty did note that in the preceding paragraph of the statement of grounds (para.E(10)), the applicant had referred to SUDS and "*unspecified attenuation measures…designed to mitigate surface waters*". However, Mr. Fogarty was unclear as to whether that was what the applicant was referring to in the context of mitigation measures. Mr. Fogarty went on to explain what SUDS were and asserted that they were a "*standard component of virtually all projects, regardless of proximity to Natura 2000 sites*" and that they "*can be considered integral to project design rather than something which is added on*". He expressed the view that SUDS could not be considered to be mitigation measures for that reason. He further rejected the suggestion that mitigation measures were proposed or considered in the screening report or taken into account in reaching the conclusion in that report and asserted that the Board's inspector did not refer to any mitigation measures in her assessment.

140. The applicant himself did not respond to any of the affidavits sworn on behalf of the Board or Aldi. The applicant was not deprived of an opportunity of doing so but appears to have taken a deliberate decision not to do so. Instead, shortly before the hearing of the proceedings, the applicant's solicitor, Mr. Downey swore an affidavit which had one substantive paragraph (para.3). In that paragraph, he stated that he was swearing the affidavit for the sole purpose of exhibiting the technical guidance document for the "*Greater Dublin Strategic Drainage Study Regional Drainage Policies*" (the "GDSDS"). He exhibited a CD containing certain volumes of that document. Mr. Downey stated that Aldi had relied on the technical guidance document in its SUDS/drainage design of the proposed development and that Aldi had denied that those measures were mitigation measures. He stated that he was exhibiting the document to allow the court "*to draw a conclusion*" on that issue. No further affidavit was sworn on behalf of the applicant on that issue.

141. Order 84, r. 20(3) RSC provides that:

> *"It shall not be sufficient for an applicant to give as any of his grounds for the purpose of paragraphs, (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground".*

142. This provision was inserted by way of amendment to O.84 by the Rules of the Superior Courts (Judicial Review) 2011 (SI no. 691 of 2011) and gave effect to the views expressed by Murray C.J. in the Supreme Court in *AP v. Director of Public Prosecutions* [2011] 1 IR 729 ("*AP*"). In that case, Murray C.J. stated:

> *"In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought". (per Murray C.J) at para. 5, p. 732).*

143. Murray C.J. continued:

"6. It is not uncommon in many such applications that such grounds, and in particular the ultimate ground upon which leave is sought or expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted, particularly when such a ground is invariably accompanied by a list of more specific grounds.

7. Moreover, if, in the course of the hearing of an application for leave, it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.

8. There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant that in reality either go well beyond the scope of the particular ground or grounds upon which the leave was granted or simply raise new grounds.

9. *The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant such seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because if goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear…"* (per Murray C.J. at 732).

144. The Board and Aldi rely on O. 84, r. 20(3) RSC and the decision in *AP* in support of their objection. They further rely on the decision of the High Court (Haughton J.) in *Alen-Buckley*, where the court ruled out a number of arguments on the basis that they were not pleaded and, therefore, fell outside the scope of the pleaded case. In the course of so ruling, Haughton J. stated:

> *"The rules of pleading governing judicial review are quite clear and require applicants to state specifically each ground advanced and to particularise matters as appropriate. Linking new matters back to generally pleaded grounds is not permissible, nor is pointing to information which was before the Board. The court is concerned with the contents of the documentation before the Board only in the context of arguments which have been correctly pleaded".* (per. Haughton J. at para. 15).

Haughton J. continued

> "*Where new arguments or evidence arises, an application should be made to amend the pleadings so as to include such arguments or evidence…"* (para. 16).

145. In my view, the applicant has not complied with the provisions of O. 84, r. 20(3) RSC in relation to the manner in which this ground has been pleaded. While the applicant has pleaded in general terms that there was improper reliance in the screening report and by the Board's inspector on mitigation measures, the applicant did not provide particulars of what those alleged mitigation measures were and did not identify in respect of this ground of challenge the facts or matters relied upon by him as supporting the ground. All of this was required by O. 84, r. 20(3) RSC. I was not provided with any convincing reason as to why the applicant did not provide such particulars and evidence of the matters relied upon in support of this ground of challenge until this was done very belatedly and in very laconic terms in Mr. Downey's affidavit. In my view, not only did the applicant not comply with the provisions of O. 84, r. 20(3) RSC but he also failed to comply with the strictures set out by Murray C.J. in *AP*. However, I am not satisfied that in the present case the Board or Aldi have been prejudiced by the applicant's failure to comply with the provisions of the rules or with the principles in *AP*. Mr. Fogarty was in a position, notwithstanding the vague and general nature of the plea, to guess what the applicant was referring to and he dealt with it in his affidavit. It is, of course, accepted that, he should not have been put in that position. When the applicant belatedly and very close to the hearing of the case provided Mr. Downey's affidavit, asserting in a vague and roundabout way that SUDS were the mitigation measures relied upon, the Board and Aldi were put on notice at that very late stage that this was the case the applicant was making. While they should not have been put in that position and while applicant did not comply with the provisions of the RSC in that regard, I am satisfied that the Board and Aldi were in a position fully to (and did) address the point at the hearing on the basis of the evidence before the court and that they were not prejudiced in doing so. Had I been of the view that the Board and Aldi were prejudiced in dealing with this ground of challenge, I would have precluded the applicant from pursuing it. However, I do not believe that they were. In those circumstances, I have concluded that notwithstanding the breach of O.84 r20(3) RSC it is appropriate for me to consider the merits of the ground.

146. It is, therefore, necessary to consider whether SUDS measures are mitigation measures as that term was defined and considered by the CJEU in *People over Wind.* If they are mitigation measures and if they were relied upon in the screening report and by the Board's inspector in carrying out her screening determination, then the applicant will succeed on this point. However, in my view SUDS measures are not mitigation measures as that term was defined and considered by the CJEU in *People over Wind.* While SUDS were considered in the screening report and by the Board's inspector at the stage 1 screening stage, they were not considered as mitigation measures which are intended to avoid or reduce the harmful effects of the proposed development on any European site and in particular on the River Nanny Estuary and Shore SPA. I have reached that conclusion for a number reasons.

147. The first is that SUDS measures are required by the GDSDS to be incorporated in all new developments in order to mitigate the impact of the development on the aquatic environment unless a developer can demonstrate to the local authority that inclusion of

SUDS is "*impractical due to site circumstances or that its effect on the control of run-off would be minimal, such as for rural sites"*. (para. 6.1 of the GDSDS). I have considered the relevant provisions of the GDSDS provided to me from the material exhibited at exhibit "*PD1*" to Mr. Downey's affidavit. I note that among the key issues driving the policy contained in the GDSDS, which are summarised at para. 1.2 of the document, was the operation of storm water and fire water drainage systems, insofar as this related to environmental management and "*insofar as such urban drainage systems can impact negatively on the natural water environment in a number of respects*". Those respects include storm water run-off, foul sewage and infiltration/exfiltration. The "*key drivers*" of the policy contained in the GDSDS are stated at (para. 1.3) to emanate from the adoption of the Water Framework Directive (2000/60/EC of the European Parliament and of the Council) which requires an approach to river basin management aiming to restore and maintain "*good ecological status*" to surface waters and good status to ground waters. Other drivers include international agreements to which Ireland is a signatory. The legal requirements behind the policy are derived from the Water Framework Directive as explained in s. 2 of the GDSDS. As is stated at para. 3.2, certain policy proposals are contained in the GDSDS having regard to the *"objectives of a sustainable environment complying with the Water Framework Directive and associated Water Quality Directive and Regulations*". The policy proposals include incorporation of SUDS measures in all new developments (with limited exceptions) as well as providing for river management and conservation and so on. Elsewhere in the GDSDS, it is made clear in the overview of sustainable drainage (at para. 6.2) that the policy contained in the document is directed to the aquatic environment with sustainable drainage systems aiming towards *"maintaining or restoring a more natural hydrological regime, such that the impact of urbanisation on downstream flooding and water quality is minimised*". The document further states that: *"Originally, SUDS were introduced primarily as single purpose facilities however this has now evolved into more integrated systems which serve a variety of purposes, including habitat and amenity enhancement …*". The Board and Aldi rely on parts of the GDSDS in support of their contention that SUDS are not mitigation measures. The applicant relies on other parts of the document. It is clear, however, from a review of the extracts from the GDSDS and from the uncontested affidavit evidence of Mr. Fogarty on behalf of Aldi (in particular his statement, at para. 19 of his affidavit), that SUDS "*is now a standard component to virtually all projects, regardless of proximity to Natura 2000 sites, and therefore can be considered integral to project design rather than something which is added on*". It is his view that SUDS "*could not be considered to be a mitigation measure for that reason"*.

148. Furthermore, the policy behind requiring SUDS and the inclusion of SUDS measures in a development is not in any way directed to the protection of any European site which might potentially be affected by a particular development off that site. It is clear that the key driver for the requirement to incorporate SUDS in development is the Water Framework Directive and not the Habitats Directive. SUDS are required entirely without reference to the presence of a European site within the zone of influence of a particular development.

149. In my view, SUDS measures are not "*measures that are intended to avoid or reduce the harmful effects*" of a particular development on a European site. They are not "i*ntended"* to have that effect as they are required to be incorporated in developments for the reasons set out in the GDSDS in light of the objectives of the Water Framework Directive and associated water quality Directives and Regulations. They are not required to be incorporated by reason of the potential effect of a development on a European site. SUDS measures cannot, therefore, in my view be regarded as measures that are "*intended*" to "*avoid or reduce*" the harmful effects of a development on a European site. It is very clear, in my view, from the judgment of the CJEU in *People over Wind* that it is only measures which are "*intended*" to "*avoid or reduce*" the harmful effects of a development on a European site which are ruled out from consideration at the screening stage as being mitigation measures. The requirement that in order to be mitigation measures the measures must be intended to have that effect is clear from several paragraphs of the judgment of the CJEU in *People over Wind,* such as paras. 26, 31, 35 and 40. I conclude, as a matter of fact and law, that SUDS are not mitigation measures which a competent authority is precluded from considering at the stage 1 screening stage.

150. There is no doubt that SUDS measures are included in the development. That is clear from the planning submission report to the Council's engineering service submitted by Aldi. The SUDS measures included in the development are described in s. 3.0 where it is said that:

> *"Methods for surface water disposal within the development using sustainable urban drainage systems (SUDS) methods i.e. re-use and/or direct infiltration to the sub-soils, have been explored and proposed where possible."*

151. It is noted in the same section of that submission that, with regard to surface water disposal and source control measures, the technical guidance document for the GDSDS must be complied with for the proposed development and that "*a comprehensive evaluation of the site for the implementation of various SUDS methods has been carried out*". Those methods are then described over the following pages of the submission.

152. The SUDS methods incorporated in the development are described in the screening report (in the section providing a "*brief description of the proposed project*", at p. 7). In that part of the report it is stated that:

> *"Surface water from the project footprint will drain via a new drainage network to connect with the public drain. Rain run-off will be separated from foul wastewater within the site. Sustainable drainage systems (SUDS) are to be incorporated into the project design and this will include a suitably sized soakaways. Run-off will pass from this tank and through a Class 1 oil/grit interceptor and flow limiting device prior to discharge to the public surface water drain on the R150. In this way outfall rates will be maintained at a 'greenfield' rate."*

153. SUDS measures are also referred to later in the screening report when considering the potential effects of the development on the European sites within the zone of influence of

the development and, in particular, when considering the issue of potential "*pollution from surface water during operation"* (at p. 18 of screening report).

154. There they are described as "*standard SUDS techniques*" incorporated into the new surface water infrastructure in the development to maintain discharge rates to "*greenfield*" levels. I am satisfied that SUDS measures are not being referred to in the screening report as measures which are "*intended to avoid or reduce the harmful effects*" of the development on any European site. They are incorporated entirely without reference to the presence or otherwise of a European site within the zone of influence of the development and are not intended to avoid or reduce any effect of the development on any European site.

155. I am satisfied, therefore, that Mr. Fogarty is correct in his evidence that having regard to the source of the requirement for the incorporation of SUDS measures and having regard to the fact that they are now standard in virtually all projects regardless of proximity to European sites and are integral to project design, SUDS cannot be considered to be mitigation measures.

156. I am also satisfied from a review of the screening report that they were not considered as mitigation measures within the correct meaning of that term as interpreted by the CJEU in *People over Wind* in that report. The inspector makes reference to SUDS measures in para. 8.6.3 of her report (under the "*appropriate assessment*" heading) however, she is merely summarising the contents of the screening report when referring to the incorporation of SUDS techniques into the surface water infrastructure enabling discharge rates to be maintained during operation to "*greenfield*" levels. She does not consider the SUDS measures as measures which are intended to avoid or reduce any harmful effects from the development on any European site within the zone of influence of the development. I conclude, therefore, that the inspector did not consider the SUDS measures incorporated in the development as mitigation measures for the purposes of the Habitats Directive.

157. Finally, this context, some reliance was placed by the applicant in support of his contention that SUDS methods were mitigation measures on the flood risk appraisal contained in s. 5.0 of the planning submission report to engineering services submitted by Aldi to the Council. This argument was apparently directed to the issue that a purpose of the inclusion of these SUDS measures was to protect adjoining areas from flooding from the development site itself. However, I agree with the submission made on behalf of the Board that the applicant's contention in that regard is misplaced. It is inconsistent with the evidence contained in the flood risk appraisal section in the planning submission report where it is stated that the site of the proposed development is "*considered to be in Flood Zone C - where the probability of flooding from rivers and seas is low".* In support of this statement reference is made to the East Meath LAP where it was noted that Laytown is subject to potential flooding from the River Nanny Estuary, its tributaries and from tidal and coastal levels. The concern being addressed here is not flooding from the development site to any European site (such as the River Nanny Estuary and Shore SPA)

but flooding of the development site itself. That is why it is stated in the planning submission report (at para. 6.4.1) that detailed proposals for surface water management associated with the development were included in the planning submission, namely, to mitigate flooding of the development site itself rather than from the site to adjoining areas. In any event, there is no evidence whatsoever before the court to support any contention that there is a risk of flooding from the development site into any of the relevant European sites and, in particular, the River Nanny Estuary and Shore SPA or that any of the SUDS measures incorporated in the development were included with the intention of avoiding or reducing any such risk to a European site.

158. For these reasons, I conclude that on the evidence the SUDS measures incorporated in the development, as required under the policy contained in the GDSDS, are not mitigation measures as that term has been defined and considered by the CJEU in *People over Wind.* It is clear from the uncontested evidence before the court that the inclusion of the SUDS measures is not with the intention of avoiding or reducing any potentially harmful effect of the development on any European site and that their inclusion is required for completely different reasons. Those measures are included entirely without reference to the proximity of the site to a European site. In my view, therefore, the applicant's challenge on this ground is misplaced and must be rejected.

B. Retail Impact Assessment – Alleged Erroneous Identification of Primary Retail Area

159. The second ground on which the applicant seeks to challenge the Board's decision to grant permission for the development is that the applicant contends that the revised sequential test submitted by Aldi as part of the retail impact statement submitted by Aldi to the Council with its planning application contained a fundamental error. The applicant contends that that error was compounded by the Board's inspector in her report. The applicant says that Aldi and the Board were under an obligation to consider the site of the proposed development as an "*out of centre*" location rather than an "*edge of centre"* location. The essential basis for this contention is that, on the applicant's case, the "*primary retail area*" by reference to which the location of the development should have been assessed is Bettystown and not Laytown. The retail impact statement and the revised sequential test submitted by Aldi classified the site of the proposed development as "*edge of centre*" for the purposes of the Retail Planning Guidelines and the sequential approach to development, which is one of the key policy objectives of those guidelines. The Board's inspector agreed with the classification of the site as "*edge of town"* (para. 8.2.5 of her report). The applicant submits that the inspector in accepting the classification of the site contained in the retail impact statement and revised consequential test, and the Board in accepting the inspector's recommendation to grant permission in respect of the development, made a fundamental error in relation to the classification of the location of the site. The applicant contends that this fundamental error arose as a result of a misinterpretation by Aldi, the Board's inspector and the Board itself of a number of planning documents including the Retail Planning Guidelines and the Meath Retail Strategy (contained at Appendix 5 of the Development Plan).

160. In support of this ground of challenge, the applicant notes that the policy background to the revised sequential test is identified in s.6.0 of the retail impact statement submitted by Aldi to the Council is that retail developments should be located in the city or town centre (and district centre, if appropriate) and should only be permitted in "*edge of centre*" or "*out of centre*" locations where other options have been exhausted as provided for in the Retail Planning Guidelines. The applicant states that the Board is required to have regard to these guidelines under s.28 of the 2000 Act.

161. The applicant submits that it is essential to identify a single primary retail area in order correctly to apply the sequential approach referred to in the Retail Planning Guidelines. He submits that the key criterion for establishing whether a particular location is *"centre", "edge of centre*" or "*out of centre*" within the meaning of those terms in the Retail Planning Guidelines is to identify the relevant "*primary retail area*" and that proximity of the site to that "*primary retail area"* will determine whether a site is "*edge of centre"* or "*out of centre*". He refers in this context to para. 4.7 of the Retail Planning Guidelines where "*edge of centre*" retailing is discussed and where it is stated:

> *"Where, following the sequential approach, the consideration of an edge of centre site becomes necessary, the applicant and the planning authority must ensure that edge of centre sites are within easy walking distance of the identified primary retail area of the city or town. The distance cannot be defined precisely as different centres vary in their size and scale but should generally not be further than 300-400 metres".*

162. The applicant further relies on definitions contained in the glossary of terms at Appendix 1 to the Retail Planning Guidelines where the terms "*retail area*", "*centre", "edge of centre"* and "*out of centre*" are defined (A1.6, page 55). The term "*retail area*" is defined as "*that part of a town centre which is primarily devoted to shopping*". The term "centre" is defined, for the purposes of the guidelines, as "*a city or town centre"* and can also refer to "*the centre of a district or neighbourhood centre which has been identified in the settlement hierarchy of a development plan*". The term "*edge of centre*" is defined as *"a location within easy walking distance of the primary retail area of a city town centre or district centre*". Finally, the term "*out of centre*" is defined as *"a location that is clearly separate from a town centre but within the town development boundary, as indicated in a development plan or local area plan*". The applicant relies on the definition of "*edge of centre*" just referred to.

163. The applicant contends that it is necessary to identify the "*single primary retail area*" in order to apply the sequential approach and that this is supported not only by the above definitions of "*edge of centre"* but also made clear at para. 3.3 of the Retail Planning Guidelines where there is a requirement that county development plans, inter alia, identify and *"define, by way of a map, the boundaries of the core shopping areas of city and town centres and also location of any district centres*".

164. The applicant further relies on the Meath Retail Strategy where he submits that the core shopping area for "Laytown/Bettystown" is identified by reference to a map which refers

only to Bettystown and that the same document, while identifying the retail areas in Laytown (including the site of the proposed development), identifies the "*core retail areas"* of Bettystown as the town centre and Bettystown Town Centre (the mixed use development in Bettystown referred to earlier) and further identifies Bettystown as the "*primary retail centre*" for the Laytown/Bettystown/Mornington cluster. He submits that the retail strategy does not identify Laytown as a "*core area*" for the purposes of the Laytown/Bettystown/Mornington cluster or as the "*primary retail centre*". He relies on similar statements made in the East Meath LAP. He further submits that the Meath Retail Strategy identifies "*core areas*" for all level 3 centres (of which Bettystown/Laytown is one). He also relies on other aspects of the Meath Retail Strategy in support of his contention that it is necessary to identify a single primary retail area from which to assess whether a site is "*centre", "edge of centre*" or "*out of centre*". He contends that the designation of Bettystown as the "*primary retail area*" for the Laytown/Bettystown/Mornington cluster means that Bettystown, and not Laytown, ought to have been identified as the "*primary retail area*" for the purposes of the retail impact statement and revised sequential test submitted by Aldi. This is the alleged fundamental error on which the applicant relies and which he says affects the Board inspector's report and the Board's decision. He further argues that the Retail Planning Guidelines require that a single "*primary retail area"* be identified for each cluster and that Bettystown is identified as such in the retail strategy for the purposes of the Laytown/Bettystown/Mornington cluster. It is the applicant's contention that the development site ought to have been classified as an "*out of centre*" location and that development should only be permitted at such a location in exceptional circumstances (in accordance with the sequential approach to development referred to in the Retail Planning Guidelines). As a consequence of this alleged fundamental error, the applicant submits that no detailed retail impact assessment was submitted nor was there any assessment of the diversion of trade from Bettystown and no mitigation of any such effects was considered.

165. It is fundamental to this ground of challenge advanced by the applicant that the interpretation of the relevant planning documents including the Retail Planning Guidelines and the Meath Retail Strategy is a matter for the courts and not for the exercise of planning judgement or expertise by the planning authority or the Board. The essential issue, he contends, is that the Board's inspector and the Board misinterpreted those documents and, as a consequence, erroneously accepted the classification of the site as an "*edge of centre*" site as a consequence of the erroneous acceptance of Laytown as the relevant primary retail area or centre from which to judge the location of the site in accordance with the sequential approach. The applicant relies principally on the decision of the High Court (McGovern J.) in *Navan Co-Ownership v. An Bord Pleanála* [2016] IEHC 181 ("Navan"). The applicant accepts, however, that these planning documents are not to be interpreted as if they were legislation.

166. In response, the Board and Aldi reject the contention that there was any fundamental error in the revised sequential test submitted by Aldi or in the assessment by the Board's inspector or by the Board of that test. Both contend that the inspector was correct in

accepting that Laytown was the appropriate location from which to assess whether the development site was an "*edge of centre*" or an "*out of centre"* site. They submit that the applicant's claim to the contrary is incorrect and not supported by a correct reading of the relevant planning documents. Further and in any event they contend that the exercise which the inspector and the Board was required to undertake in assessing the classification of the location of the development was a complex and nuanced one in which it was necessary to exercise planning expertise and judgement. It was much more nuanced than the consideration of a strict question of law. They contend, therefore, that without prejudice to their assertion that the inspector and the Board were correct in their interpretation of the documents, the conclusion of the inspector, which was accepted by the Board, can only be reviewed on the grounds of unreasonableness or irrationality in accordance with the principles *O'Keeffe* (and other cases such as *Meadows v. Minister for Justice and Equality* [2010] 2 I.R. 701). In that regard the Board in particular relies on decisions such as that of Haughton J. in *Ratheniska Timahoe and Spink (RTS) Substation Action Group & Ors. v. An Bord Pleanála* [2015] IEHC 18 ("*Ratheniska*") and of Noonan J. in *Aherne v. An Bord Pleanála* [2015] IEHC 606.

167. The Board (supported by Aldi) contends that in advancing this ground of challenge the applicant is effectively seeking to review the merits of the conclusions reached by the inspector and the Board on the validity of the retail impact assessment contained in the retail impact statement and in the revised sequential test. The Board submits that the inspector considered all of the relevant issues arising in respect of retail impact, had regard to all of the relevant planning documents including the Retail Planning Guidelines, the East Meath LAP and the Meath Retail Strategy and reached her conclusions in relation to those documents. It submits that the application of those documents in the retail impact statement and revised sequential test was quintessentially within the jurisdiction and competence of the Board and its inspector. The Board submits that it is inappropriate to ask the court to review the merits of the inspector's conclusions on these issues and that there is no basis upon which the inspector's determination (as accepted by the Board) in relation to the location and status of Laytown could be reviewed by the court on the facts of this case.

168. In developing these submissions, the Board stresses that what was at issue here was not a relatively simple exercise of reviewing and interpreting a development plan (which was at issue *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527 ("*Tennyson*")) but rather it says planning documents and policies which are required to be considered in the context of an assessment of the retail impact of a development are multi-layered and contain overlapping and, at times, conflicting policies and objectives. The Board refers by way of example to the fact that the site of the proposed development in Laytown is zoned B1 allowing for "*shop – local*" and "*shop – major*" development and yet, on the applicant's case, a strict application of the Retail Planning Guidelines might preclude such development at the site location notwithstanding that zoning. The Board further highlights the fact that in the Retail Strategy, Laytown and Bettystown are dealt with together as forming the Laytown-Bettystown-Mornington cluster and that, as a consequence, it is difficult to determine where the centre of the cluster may be. The

Board further submits that the main concern of the retail strategy is the leakage of retail expenditure out of the Laytown/Bettystown area to the larger towns such as Drogheda and to Dublin. It submits that the Retail Strategy is not directed to a dispute or to competition as between Laytown and Bettystown in relation to retail development and, in particular, convenience or supermarket shopping, but rather is designed to reduce or prevent leakage of retail expenditure out of the area. The Board also refers to several parts of the Retail Strategy in which Laytown and Bettystown are dealt with on a "*dual handed*" basis in which Bettystown is not classified as the centre or primary retail area in the Laytown-Bettystown-Mornington cluster to the exclusion of Laytown. It submits that Bettystown is not classified as the single town centre for the cluster. My attention was drawn to several parts of the Retail Strategy which are said to demonstrate this "*dual handedness"* of approach to Bettystown and Laytown. The Board submits from a review of the planning documents that the Meath Retail Strategy expressly provides for the development at issue and does not preclude Laytown from being part of the centre for retail in the area. It expressly leaves it open for retail developments such as the Aldi development to take place in Laytown and in the particular location in Laytown at issue. The Board submits that the applicant is essentially seeking to preclude a development which is expressly permitted and envisaged under the relevant zoning applicable to the site location and under the Meath Retail Strategy itself.

169. The Board (and Aldi) also rely on the decision of McGovern J. in Navan and the various authorities mentioned in it in support of the approach which they say the court should take in considering this ground of challenge raised by the applicant.

170. In its submissions, Aldi adopts a similar approach to the Board and helpfully took the court in some detail through the Retail Planning Guidelines and the Meath Retail Strategy in order to demonstrate to the court that the development at issue here is consistent with the guidelines and with the strategy and that no error was made by Aldi in its application of the sequential test or by the Board's inspector or the Board in accepting that test, including the classification of Laytown as the correct point from which the development site is classified as "*edge of centre*".

171. I have not reproduced or summarised the full extent of the submissions advanced by the parties on this issue. However, I have carefully considered and taken all of them into account in reaching the conclusions on this issue which I set out below.

172. In addressing and determining this issue it is necessary to outline the approach which the court should take in reviewing the inspector's conclusion (as accepted by the Board) that the site of the development is "*edge of town*" (or "*edge of centre*" as it was described in the retail impact statement and revised sequential test) which conclusion was accepted by the Board. (I should observe here that the Retail Planning Guidelines themselves appear to use the terms "*edge of centre*" and "*edge of town*" interchangeably: See for example, para 4.7, p32. I do not, therefore, read any significance into the fact that the inspector uses the term "*edge of town*" rather than "*edge of centre*" in her report). Before doing

that it is necessary to return to the inspector's report to examine how the inspector dealt with this issue.

173. The inspector dealt with the issues raised in relation to retail impact at s. 8.2 of her report. At para. 8.2.1 she referred to the arguments made in relation to retail impact and to the point made by a number of the appellants that Bettystown is intended to act as the "*primary retail service area for the settlement of Bettystown/Laytown*". She noted that a number of the appellants had criticised the (revised) sequential test submitted by Aldi. She summarised Aldi's response to those complaints.

174. At para. 8.2.2 the inspector referred to the Meath Retail Strategy which identified Laytown/Bettystown as a Level 3 centre and noted that the retail policy objectives for a centre such as that are stated as: "*incorporating a range of convenience and comparison retail facilities adequate to serve the everyday needs of the catchment population*". She also noted that the Meath Retail Strategy "*reaffirms the guidance set out in the Retail Planning Guidelines 2012 around the sequential approach and the requirement and the enhancement of the vitality and viability of town centres*". She referred to paras. 5.6.6 and 5.6.32 of the Retail Strategy stating that Bettystown "*performs the retail function for the Laytown/Bettystown/Mornington cluster" and that "it is expected that retail growth will be primarily directed towards Bettystown"*. The inspector interpreted that to mean "that while the growth is expected to be primarily in Bettystown, retail growth in Laytown is not precluded". She then referred to para. 5.6.23 of the Meath Retail Strategy referring to the limited opportunities for the expansion of the town centre of Laytown and to the fact that infill development along Alverno Terrace and Strand Road are identified as having retail development potential. She noted that para. 8.4.7 of the Retail Strategy outlines the "*key objectives*" in respect of Laytown including:

"• *Recognise the association of Laytown with Bettystown, which is the primary retail service centre in the Laytown/Bettystown/Mornington cluster;*

• *Support the provision of small to medium scale convenience retail development in Laytown to support the needs of the local community".*

175. None of this is disputed as a matter of fact by the applicant in these proceedings.

176. At para. 8.2.3 the inspector referred to the East Meath LAP and to the zoning of the site of the development as "*B1 Commercial/Town or Village Centre*" with an objective to "*protect, provide for and/or improve town and village centre facilities and uses*" and that uses normally acceptable under this zoning include "*shop – local*" and "*shop – major".* She noted that the East Meath LAP is "*supportive of development of the retail and service role of Laytown/Bettystown as a level 3 sub-county town and recognises that there is a need to address retail expenditure leakage from the settlement which is performing poorly"*. Again none of this is disputed by the applicant in these proceedings.

177. The next relevant part of her report in this issue is para. 8.2.5. This is the part of the inspector's report with which the applicant takes issue and he bases his challenge on this ground on what is said here. It is worth setting out in full what the inspector says:

> *"8.2.5 I would agree that the appeal site can be classified as an 'edge of town' site. It is c150m north of established retail provision on Strand Road and c350m south west of retail provision in the vicinity of the train station, which are the two retail areas in Laytown. Further information was sought by the planning authority around the flexibility of alternative sites in Bettystown. While the retail strategy recognised that Bettystown is currently the prime (sic) retail service centre for the settlement, it supports the provision of small to medium scale convenience retail development to serve the needs of the community in Laytown. In relation to the sequential test, three sites were selected in Bettystown, including vacant units in an incomplete development. I am satisfied that it has been demonstrated through the sequential test (as revised at further information stage) that these alternative sites can be discounted as they are not suitable, available or viable for the proposed retail development".*

178. As already noted, the applicant challenges the inspector's agreement with the classification of the site of the development as "*edge of town*" (or "*edge of centre*" as it is described in the retail impact statement and revised sequential test). The applicant's case is that the starting point for determining the location should have been Bettystown and not Laytown. The applicant does not dispute the distances referred to in the above paragraph of the inspector's report.

179. The inspector continued, at para. 8.2.6, by indicating that she considered that the convenience foodstore the subject of the application fits the description of "*medium scale*" retail development which she said "*would support the local community and is supported by policy set out in the retail strategy for Laytown".* The applicant does not disagree that the development the subject of the application is a "*medium scale*" convenience retail development and that permission would be given for it provided the sequential test was properly applied. The inspector further noted that the development would be located on an "*underutilised infill site which is zoned 'B1', where the zoning category clearly allows for a medium sized primarily convenience retail store as is now proposed*". Again, I do not understand the applicant to dispute that statement.

180. In her conclusion, at para. 8.2.7, the inspector stated that she was *"satisfied that, if permitted, the development would be consistent with the retail policies set out in the East Meath LAP 2014 and the Retail Strategy for Co. Meath …*", that it would be "*consistent with national regional retail planning policy*", that it "*clearly accords with the local 'B1' zoning objective for the site".*

181. As noted earlier in this judgment, in recommending that permission be granted, the inspector set out "*reasons and considerations*" and made specific reference to the Retail Planning Guidelines, the objectives of the Development Plan, the East Meath LAP including the "*B1 – commercial/town or village centre*" zoning and the uses normally acceptable

under that zoning including "*shop-local*" and "*shop-major*" and to the action/recommendations set out in the Meath Retail Strategy "to support the provision of small to medium scale" convenience retail development in Laytown to support the needs of the local community.

182. In accepting the inspector's recommendation, the Board direction and Board order adopted verbatim those "*reasons and considerations".*

183. In terms of the approach which the court should take to reviewing the inspector's conclusion in relation to the correct classification of the development site for the purposes of the sequential approach to development, all parties have relied on the decision on McGovern J. in *Navan*. I agree that it is a directly relevant and very helpful authority on this issue. In my view, it vividly demonstrates that the proper approach for the court to take in the review of such a conclusion cannot be readily described as either a pure question of interpretation of planning documents for the court or a matter exclusively within the planning expertise and judgement of the planning authority or the Board and its inspector. The position is considerably more nuanced than that having regard to the very nature of the planning documents concerned and the overlapping and sometimes competing, and arguably inconsistent, policies and objectives promoted in those documents. This has a particular resonance in the present case when considering the respective positions of Laytown and Bettystown in the context of the Meath Retail Strategy and East Meath LAP.

184. The *Navan* case is very helpful as it acknowledges the difficulty which can exist when the court is asked to interpret planning policies and objectives. In *Navan*, the court had to consider how the zoning designation "*B1*" and the term "*town centre*" in the Navan Development Plan were to be interpreted. There was a major disagreement between the parties on the meaning and interaction of those concepts. McGovern J. set out the general principles applicable to the interpretation of planning documents such as terms used in a development plan. He first referred to the decision of the High Court (Barr J.) in *Tennyson* where, having held that the court is not the appropriate body to adjudicate on "*purely planning matters*", Barr J. stated:

> "*However where the dispute raises an issue regarding a matter of law such as the interpretation of the wording of a development plan in the light of relevant statutory provisions and the primary objective of the document, then these are matters over which the court has exclusive jurisdiction, An Bord Pleanála has no authority to resolve disputes on matters of law*" (per Barr J. at 534).

McGovern J. also noted that Barr J. in Tennyson adopted the principles governing the true construction of planning documents as outlined by McCarthy J. for the Supreme Court in *Re XJS Investments Limited* [1986] IR 750 ("*XJS*"). McCarthy J. stated:

> *"Certain principles may be stated in respect of the true construction of planning documents:*

(a) *To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.*

(b) *They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning".* (per McCarthy J. at 756).

These principles have been endorsed in several subsequent cases including *Ogalas Limited (t/a Homestore and More) v. An Bord Pleanála* [2014] IEHC 487 (High Court, Baker J.) ("*Ogalas*") *North Kerry Wind Turbine Awareness Group v. An Bord Pleanála* [2017] IEHC 126, High Court, (McGovern J.) and *Element Power Limited v. An Bord Pleanála* [2017] IEHC 550 (Haughton J.).

185. Having cited these principles concerning the construction of planning documents, Barr J. in *Tennyson* went on to state (at page 535):

> *"In the light of these authorities it seems to me that a court in interpreting a development plan should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provisions?".*

186. McGovern J. in Navan expressly endorsed that approach in looking at the relevant zoning in the case and in construing what was meant by "*town centre*" in the context of the application for planning permission at issue (para. 22 of the judgment in *Navan*).

187. However, McGovern J. also observed that in *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13 ("*Dundee*"), where the UK Supreme Court reiterated that the proper interpretation of a development plan was a matter for the courts, Lord Reed made the following observations in relation to the application of statements of policy or conflicting policies to a given set of facts:

> "*19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgement. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgement can only be challenged on the ground that it is irrational or perverse… Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean*". (per Lord Reed at para 19).

188. McGovern J. also cited the decision of Lang J. in the High Court of England and Wales in *William Davis Limited v. Secretary of State for Communities and Local Governments* [2013] EWHC 3058 (Admin), where the court stated (at para. 46):

> *"The task of reconciling different strands of planning policy on the facts of a particular case has been entrusted to the planning decision – maker. Such planning judgements will only be subject to review by this court on very limited grounds.".*

189. Drawing these principles together in his judgment in Navan, McGovern J. applied what he termed an "*holistic approach*" and looked at the particular development plan in its entirety. He noted that the development plan reflected the observations of Lord Reed in *Dundee* in that it was "*full of broad statements of policy many of which may be mutually irreconcilable, so that in a particular case one must give way to the other"* (para. 22). McGovern J. proceeded to "*read… the development plan as a whole and attempt…to discern the planning objectives of the local authority from that document*" (para. 24). He stated that the approach being taken by the applicants in the case was one which involved:

> *"..parsing and analysing the development plan in an unnecessarily technical and over legalistic manner which is precisely what the Supreme Court in XJS Investments Limited cautioned against. In effect, the applicant invites the court to look at the development (plan) as though it was an Act of the Oireachtas or subordinate legislation which had been drafted by parliamentary draftsmen rather than a plan for the town of Navan which includes a broad statements of policy"* (para. 25).

190. McGovern J. concluded that he could see nothing wrong in the way in which the Board interpreted the development plan and, in particular, the meaning it gave to the terms "B1" zoning and "town centre" in the plan.

191. I completely agree that, in the first instance, at least, the interpretation of planning documents such as the development plan is a matter for the court. In carrying out that interpretative exercise, the court will apply the principles of interpretation and approach set out by the Supreme Court in *XJS*. However, it is equally the case, as adverted to by Lord Reed in *Dundee*, and as accepted and applied by McGovern J. in Navan, that, as interpreted, the relevant planning document such as a development plan, will contain a range of broad statements of policy, some of which may be irreconcilable and may contain provisions which themselves require the exercise of planning expertise and judgement in terms of their application to a given set of facts. While the division of responsibility as between the planning authority/the Board and the courts can broadly speaking be framed in such a way that the interpretation of the relevant planning documents is for the court and the application of the policies and provisions of those documents, as interpreted by the court, is for the planning authority/the Board in the exercise of their respective planning expertise and judgement. However, that division or allocation of roles is not always clear or straightforward. That is due to the fact that the provisions of planning documents such as a development plan or statutory guidelines

often contain broad statements of policy, some of which may be mutually irreconcilable, and may be framed in language where the application of the relevant provision to a given state of facts requires the exercise of planning expertise and judgement itself.

192. I propose to take the approach which McGovern J. took in *Navan*, to apply the interpretative principles in *XJS*, to bear in mind the observations of McGovern J. and, indeed, of Lord Reed in Dundee and to consider the planning documents at issue here, principally, the Retail Planning Guidelines, the Meath Retail Strategy (attached at Appendix 5 to the Development Plan) and the East Meath LAP, in a "*holistic way*" and to review those documents "*as a whole*" rather than focussing, as I believe the applicant does, on one part or policy, namely, the sequential approach. In doing so, I have reached the conclusion that the applicant has unduly focussed his attention on the sequential approach and has sought to interpret the Retail Planning Guidelines and the Meath Retail Strategy, in particular, in an excessively "*technical and over legalistic manner*". McGovern J. in Navan stated that this was precisely what the Supreme Court in *XJS* cautioned against. In applying this approach, I am satisfied that the authors of the retail impact statement and revised sequential approach, the Board's inspector and the Board itself, correctly interpreted the relevant provisions of those documents, bearing in mind the different and competing policies and objectives referred to in them, particularly as between Laytown and Bettystown and applied that interpretation to the particular circumstances arising on this planning application and, in the case of the inspector and the Board, did so in the exercise of their planning expertise and judgement. I am satisfied that the authors of the retail impact statement and revised sequential approach correctly classified the location of the site as "*edge of centre*" and that in accepting that interpretation the Board's inspector, and the Board, correctly interpreted the Retail Planning Guidelines in the context of the Meath Retail Strategy and the East Meath LAP and then applied that interpretation to the facts, in the exercise of planning expertise and judgement which has not been shown to be unreasonable or irrational in the *O'Keeffe* sense.

193. In reaching this conclusion, I have taken the following into account and made the following findings. First, the primary source of the applicant's complaint in relation to the misinterpretation of the term "*edge of centre*" is the Retail Planning Guidelines and the sequential test provided for in those guidelines. It is common case that the Council (as planning authority) and the Board were required to "*have regard*" to those guidelines in the performance of their functions (s. 28(1) and (2) of the 2000 Act). That is expressly stated at para. 1.2 of the guidelines themselves. The sequential approach to development is one of the key policy objectives of the guidelines. The sequential test is referred to and described in some detail throughout the guidelines (including in s. 4.4). It is clear from the inspector's report that she considered and, therefore, "*had regard*", to the retail guidelines in her assessment of the application. The retail guidelines are referred to in para. 6.1 of her report. They are also referred to and discussed in s. 8.2 of her report dealing with the retail impact issues which arose and in the "reasons and considerations" for her recommendation that permission should be granted at s. 10.0 of the report. The Board accepted the inspector's recommendations and in the "*reasons and considerations*"

set out in the Board direction and in the Board order, express reference is made to the Retail Planning Guidelines, the Development Plan, the Meath Retail Strategy and the East Meath LAP. In both documents the Board states that "*having regard*" to, *inter alia*, the Retail Guidelines, the permission should be granted. The Board was not required to do any more than that. The extent of the requirement in s. 28 of the 2000 Act to "*have regard*" to ministerial guidelines such as the Retail Guidelines has been considered in many cases going back to *Glencar Exploration Plc v. Mayo Co. Council* (No. 2) [2002] 1 I.R. 84 where Keane C.J. observed that the fact that the planning authority was obliged to "*have regard*" to policies and objectives of the government or a particular minister "*does not mean that, in every case, they are obliged to implement the policies and objectives in question*" (per Keane C.J. at 142).

194. That obligation was considered by the High Court (Quirke J.) in *McEvoy v. Meath Co. Council* [2003] 1 I.R. 208 ("McEvoy") where he stated that the obligation on a planning authority making or adopting a development plan to "*have regard*" to regional planning guidelines in place is "*to inform itself fully of and to give reasonable consideration*" to any relevant regional planning guidelines in force and that they are "*not bound to comply with the guidelines and may depart from them for bona fide reasons consistent with a proper planning and development of the areas for which they have planning responsibility*" (per Quirke J. at p. 224). The court had earlier stated that the obligation did not require the planning authority to "*rigidly*" or "*slavishly*" comply with the guidelines' recommendations or even necessarily to adopt fully the strategy and policies outlined therein (per Quirke J. at p 223).

195. This is the test which has been consistently applied by the Irish courts since *McEvoy*. It was expressly applied by the High Court (Clarke J.) in the context of the Retail Planning Guidelines then in force in *Tristor Ltd. v. the Minister for the Environment, Heritage and Local Government* [2010] IEHC 397 ("*Tristor*"). In that case, Clarke J. expressly adopted the view of Quirke J. in *McEvoy* as being applicable to the extent of the requirement on the planning authority to consider the Retail Planning Guidelines. A similar approach was taken in the context of the Retail Planning Guidelines at issue in this case by the High Court (Baker J.) in *Ogalas* (at paras. 22-25, at pp. 9-10).

196. In applying the test evident from those authorities, the Board clearly "*had regard*" to the Retail Guidelines, including the sequential approach provided for in them. Even if the Board's inspector or the Board incorrectly applied the sequential approach (and I do not believe that they did), I do not believe that any such incorrect application would, in this case at least, afford a basis for invalidating the Board's decision.

197. Second, the manner in which the sequential approach is described in the Retail Guidelines strongly indicates that a failure strictly to apply the sequential approach referred to in those guidelines would not afford a basis for invalidating the Board's decision. The most significant reason for this is the fact that at s. 4.5 of the Retail Guidelines it is expressly stated that the application of the sequential approach "*requires flexibility and realism on the part of both retail developers and planning authority, to ensure that the various forms*

of retailing are developed in the most appropriate locations". The requirement of "*flexibility*", and indeed of "*realism*", suggests that, at the very least, a person seeking to challenge a decision of the Board based on an allegation that it incorrectly applied the sequential approach faces very significant obstacles. The in-built flexibility of the process is strongly suggestive that the territory engaged here is one involving and requiring planning expertise and judgement and is not a matter of strict legal interpretation. Consistent also with that suggestion is that it is expressly stated earlier in the Retail Guidelines (at s. 2.2, p.10) in relation to retailing and the settlement hierarchy that the classification of areas for the purposes of the application of the Retail Guidelines is "*indicative*" and that there are "*no clearly defined cut off points between levels of the hierarchy"*. This again strongly indicates that the Guidelines operate primarily in the context of the exercise of planning expertise and judgement. So too does the fact that, in interpreting these provisions in accordance with the principles for interpretation set out in *XJS*, the court does not approach them as if they were statutory provisions. A similar level of flexibility and lack of precision is evident in s. 4.7 of the Retail Guidelines which concerns: "*edge of centre retailing*" and where it is stated that in terms that the distance between the "*primary retail area*" (a term not actually defined in the Retail Guidelines, although "*retail area*" is) of the relevant city or town and the site in order for that site to be an "*edge of centre*" site "*cannot be defined precisely*". Section 4.7 goes on to state that: "*Generally edge-of-town sites should be adjacent to the boundary of the central area but consideration should also be given to the local context …*" (p.32). These are merely examples of the "*flexibility*" and "*realism*" which s. 4.5 requires in the application of the sequential approach and which, in my view, strongly militates against the case which the applicant seeks to make that an alleged error in the application of this sequential approach invalidates the Board's decision. While I do not believe that the Board did incorrectly interpret or apply the sequential approach in this case, even if it did, does not seem to me that that would necessarily lead to its decision being invalidated.

198. Third, I cannot lose sight of the fact that the development at issue here and its intended use is entirely consistent with the relevant zoning ("*B1"*) in the East Meath LAP and with the Meath Retail Strategy. Dealing first with the zoning, as the inspector stated in her report, the site is zone "*B1 Commercial/Town or Village Centre*", one of the objectives of which is to "*protect, provide for and/or improve town and village centre facilities and use*" that uses which would normally be acceptable under that zoning include "*shop – local"* and "*shop -major*" and that this would allow for a medium sized convenience retail store such as the proposed Aldi development. It is also clear from the several references in the Meath Retail Strategy to the potential for retail developments in Laytown, including in the vicinity of the site of this proposed development. It is unnecessary to refer to all of the relevant provisions of the Meath Retail Strategy. However, I have considered the document in its entirety in so far as it concerns Laytown and Bettystown.

199. The Meath Retail Strategy forms part of the Development Plan and appears at Appendix 5 to that plan. It does incorporate and provide for a sequential approach to development and gives effect to the Retail Guidelines. Chapter 5 contains a *"Health Check Qualitative Analysis*" in respect of eight key centres in Co. Meath identified in the document. While

Bettystown is mentioned at s. 5.1.1 and there is no express reference there of Laytown, both are subsequently described as "*centres*" in the document. At s. 5.6.1, Bettystown is stated to form part of the "*Laytown/Bettystown/ Mornington cluster*" and to be the "*largest retail centre in the cluster*". It is noted (at s. 5.6.4) that "*along with Laytown, Bettystown*" is identified in the retail planning strategy for the Greater Dublin Area 2008 – 2016 as a level 3 town and/or district centre and sub county town centre. At s. 5.6.5 it is stated that Laytown forms part of the "*Laytown/Bettystown/Mornington cluster*" and that "*the centre*" (i.e. Laytown) has developed in two small clusters of shops and other services along the Main Street. It is stated that Laytown is a "*small retail centre*" with the majority of shopping needs being currently met in Drogheda. Section 5.6.6 states that Bettystown "*performs the retail function for the Laytown/Bettystown/Mornington cluster*". However, under the heading "*definition of core retail area*", having referred to Bettystown having "*two distinct town centre core areas*", namely the traditional town centre and Bettystown Town Centre, s. 5.6.10 of the Meath Retail Strategy states refers to Laytown and that:

> *"Retailing in Laytown is concentrated in two areas, one at Alverno Terrace adjacent to the train station, which provides a convenience supermarket, a restaurant, a bookmakers and a takeaway … The second area of retailing is on Strand Road leading towards Bettystown where there is a general goods store/comparison supermarket, a takeaway and a pharmacy."*

200. Section 5.6.16 notes that Laytown is accessible by commuter rail and served with commuter services on a regular basis. Section 5.6.22 states that "*only basic retail services are provided in Laytown*" and that "*save for basic convenience needs*", retailing needs are served by "*adjacent centres such as Bettystown*". The Retail Strategy examines "*retail opportunity sites*", in the context of Laytown, and states at s. 5.6.32:

> *"Laytown effectively acts as a commuter town, with convenience retailing needs being provided by Bettystown and comparison needs to (sic) adjacent centres such as Balbriggan and Drogheda. The location of the town on the Strand means that there is limited opportunity for the expansion of the town centre. It is expected that retail growth will be primarily directed towards Bettystown. In the event that retail development is pursued in Laytown, the following should be investigated:-*
>
> *(i) Infill developments along Alverno Terrace and Strand Road;*
>
> *(ii) Potential development at the surface car park on adjoining green field site opposite Alverno Terrace."*

201. The Retail Strategy, therefore, regards Laytown as a "*town*" having a "*town centre*" with the potential for retail development.

202. I would observe here that the inspector states that the site of the proposed development is approximately 150 metres from the established retail provision on Strand Road and

approximately 350 metres south west of the retail provision near the train station, which it is stated are the two retail areas in Laytown.

203. Under the heading "*key actions and recommendations*", at s. 5.6.34, the Strategy states with regard to Laytown:

> *"The key actions and recommendations arising from this health check in respect of Laytown are as follows:*
>
> *(i) Recognise the association of Laytown with Bettystown, which is the primary retail service centre in the Laytown-Bettystown-Mornington cluster;*
>
> *(ii) Support the provision of small to medium scale convenience retail development in Laytown to support the needs of the local community."*

204. In my view, properly construed, the Meath Retail Strategy clearly envisages the possibility of a development such as the proposed Aldi development in the location proposed. The proposed development is a "*medium scale convenience retail development*" as referred to in s. 5.6.34 (ii) and the proposed development is intended "*to support the needs of the local community*". This is expressly stated in the conclusion section of the revised sequential test where it is stated:

> *"Furthermore, it is considered that the proposed development will be a retail development to serve Laytown in its own right".*

205. Similarly, the location of the development is consistent with the "*retail opportunity sites*" in Laytown identified in s. 5.6.32 of the Meath Retail Strategy, as outlined above.

206. The applicant did not dispute that the development would be consistent with the "*B1*" zoning and with the Meath Retail Strategy and expressly acknowledged at the hearing that such a development could be permitted provided the sequential approach was properly complied with.

207. Fourth, in my view, the sequential approach was properly applied in the retail impact statement and revised sequential test. The Board's inspector in agreeing with the conclusion that the development site is "*edge of town"/ "edge of centre*" and the Board, in accepting that conclusion, correctly interpreted the provisions of the Retail Guidelines and the Meath Retail Strategy. The contention to the contrary by the applicant is, in my view, based on an unnecessarily technical and overly legalistic approach to the interpretation of those documents and ignores or affords insufficient weight to what is said in the Retail Strategy about Laytown. They are not intended to be construed as if they were legislative provisions. The interpretation and application of the sequential approach requires"*flexibility*" and "*realism*". I accept the submission advanced on behalf of the Board that the Meath Retail Strategy attempts to adopt a "dual handed" approach to Bettystown and Laytown.

208. The Retail Strategy considers the position of Laytown (as well as that of Bettystown) under the heading "*definition of core retail area*" at s. 5.6.10 and identifies the two areas in Laytown where retailing is concentrated. In my view, it is perfectly correct to identify those areas as "*core retail areas*" of the town of the Laytown from which to assess whether the site of the proposed development is "*edge of centre*" or "*out of centre*" (although I recognise that there may be no clearly defined retail core in Laytown, as stated in the retail impact statement, at para 2.5). Having regard to the distances from the existing retail areas in Laytown to the proposed development site, it seems to me on the evidence that they are clearly within easy walking distance and are, therefore, "*edge of centred"* as that term is defined in A1.6 of Annex A: Glossary of Terms of the Retail Planning Guidelines. It is also complies with the explanation of "*edge of centre*" at s. 4.7 of the Retail Guidelines but recognising at all times that these are intended to be flexible and difficult precisely to define. I am satisfied that the Board's inspector, and the Board, correctly interpreted and applied the sequential approach. However, even if I felt that an error had been made in the application of the sequential approach, I would not have regarded that as sufficient to invalidate the Board's decision in light of the following. First, the inspector and the Board clearly had regard to the Retail Planning Guidelines and the Meath Retail Strategy; second, the proposed development is consistent with "*B1"* zoning in the East Meath LAP; third, the development is consistent with the Meath Retail Strategy; fourth, the interpretation of the sequential approach, while a matter for the courts involves consideration of various broadly stated polices and in its application involves the exercise of planning expertise and judgement; fifth, the policy contained in the Meath Retail Strategy attempts to deal with the respective positions of Bettystown and Laytown and to provide for medium scale convenience retail development in both locations but particularly, for present purposes, in Laytown; sixth it may not simply be possible in every case strictly to apply the sequential approach and that is something acknowledged in the Retail Guidelines in so far as they accept that "*flexibility*" and "*realism*" are required in applying the approach.

209. For these reasons, I do not accept that the applicant has established that there is any basis for invalidating the Board's decision on the basis of an alleged incorrect application of the sequential test.

C. Alleged failure by the Board to specify matters considered

210. The final ground of challenge advanced by the applicant is that the Board order does not specify the matters to which it had regard and does not list or identify those matters or explain how precisely the Board had regard to them or what role (if any) those matters played in its decision. The applicant pleads (at para.20 of the statement of grounds) that his capacity to exercise his right to judicially review the Board's decision, and the ability of the court to exercise its oversight function, are set at nought in circumstances where the Board has failed or refused to identify the "*constituent elements which formed or underpinned its decision*". The applicant contends that the Board is obliged to do so and that its failure to do so makes it difficult or impossible to identify whether the Board failed to take into account relevant considerations or to ascertain whether it acted *intra vires.* The applicant contends that this alleged failure constitutes a breach of his right to fair

procedures and to national and constitutional justice and constitutes a breach of the Board's obligation to provide reasons for its decision.

211. In his written submissions, for the first time, the applicant identified three documents or matters not listed in the Board order or Board direction which he contends the Board was obliged to take into account. Those three documents or matters are: First, the Department's Guidance, i.e., "*The Appropriate Assessment of Plans and Projects in Ireland – Guidance for Planning Authorities (2009)"* published by the Department of Environment, Heritage and Local Government (referred to earlier) which he contends is a guideline to which the Board was required to have regard under s.28 of the 2000 Act: Second, the OPW/Department of the Environment, Heritage and Local Government Publication entitled "*The Planning System and Flood Risk Management-Guidelines for Planning Authorities*" (November 2009) which are referred to in the planning submission report to the Council's engineering services submitted by Aldi with its application for permission for the development. The applicant claims to be unaware as to whether the Board took this into account as it is not listed and, if it failed to do so, he contends that it would be a breach of s.28 of the 2000 Act. Third, the applicant contents that he does not and cannot know if the Board took into account its obligations under s.15 of the Climate Action and Low Carbon Economy Act, 2015 (the "2015 Act") as it is not expressly mentioned in the Board's order or in the Board's direction. These documents and matters are referred to by the applicant as examples of matters not listed in the Board order in respect of which the applicant is unaware whether they were considered by the Board.

212. The applicant relies on a series of cases in support of his contention that the Board failed to identify adequately at all the materials upon which it based its decision to grant permission for the development. The cases relied on include *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750 (High Court, Murphy J.) ("*O'Donoghue*"), *Mulholland v. An Bord Pleanála (No. 2)* [2005] 1 IR 453 (Kelly J.) ("*Mulholland*"), *Christian v. Dublin City Council* [2014] IEHC 382 (High Court, Clarke J.) ("*Christian"), International Fishing Vessels Limited v. Minister for Marine,* [1989] IR 149 (High Court, Blayney J.), *Mallak v Minister for Justice, Equality and Law Reform* [2012] 3 IR 297 (Supreme Court), *Deerland Construction Limited v. Aqua-Culture Licence Appeals Board* [2009] 1 IR 673 (Kelly J.) ("*Deerland*")and, finally, *Connelly v. An Bord Pleanála* [2016] IEHC 322 (High Court Barrett, J.) ("*Connelly*"). The decision of Barrett J. in *Connelly* was appealed to the Supreme Court. The decision of the Supreme Court in that case is of considerable relevance to this part of the applicant's case. Since judgment was delivered by the Supreme Court in *Connelly* after the hearing of this case concluded, the parties were afforded the opportunity, and availed of that opportunity, to make further written submissions in relation to the case. I have considered those submissions in preparing this judgment.

213. The Board and Aldi opposed this ground of challenge by the applicant. With regard to the three examples of documents or matters which it is said are not referred to in the Board order, both object to the applicant relying on these documents in circumstances where they were not referred to in the statement of grounds on foot of which the applicant

obtained leave to bring these proceedings. No leave was granted to the applicant to rely on the alleged non reference to these documents or matters in the Board's order. The first time they were referred to or relied upon by the applicant was in his written submissions in the proceedings. They were not relied upon by him in his appeal to the Board. Both the Board and Aldi contend that in seeking to rely on the non reference to these documents in the Board's decision, the applicant has failed to comply with the provisions of O. 84, r. 20 (3) RSC and with the principles set out by Murray CJ in the Supreme Court in AP.

214. Without prejudice to that contention, the Board (supported by Aldi) rely on a series of cases which set out the extent of the Board's obligations under s.34(10) of the 2000 Act. Aldi further observes that the applicant did not in fact allege a breach of s.34 (10) in the statement of grounds and did not obtain leave to pursue that ground. The cases relied upon by the Board and Aldi include *Mulholland, Grealish v. An Bord Pleanála (No. 2)* [2006] IEHC 310 (O'Neill J.) *("Grealish"), Mulhaire v. An Bord Pleanála* [2007] IEHC 478 (High Court, Birmingham J.) ("*Mulhaire"), Deerland* and *O'Keeffe*. Aldi also relies on the rebuttable presumption that the Board's decision is valid and the onus of proof which rests on the application to establish the contrary and relies in this regard on a number of other authorities which I will address briefly below.

215. In considering this ground of challenge, I must first address the point made by the Board and by Aldi that no reference was made by the applicant in his statement of grounds to any of the three documents or matters given by him by way of example of matters not listed in the Board order. I have set out earlier in this judgment the relevant provisions of O. 84, r. 20(3) RSC and the observations of Murray C.J. in the Supreme Court in *AP*. The three documents or matters referred to by the applicant were not raised or referred to by the applicant before the planning authority or on the appeals before the Board. They were not referred to in the statement of grounds or in any of the affidavits sworn by the applicant. They were raised for the first time in the applicant's written submissions. The applicant has not obtained leave to rely on the non-reference to these documents or matters in the Board order. Even if it could be said that they are caught by the general terms of the pleas contained at paras. E(18)-(20) of the statement of grounds or by the relief sought at para. D(4), and I do not believe that they are, the applicant would, in any event, be in breach of the provisions of O. 84, r. 20(3) RSC. The assertions made in these paragraphs of the statement of grounds are "*in general terms*" and the applicant has not stated "*precisely each such ground, giving particulars where appropriate*". If I were satisfied that the Board and Aldi were prejudiced by the applicant's failure to comply with the rule, I would without hesitation have prevented the applicant from relying on these matters. However, I am satisfied that the Board and Aldi have a good answer to the substantive points raised by the applicant and are not prejudiced. I will, therefore, address the substance of the applicant's ground of challenge to the Board's decision on this basis.

216. In considering the substance of the applicant's complaint, I would make the following initial observations. First, it is well established that there is a presumption of validity in

respect of the Board's decision unless the contrary is shown. Second, the onus of proof of rebutting that presumption of validity lies with the applicant. These two principles were stated by McGuinness J. in the High Court in *Lancefort Limited v. An Bord Pleanála* [1998] IEHC 199 ("*Lancefort*") and have been applied in many subsequent cases including *Weston v An Bord Pleanála* [2010] IEHC 255, *Harrington and Ratheniska*. Third, in the absence of disagreement between the Board and its inspector such as where the Board follows the inspector's recommendation, the court is entitled to conclude that the Board has adopted the inspector's reasoning at arriving at its decision and in furnishing its reasons and considerations. In other words, the court is entitled to read the inspector's report and the Board's decision together. This principle has been applied in a series of decisions including *Maxol v. An Bord Pleanála* [2011] IEHC 537 (High Court, Clarke J.), *Cork City Council v. An Bord Pleanála* [2007] 1 IR 761 (Kelly J.), *Ogalas* (Baker J.) Buckley (Cregan J.) and *South-West Regional Shopping Centre v. An Bord Pleanála* [2017] 2 IR 481 (High Court, Costello J.) ("*South-West Regional*"). In *Connelly*, the Supreme Court considered the related issue as to where reasons for a decision of the Board can be found. It should be remembered that in that case the Board took a different view in relation to the appeal to the inspector. In his judgment for the Supreme Court, Clarke C.J. stated that the test as to where reasons can be found is that identified by him in *Christian* and stated:

> *"Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned… [It] is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning".* (para. 9.2, p. 472).

217. Later, at para. 4.4, Clarke C.J. stated that, in the context of a process such as that which occurred in that case, *"the reasonable observer would undoubtedly look to the inspector's report*…" and to further information sought by the Board, in light of the reservations expressed by the inspector in the report. He further stated that the report of the inspector did not become irrelevant even though it pre-dated the provision of further information by the developer and that even where the Board took a different view ultimately to the inspector, the inspector's report was not irrelevant to the process of reasoning (para. 9.5, p. 473). He then stated:

> *"In that context it does seem to me to be worth saying that it would be preferable in all cases if the Board made expressly clear whether it accepts all of the findings of an inspector, or, if not so doing, where and in what respect it differs. It may be possible, in certain circumstances, to reach a significantly clear inference as to what the Board thought in that regard but it would be better if the matters were put beyond inference and were expressly stated".* (para. 9.6, p.473).

218. Clarke C.J. continued:

> *"It seems to me, therefore, that the reasons for the Board's development consent decision in this case, can, at a minimum, be found in the inspector's report and the documents either expressly or by necessary implication referred to in it….as well as the final decision of the Board to grant permission including the conditions attached to that decision and the reasons given for the inclusion of the conditions concerned".* (para. 9.8, p. 474)

219. A fortiori, where, as here, the Board "*generally*" accepted the inspector's recommendation (and only slightly differed in relation to two conditions), the reasons for the Board's decision can be found not only in the final decision of the Board itself but also in the inspector's report and in the documents expressly or by necessary implication referred to in that report.

220. Later, at para. 10.13 of his judgment, Clarke C.J. expressed the conclusion, as a matter of Irish law, that the cumulative effect of the inspector's report and the Board's decision which specifically addressed those areas where the inspector's view was negative provided adequate reasons for the Board's decision (para. 10.13, p.480). While the Supreme Court reached a different conclusion in relation to the test to be applied for the purposes of the stage 2 appropriate assessment stage, those considerations are not relevant to the "*matters considered*" ground of challenge raised by the applicant in this case. Having set out these observations, I now turn to consider the substance of this ground of challenge advanced by the applicant.

221. No reference is made in the statement of grounds to any alleged breach of s.34 (10) of the 2000 Act by the Board. However, the source of the Board's obligation to "*state the main reasons and considerations on which the decision is based"* is contained in s.34(10)(a) of the 2000 Act, as applied to the Board by s.37 of that Act. In considering whether there was any alleged failure by the Board to specify the matters considered by it, it is necessary to consider the extent of the duty contained in s.34(10) and how the courts have dealt with that issue.

222. The Board (supported by Aldi) relies on s.34(10) as being the statutory basis for its obligation to provide reasons and considerations for its decisions. The Board and Aldi maintain that there was no breach by the Board of its obligation under s.34(10). I agree. Section 34(10), as applied to the decisions taken by the Board in determining appeals, provides that the Board's decision and the notification of the decision *"shall state the main reasons and considerations on which the decision is based".*

223. The nature of the obligation imposed on the Board under this provisions has been considered in a number of cases and is now well settled. In Mulholland, Kelly J. stated that *"in order for the statement of considerations to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons".* I would add here that the obligation in s. 34(10) is to state the "*main reasons and considerations*" (emphasis

added) and not necessarily every conceivable reason and consideration which may have played any part (no matter how minor) in the Board's decision. Kelly J. continued:

> "*The statement of considerations must therefore be sufficient to:*
>
> *(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;*
>
> *(2) arm himself for such hearing or review;*
>
> *(3) know if the decision maker has directed its mind adequately to the issues which it has considered or which it is obliged to consider;*
>
> *(4) enable the court to review the decision".* (per Kelly J. at para. 34, pp. 464 and 465).

224. Having referred to the pre-existing case law on the adequacy of reasons, namely, *O'Donoghue* (High Court, Murphy J.) and *State (Sweeney) v. Minister for the Environment* [1979] ILRM 35 (High Court, Finlay P.), Kelly J. held that there is no obligation under the law in relation to the adequacy of reasons to provide a "*discursive judgment*" (para. 32 p. 464). Reasons given had to be "*clear and cogent*" (para. 33, p. 464). This approach has been followed in several subsequent cases including *Grealish* (O'Neill J.), *Mulhaire* (High Court Birmingham J.) and Deerland (Kelly J.). I respectfully adopt and apply this approach in my consideration of this ground of challenge.

225. In *Grealish*, O'Neill J. described the legal obligations on the Board to explain its decisions as being "*a very light one, one could even say almost minimal*" (para. 40, p. 553). In *Deerland* (which was not a planning case) Kelly J. restated the principle which he had spelled out in *Mulholland* and cited with approval these comments of O'Neill J. on the extent of the obligation on the Board under s. 34(10). He stated that a "*pro forma recitation*" of matters in a decision does not amount to compliance with a statutory obligation to state reasons for a decision. Nor, therefore, would a "*pro forma recitation"* of the main considerations be sufficient compliance with the provisions of s. 34(10) of the 2000 Act. It seems to me that the effect of the applicant's contention that the Board should have recited guidelines, documents or statutory provisions in its decision which were not raised by the applicant (or by other appellants) in the appeals before the Board and which are not alleged by the applicant in the proceedings to have been breached by the Board would be to require the Board effectively to recite in a *pro forma* matter all potentially relevant guidelines, documents and provisions notwithstanding that no issue had been raised in relation to them before the Board. This would essentially turn the obligation on the Board to state the "*main reasons and considerations*" for its decision into a mere box ticking exercise (something deprecated by Clarke CJ in *Connelly* at para. 10.15, p.480) and a legal obstacle course to be got round by the Board. Section 34(10) does not require this of the Board.

226. As I have already noted, the applicant did not allege before the Board, and does not actually allege in the proceedings, that the Board breached its obligation under s.28 of the 2000 Act to "*have regard*" to the two guidelines referred to by him or any obligation with regard to the statutory duty contained in s.15 of the 2015 Act (and does not have leave to make that case, in any event). In those circumstances, where the issues were not raised before the Board, they could not be said to have constituted the "*main reasons and considerations*" for the Board's decision. Notwithstanding this, it is clear from her report that the Board's inspector did carefully consider the screening report submitted by Aldi in respect of the development. The screening report made express reference to the Department's appropriate assessment guidelines referred to by the applicant. The applicant raised no issue in relation to flooding although the inspector clearly considered all of the material relevant to the appeals which is highly likely, on the balance of probabilities, to have included the planning submission report to engineering services submitted by Aldi to the Council which contained express reference to the Department's flood risk management guidelines referred to by the applicant. In the unlikely event that the inspector did not consider these, I do not believe that the failure to refer to those guidelines in the report or in the Board's order or direction amounted to a breach of the Board's obligations under s.34(10) of the 2000 Act or a breach of any other obligation to provide reasons. This is particularly so in circumstances where the applicant raised no issue in relation to the flood risk management guidelines before the Board and made no allegation that the Board's inspector or the Board did not consider those guidelines. As regards the 2015 Act, no issue whatsoever was raised in relation to compliance with that act in the appeals before the Board or in the case made by the applicant in the proceedings.

227. It is clear from the decision of the High Court (Kearns J.) in *Evans v an Bord Pleanála* (Unreported, High Court Kearns J., 7th November, 2003) [2004] WJSC-HC 4037 ("*Evans*"), that the mere failure by the Board to recite or refer to a particular policy or guidelines "*does not in any way prove a failure on the part of the Board to have kept itself aware of such policy*", having regard to the rebuttable presumption of validity (as described by McGuinness J. in the High Court in *Lancefort* and having regard to the onus of proof which rests on the applicant who seeks to challenge a decision of the Board. Both McGuinness J. in *Lancefort* and Kearns J. in *Evans* referred in this regard to the earlier decision of Finlay P. in the High Court in *Re Comhaltas Ceoltoiri Eireann* (Unreported, High Court, Finlay P., 14th December, 1977). This aspect of the decision of Kearns J. in *Evans* was followed and applied by Costello J. in the High Court in *South-West Regional* (at paras. 113-114 p.525).

228. It is also well established that in assessing whether the Board has complied with its obligation in s.34(10) to state the "*main reasons and considerations"* in its decision, it is necessary to consider the position from the persepective of an informed participant. This was established by the Supreme Court *O'Keeffe* where Finlay C.J. stated:

> *"What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would*

understand from this document, these conditions and these reasons. (per Finlay C.J. at p.76).

A similar point was made by Birmingham J. in the High Court in *Sweetman v An Bord Pleanála* [2009] IEHC 599 where he stated:

> *"The reasons for the decision must be read in a straight forward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. Therefore, a challenge based upon the reasons of the Board will only succeed if the party aggrieved can satisfy the court that he is genuinely being substantially prejudiced by the failure to provide an adequately reasoned decision".* (per Birmingham J. at para.57, p. 28)

229. Very similar statements were made by Clarke CJ. in the Supreme Court in *Connelly* where he made clear that when assessing a ground of challenge to a decision of the Board based on the inadequacy of the reasons given, it was necessary to consider to consider the position from the point of view of "*reasonable observer carrying out a reasonable enquiry*" (para. 9.2, p. 472).

230. As a participant in the planning process, both before the planning authority and before the Board, the applicant was well aware of the issues raised on the appeals. He was well aware, therefore, of the issues which were being considered by the Board on those appeals. It was open to the applicant to raise such issues as he felt appropriate. He did raise certain issues. He did not raise any issues in relation to the Habitats Directive. Nor did he raise any issues in relation to the application of the Department's appropriate assessment guidelines or the flood risk management guidelines or in relation to the 2015 Act. Nor the did applicant allege in the statement of grounds on foot of which the applicant obtained leave to bring these proceedings that the Board failed to have regard to these guidelines or to comply with its duty under s.15 of the 2015 Act. The fact that the Board did not recite in its direction or order that it did have regard to them does not support the applicant's contention that the Board did not. While the applicant relies on para. 18 of the Board's statement of opposition where the Board stated that the matters to which it had regard are specified in the Board direction and the Board order and are clear from an examination of those documents, it seems to me that the applicant is placing undue weight on that plea in support of this aspect of his case. The plea was in response to the particular matters alleged in the statement of grounds (which did not include any reference to the guidelines or statutory provision which the applicant alleges were not referred to in the Board's decision). The plea at para. 18 of the statement of opposition was clearly directed to the matters alleged in the statement of grounds. In any event, I am satisfied that the "*main reasons and considerations"* considered by the Board were fully set out in the Board direction and the Board order when read with the Board inspector's report.

231. I conclude that on the basis of the principles and case law discussed above, the applicant has failed to rebut the presumption of validity in respect of the Board's decision and has failed to discharge the onus of proof that the Board failed to comply with its obligation

under s.34(10) of the 2000 Act to state the "*main reasons and considerations*" for its decision or with any other obligation to specify the matters considered by it.

232. The applicant sought belatedly to make an argument that the decision of the Board failed to refer to the screening for appropriate assessment carried out in respect of the development. The applicant did not allege in the statement of grounds that the Board's decision should be invalidated as a result of any such alleged failure. However, there is in any event no merit to the point. The Board direction makes clear that the Board decided to grant permission "*generally in accordance with the inspector's recommendation*" for the reasons and considerations and subject to the conditions set out in the direction. The Board direction made clear that the Board had considered the submissions on the file and the inspector's report. The Board order made clear that the Board had regard to all of the matters which it was required to have regard under the relevant legislation including submissions and observations received by it. It then set out the reasons and considerations and the conditions. The Board order and the board direction can be read with the Board inspector's report which clearly outlines the screening for appropriate assessment carried out in respect of the development. I am satisfied therefore that there is no merit to this argument made by the applicant.

233. In conclusion, therefore, the applicant has failed to establish that the Board's decision should be invalidated by reason of a failure to specify the matters considered by it.

Summary of Conclusions

234. In summary, my conclusions on the grounds of challenge advanced by the applicant in respect of the Board's decision are as follows:-

(A) Habitats Directive

(1) Screening: Incorrect Test?

(a) The Board and its inspector did not apply an incorrect test for screening the development for appropriate assessment under Article 6(3) of the Habitats Directive and s. 177U of the 2000 Act. I have concluded that the correct test for screening was applied by the Board and its inspector.

(b) The Board's decision does not, in my view, contain gaps or lacunae in relation to the screening of the development with particular reference to the presence of concrete on the site and sediment run off during the construction phase. These issues were adequately considered in the screening report prepared by Aldi and in the screening for appropriate assessment carried out by the Board and its inspector.

(2) Screening: mitigation measures

(c) The applicant failed to comply with the provisions of O. 84, r. 20(3) RSC in making his case in relation to the alleged wrongful reliance on "mitigation measures" at the screening stage. Notwithstanding that failure, I have considered this ground of challenge in full. I have concluded that the Board

and its inspector did not take into account "mitigation measures" at the screening stage in breach of Article 6(3) of the Habitats Directive and the decision of the CJEU in *People Over Wind*. The SUDS measures incorporated in the development are not "mitigation measures" as that term has been considered by the CJEU in *People Over Wind*.

(B) Retail Impact Assessment: Alleged Erroneous Identification of Primary Retail Area

The retail impact statement and revised sequential test submitted by Aldi with its application for permission did not contain a fundamental error in the application of the sequential approach provided for in the Retail Planning Guidelines. The Board and its inspector did not make any error, still less a fundamental error, in the assessment of the retail impact of the development and, in particular, in the application of the sequential approach to development contained in those guidelines.

(C) Alleged Failure to Specify Matters Considered by Board

The Board did not fail to specify the matters considered by it. The applicant did not comply with the provisions of O. 84, r. 20(3) RSC in relation to some of the matters sought to be relied upon in respect of this ground of challenge. Nonetheless, I have considered the ground of challenge in full. I have concluded that the Board fully complied with its obligation under s. 34(10) of the 2000 Act to state the "*main reasons and considerations*" for its decision, as that obligation has been considered in the well established case law of the Irish Courts. The Board did not fail to specify the matters considered by it. The Board's decision must be read with the inspector's report. The applicant has failed to discharge the onus of proof and to rebut the rebuttable presumption as to the validity of the Board's decision.

235. Accordingly, the applicant has failed to sustain any of the grounds advanced by him. As a consequence, the applicant's application should be refused and the proceedings dismissed.