[2020] IEHC 39

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW
IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000
[2019 No. 33 J.R.]

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

IGP SOLAR 8 LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Denis McDonald delivered on 31 January, 2020

Introduction

1. In these judicial review proceedings, the applicant seeks to quash the decision of the first named respondent *("the Board*") dated 15th November, 2018 to grant planning permission for a development of a 67.8 hectare solar farm at Fiddane, Ballyhea, County Cork. The decision of the Board in this case arose following an appeal by a third party of a decision by Cork County Council *("the Council")* to grant permission for the development.

2. The applicant's case as against the respondent was argued on the basis of three distinct grounds:-

   (a) In the first place, it was argued that the Board acted *ultra vires* and in breach of the Planning and Development Regulations, 2001 (as amended) ("*the 2001 Regulations*") by failing to include notice of the receipt of the appeal of the decision of the Council in the weekly Board list not later than the third working day following the week ending 23rd February, 2018;

   (b) Secondly, the applicant contends that the decision of the Board is ultra vires and not in compliance with the obligations that arise under Directive 2011/92/EU (as amended) ("*the EIA Directive*") in circumstances where (so the applicant alleges) there was an absence of a proper screening for Environmental Impact Assessment ("*EIA*"). The debate in relation to this issue largely centres on whether a development of the kind proposed here falls within Annex II to the EIA Directive;

   (c) Thirdly, it is the applicant's case that the decision of the Board was *ultra vires* and in breach of its obligations under Council Directive 92/43/EC *("the Habitats Directive*") in circumstances where there was a failure to carry out an appropriate assessment or a proper screening for an appropriate assessment. The debate in relation to this issue was focused on whether, contrary to the decision of the CJEU in Case C-323/17 *People over Wind v. Coillte Teo*, the Board had taken mitigation measures into account at the screening stage.

3. The Board is not, however, the only respondent to these proceedings. Ireland and the Attorney General ("*the State respondents")* have also been named as respondents to the proceedings. The basis on which the State respondents have been joined is far from clear. The case is made that, if the Board made the decision of 15th November, 2018 in accordance with Irish law, then it must follow that the State has failed to adequately transpose the Habitats Directive and the EIA Directive. However, no provision of Irish law is identified in the statement of grounds which it is alleged fails to properly transpose the provisions of either the Habitats Directive or the EIA Directive. Remarkably, this element of the applicant's case occupied no more than one paragraph in the written submissions delivered on behalf of the applicant. There were, however, some submissions made in the course of the very helpful oral presentation of the applicant's case by counsel. As I understand it, the case which the applicant makes against the State respondents only arises in the event that the court concludes that, in the context of its approach to the EIA and Habitats Directive issues, the Board acted lawfully in accordance with Irish law. It is therefore appropriate that I should defer dealing further with the case against the State respondents until after I have addressed each of the issues that arise as between the applicant and the Board (as summarised in para. 2 above). I deal with those issues, in turn, below. It should be noted that the notice party, IGP Solar 8 Ltd, the notice party, did not participate in the hearing.

The weekly list

4. In order to explain the issue which arises in relation to the weekly lists, it is necessary to bear in mind that Mr. Sweetman was not a party to the planning application process that took place before the Council. He did not make any submissions or observations in the course of the process which led to the grant of planning permission. However, under s. 130 (1) (a) of the 2000 Act, any person other than a party to the proceedings before the planning authority may make submissions or observations in writing to the Board in relation to an appeal. Under s. 130 (1) (b) submissions or observations must be made within the period specified in s. 130 (3). That subsection also provides that any submissions or observations received by the Board after the expiration of that period *"shall not be considered by the Board".*

5. In turn, s. 130 (3) lays down a number of different time periods depending on the nature of the process before the Board. In the case of an appeal of the kind in issue here, s. 130 (3) (c) provides that the period for making submissions is:-

> *"…the period of 4 weeks beginning on the day of receipt of the appeal by the Board or, where there is more than one appeal against the decision of the planning authority, on the day on which the Board last receives an appeal".*

6. The Board is not empowered under the 2000 Act to extend the period prescribed by s. 130 (3). Furthermore, under s. 130 (4), a person who makes submissions or observations to the Board is not entitled to elaborate upon the submissions or observations or to make further submissions or observations in writing in relation to the appeal and the subsection provides that any such subsequent submissions or observations that are received by the Board from such a person *"shall not be considered*

by it". The combined effect of s. 130 (3) and s. 130 (4) is that it is crucial for a person to whom s. 130 applies (such as the applicant) to ensure that submissions and observations are furnished to the Board within the relevant four-week period and that the submissions are as comprehensive and cogent as possible. Once the relevant four-week period has expired, there is no opportunity to supplement the case made by filing additional written observations or submissions.

7. It is important to keep in mind that the relevant four-week time period runs from the date of receipt of the appeal by the Board. However, a person (such as the applicant here) who was not a party to the process before the planning authority will obviously not be immediately aware of the lodgement of the appeal with the Board. Equally, the Board will be unaware of the existence of any such person. The Board is, therefore, not in a position to notify such a person in the same way as the Board would notify a party to the process. The position of parties to the process before the planning authority is addressed in s. 129 (1) of the 2000 Act. Under that subsection, the Board is required *"as soon as may be after receipt of an appeal*" to give a copy to each party (other than the appellant). Under s. 129 (3) (a) those parties then have a period of four weeks from the date the relevant appeal is sent to them in which to make submissions or observations in writing to the Board. In contrast, the time period for persons such as the applicant runs from the date of lodgement of the appeal and therefore begins to run even before they become aware of the existence of the appeal.

8. In order to give effect to the right of persons under s. 130 to make submissions and observations, it was necessary to put in place a system for publication of lodgement of appeals. The way in which persons other than parties become aware of the existence of an appeal is through the mechanism of the weekly list. Under Regulation 72 (1) of the 2001 Regulations, the Board is required "*not later than the third working day following a particular week, make available a list of … (a) the appeals… received by the Board … during that week".* For completeness, it should be noted that, subsequent to the events in issue, the provisions of Regulation 72 (1) were amended by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018) *("the 2018 Regulations")* under which the Board was also required to display the appeals for inspection on its website. The 2018 Regulations are not, however, relevant to these proceedings. The appeal here was lodged with the Board on 22nd February, 2018. The 2018 Regulations did not come into effect until 1st September, 2018.

9. Under Part 1 of the Schedule to the Interpretation Act, 2005 ("*the 2005 Act*") a "*week*" is defined as meaning the period between midnight on any Saturday and midnight on the following Saturday. In this case, as noted above, the appeal was lodged with the Board on 22nd February, 2018. That was a Thursday. Thus, under Regulation 72 (1) of the 2001 Regulations, the Board was required to include the appeal against the decision of the Council in the relevant weekly list not later than the Wednesday immediately following 22nd February, 2018 namely 28th February, 2018. However, the appeal was not included in the list of appeals published on the Board's website on that date. Instead, it was

included in a revised weekly list which was uploaded onto the website on 8th March, 2018. In this context, although Regulation 72 (in its then current form) did not specifically require the Board to make a list of appeals available on its website, the Board had adopted the practice of publishing the lists on its website so as to make the lists readily available to the public. Under Regulation 72 (7) the Board was empowered to display the list at its offices or by any other means including in electronic form that the Board considered appropriate.

10. As noted above, the appeal from the decision of the Council was not included in the weekly list published by the Board on its website on 28th February, 2018. The explanation provided by the Board for the non-inclusion of the appeal in the list published on 28th February, 2018 is that the Board was undertaking an on-going information technology ("*IT*") systems upgrade involving the migration of large volumes of data from the Board's previous website servers to one new server.

11. The applicant says that he did not become aware of the appeal until after the decision of 15th November, 2018 was made. In a replying affidavit sworn on behalf of the Board by Mr. Pierce Dillon, he noted that the applicant has not provided any evidence or justification as to why the applicant did not see and review the amended and revised weekly list published by the Board on 8th March, 2018 or at any time thereafter.

12. According to the affidavit of the applicant in response, he did not see the second list and did not realise that the original list of 28th February, 2018 was incomplete. The applicant also drew attention to the fact that the weekly lists were in pdf form at that time and could not be searched using the website's main search function. Each weekly list had to be opened and searched individually.

13. In a subsequent affidavit sworn on 21st November, 2019 the applicant further explained that:

> *"I am certain as I can be that I read the first list for the week ended 23rd February, 2018 when it was published online on 28th February, 2018 because it is my habit to read the new lists on a Wednesday evening. I did not notice that the proposed solar farm development in the Blackwater catchment had been added to a subsequent list made on 08 March 2018".*

14. In the same affidavit, the applicant observed that, although some changes have been made to the way in which the Board now publishes its list of new cases each week, it has not "*changed its habit of updating the weekly list long after the deadline for publishing the list has passed*".

15. The applicant complains that, as a consequence of the failure of the Board to include the appeal in the weekly list published on 28th February, 2018, he lost the opportunity to make submissions in relation to the appeal. The applicant has explained that he has a long held interest in the protection of the Freshwater Pearl Mussel and, as a consequence, he seeks to identify planned new developments in river catchments where the species is

known to exist. The Blackwater River has a number of populations of the mussel. One of the issues which arose in the course of the appeal before the Board was whether the development had the potential to adversely affect a number of species in the Blackwater River and its tributaries. The applicant says that he would wish to have made observations in relation to the freshwater pearl mussel which is a highly endangered species.

16. The principal issue which arises in this context is whether the provisions of Regulation 72 (1) in relation to the weekly lists are mandatory or merely directory. However, the Board also seeks to raise a further issue in this context. Although the Board does not challenge the standing of the applicant to mount a challenge to its decision in these proceedings, the Board argues that, in the event that the court concludes that the obligation is mandatory, the court should nonetheless, in the exercise of its discretion, refuse relief to the applicant on this ground. The Board stresses that the remedy sought is discretionary. The Board submits that the court, in considering whether to grant such a discretionary remedy, has tended not to be impressed by purely technical arguments in relation to alleged breaches of procedure unless the applicant has suffered significant prejudice.

17. The Board has also drawn attention to the fact (which is not denied by the applicant) that the original application made to the Council for planning permission for this development had been advertised in the Vale Star, a newspaper circulating in the locality where it is intended to construct the development. The Board also places some emphasis on the fact (which again is not denied by the applicant) that the Council had published on its website weekly lists of planning applications and further information received by the Council in the course of its consideration of the application made by the notice party ("IGP"). In response, the applicant has said, on affidavit, that he did not see the advertisement in the Vale Star. He draws attention to the fact that this newspaper has a very small and very local circulation and he contends that, in the circumstances (including the fact that he lives in County Mayo at a considerable distance from the site of the proposed development), it was unsurprising that he would not see a planning notice published in that way. He also avers that the notification by the Council of the planning application in its weekly list was also made outside the statutory time frame and that he did not see the notification when it was eventually made. It was also strongly urged on behalf of the applicant that he was entitled in law to make a submission to the appeal to the Board in this case. The appeal here was made by the Fiddane Solar Action Group who the applicant said had raised issues of interest to him in particular the need for an EIA together with the need for a sufficient screening exercise for appropriate assessment.

The nature of the obligation imposed by Regulation 72(1)

18. Before turning to any issues that might be said to go to the discretion of the court to grant relief, it seems to me that the first issue that requires to be addressed is whether the obligation imposed by Regulation 72(1) of the 2001 Regulations is mandatory or directory.

19. The applicant makes the case that the obligation imposed on the Board under Regulation 72(1) of the 2001 Regulations is mandatory. The applicant places some emphasis on the

use of the word "*shall*" in this context although, as the applicant acknowledged, in the course of submissions by his counsel, the use of the word "*shall*" will not always be construed as imposing a mandatory statutory requirement. The relevant principle was explained as follows by Henchy J. in the Supreme Court in the *State (Elm Developments Ltd) v. Monaghan County Council* [1981] ILRM 108 at p. 110 where he said:-

> *"Whether a provision in a statute … which on the face of it is obligatory (for example, by the use of the word 'shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused".*

20. If the court concludes that a provision is truly mandatory, then compliance with that requirement will be regarded as a pre-condition to the validity of any decision affected by the statutory provision in question unless it can be shown, in the words of Henchy J. in the State (*Alf-a-Bet) Ltd v. Monaghan County Council* [1980] ILRM 64 at p. 69 to be:

> *"… so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with".*

21. The applicant has sought to rely on a number of authorities that have applied the principles laid down by the Supreme Court in the *Elm Developments and Alf-a-Bet* decisions. In particular, the applicant relies on the decision of Kelly J. (as he then was) in *McAnenley v. An Bord Pleanála* [2002] 2 I.R. 763 and the decision of Simons J. in *Southwood Park Residents Association v. An Bord Pleanála* [2019] IEHC 504. The applicant also sought to rely on the public participation and access to justice principles enshrined in the Aarhus Convention although this did not feature in the oral submissions made by counsel for the applicant at the hearing. In response, the Board argued that, on a proper construction of the 2001 regulations, the obligation imposed by Regulation 72(1) was directory rather than mandatory. The Board drew attention in this context to the fact that the 2001 Regulations do not specify the consequences of a failure to comply with Regulation 72(1). The obligation is therefore to be distinguished from provisions such as s. 37 (3), s. 127 (2) and s. 130 (2) of the 2000 Act. In contrast to Regulation 72 of the 2001 Regulations, s. 37 (3) of the 2000 Act provides that certain appeals received by the Board after the expiration of a prescribed period "*shall be invalid as not having been made in time"*. Similarly, s. 127 (2) states that an appeal or referral which does not comply with the requirements of s. 127 (1) shall be invalid. Section 130 (2) also provides that submissions or observations by persons other than parties to the appeal which do not comply with the requirements of s. 130 (1) shall be invalid.

22. On behalf of the applicant, it was argued that the weekly lists should be accurate and should be published on time so that persons in the position of the applicant will be in a position to identify appeals of interest to them and to make submissions within the four-week time limit for doing so. My attention was drawn to the observations of Murphy J. in *O'Connor v. Cork County Council* [2005] IEHC 352 and Finlay Geoghegan J. in *Linehan v. Cork County Council* [2008] IEHC 76 where, in both cases, it was made clear, in the context of the equivalent obligation that lies on planning authorities to publish weekly lists of planning applications, that the public are entitled to rely on the lists as containing all applications received in the relevant week.

23. It was submitted on behalf of the applicant that the obligation imposed by Regulation 72 (1) of the 2001 Regulations is a critical component of the public participation regime. Against that backdrop and in circumstances where the relevant four-week time limit for making submissions runs from the date of receipt of the appeal, it was argued that the word "*shall*" in Regulation 72 (1) must be read as mandatory. Otherwise, the right of public participation envisaged by s. 130 (1) would be severally curtailed or entirely abrogated. It was suggested that the present case was an example of the latter in that it involved the abrogation of the applicant's rights to participate in the appeal process and to make observations in relation to a critically endangered species such as the Freshwater Pearl Mussel.

24. As noted above, the Board places significant reliance on the fact that, in contrast to the statutory provisions discussed in para. 21 above, Regulation 72 does not provide that a failure to comply with the obligation imposed by the regulation would render the appeal invalid. However, I am not persuaded that the absence of such a provision means that the use of the word "*shall*" in Regulation 72 (1) must be read as directory rather than mandatory. There are two decisions which are of particular assistance in this context – namely the decisions of Kelly J. (as he then was) in *Graves v. An Bord Pleanála* [1997] 2 IR 205 and *McAnenley v. An Bord Pleanála* [2002] 2 IR 763. In *Graves*, there was a failure to comply to the letter with s. 4 (5) (b) of the Local Government (Planning and Development) Act, 1992 ("the 1992 Act"). Under that provision, an appeal was required to be made in one of three ways. In particular, under s. 4 (5) (b) an appeal could be made by "*leaving the appeal with an employee of the Board at the offices of the Board during office hours*". There was no provision in the 1992 Act declaring that a failure to follow this procedure would render the appeal invalid. Nonetheless, Kelly J. held that the obligation imposed by s. 4 (5) was mandatory. In that case, the appeal had been taken to the offices of the Board within the prescribed time and had been left with a security guard (who was not an officer of the Board). Although the security guard had, in turn, passed the appeal to an officer of the Board on the same day, Kelly J. held that the appeal had not been properly made. At p. 214, he said:-

> *"The wording of Section 4, sub-section 5 of the Act… is in mandatory terms. It requires that an appeal be left with an employee of the Board at the offices of the Board. It appears to me that an appellant who wishes to argue that he has made a valid appeal would have to be able to demonstrate compliance with the statutory*

provisions. …Mr. Graves… cannot prove that the appeal was left with an employee of the Board at the offices of the Board on the day in question. The fact that an employee of the Board came into possession of the documents on the 20th January, 1997 does not appear to me to discharge the obligation of the appellant to demonstrate compliance with the mandatory requirements of [the sub-section]…".

25. Subsequently, in *McAnenley*, an issue arose as to whether the requirements of s. 6 of the 1992 Act were mandatory or merely directory. Under s. 6 of the 1992 Act, a planning authority was required, where its decision was appealed to the Board, to furnish certain documents to the Board within a period of 14 days from the date on which a copy of the relevant appeal had been forwarded to the authority by the Board. Section 6 used the word "*shall*" in this context. There was no provision which stated that any failure to comply with this obligation rendered the appeal invalid. Nonetheless, Kelly J. came to the conclusion that the obligation on the planning authority was mandatory and that the failure of the planning authority to furnish certain documents falling within the ambit of s. 6 invalidated the Board's decision in respect of the appeal. Citing the observations of Henchy J. in *Elm Developments*, Kelly J. at p. 765-766 said:-

"It is suggested that this statutory provision is to be interpreted as not creating a mandatory obligation on a planning authority. Rather it is said to be permissive.

I cannot agree with this proposition…

I am of the view that the legislature in setting up the statutory scheme of appeals to the respondent had in mind that certain documents would be placed before it when it is called upon to exercise its de novo jurisdiction involving an appeal to it from a decision of a planning authority.

The obligation to submit these documents is placed on the planning authority. The section uses the word "shall". The intent of the legislature is that there should be placed before the board the documentary material as specified which was on the planning authority file and was before it when it made its decision…".

26. The approach taken by Kelly J. in *McAnenley* is particularly relevant in light of the submission made by the Board in para. 2.13 of its written submissions where the following case is made:-

"2.13 It is worth noting that… if the Applicant's contention… was taken to its logical conclusion, any slippage by the Board in the requirement to publish a list of appeals within 3 days of the week following the lodging of an appeal would… render that appeal a nullity. There is nothing in the language of the Regulation to suggest such an extreme consequence, nor could it be argued that the Minister, by Regulation, should have intended such a consequent curtailment of the statutory right of appeal".

27. A similar argument might well have been made in McAnenley. The "*slip*" in that case was made by the planning authority, the local County Council. Yet, that "*slip*" in failing to furnish all of the relevant documents to the Board rendered the subsequent decision of the Board on the appeal invalid. It may seem harsh that the rights of the parties to the appeal could be adversely affected by a "*slip*" on the part of the Board. However, if the provisions of Regulation 72 are mandatory, then, as *McAnenley* demonstrates, the failure to comply with the obligation imposed by the regulation will render any decision of the Board invalid unless it can be established that the failure to comply was of an insubstantial or trivial nature (in which case the non-compliance might be excused).

The obligation imposed by Regulation 72 (1) is mandatory

28. I have come to the conclusion that the obligation imposed by Regulation 72 (1) is mandatory in nature. I have reached that view for the following reasons:

(a) In the first place, I do not believe that any significant distinction can be drawn between the approach to be taken to Regulation 72 (1) on the one hand and the approach taken by Kelly J. in *Graves* and *McAnenley* in relation to ss. 4 (5) and (6) of the 1992 Act, on the other. The two decisions of Kelly J. illustrate that, in a planning context, the use of the word "*shall*" is particularly important. It is also significant that in both s. 4 (5) of the 1992 Act (the subject of the decision of Kelly J. in Graves) and s. 6 of the 1992 Act (the subject of the decision of Kelly J. in *McAnenley*) there was no provision declaring that a step taken in breach of the relevant obligation would render that step (or the underlying appeal) invalid.

(b) Secondly, I must bear in mind that Regulation 72 uses the word "*shall*". While the use of that word does not automatically make mandatory the obligation imposed, the word "*shall*" as a matter of ordinary English usage, carries that connotation;

*(c) Thirdly, and most importantly, the use of the word "*shall*" in Regulation 72 (1) must be read in the context of s. 130 of the 2000 Act and in particular in the context of the strict four-week time limit for the making of submissions by persons who are not parties to the underlying planning process. In circumstances where the Board is not empowered by the 2000 Act to extend the four-week time limit for the making of observations and submissions, it is difficult to see how the obligation imposed by Regulation 72 (1) could be read as other than mandatory. The failure to publish a list of appeals on time carries with it the risk that the right to make submissions might be rendered entirely nugatory or, at the very least, could significantly curtail the ability of an interested person from making detailed submissions (particularly in a complex or document heavy case).*

(d) To interpret Regulation 72 (1) as being merely directory could have very serious consequences. For example, if there was a failure to publish the weekly list until very close to the four-week deadline for making submissions – or even after that deadline – the scheme of public participation envisaged by s. 13 of the 2000 Act could be entirely undermined. For that reason, it is crucial that the obligation imposed by Regulation 72 should be performed by the Board on time. There is

accordingly every reason to give the word "*shall*" in Regulation 72 (1) its ordinary and natural meaning – namely that it is obligatory (i.e. mandatory) to comply.

The failure to comply with Regulation 72 (1) cannot be said to be insubstantial

29. Nor do I believe that there is any basis upon which I could properly conclude that the failure by the Board to comply with its obligations under Regulation 72 (1) was insubstantial or trivial. As Simons J. observed in *Southwood Park Residents Association v. An Bord Pleanála* [2019] IEHC 504, the ability of the courts to excuse or waive a breach of a procedural requirement of this kind is limited. Simons J. referred to the judgment of Henchy J. in *Alf-a-Bet* where the latter said at p. 69:

> *"…when the 1963 Act prescribed certain procedures as necessary to be observed for the purpose of getting a development permission, which may affect radically the rights or amenities of others and may substantially benefit or enrich the grantee of the permission, compliance with the prescribed procedures should be treated as a condition precedent to the issue of the permission. In such cases, what the Legislature has, either immediately in the Act or mediately in the Regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the de minimis rule..".*

30. As noted in para. 20 above, the *de minimis* principle can only be applied where there is substantial compliance with the relevant statutory obligation such that any non-compliance with the obligation can be regarded as trivial or insubstantial. In *Southwood* there had been a failure to publish on the Board's website a number of bat surveys. This was contrary to Article 301 (3) of the 2001 Regulations. Simons J. rejected the suggestion that the *de minimis* principle was capable of application. At paras. 41-42, he explained that it is difficult to apply that principle where the public authority is given no discretion in the performance of an obligation under a statutory provision. He said:

> *"41. Where judicial review proceedings are brought alleging a failure to comply with fair procedures, then it might be appropriate for the court to consider the content of the documents, and, in particular, to assess whether there is new material in respect of which a right to reply must be afforded. Typically, this will be done against a background whereby the decision-maker itself has considered the material and reached a view on whether or not same contains new material. The High Court, on judicial review, will normally show some deference to that view. ….*
>
> *42. The legal position is entirely different where, as in the present case, the decision-maker has no discretion. In such circumstances, it is inappropriate for either the decision-maker, or for the court, to embark upon a detailed examination of the content of the material with a view to determining whether or not it is significant or otherwise. This is because the Oireachtas has ordained, albeit mediately through Ministerial Regulations, that all documentation in respect of a planning application must be posted on a dedicated website. In truth, therefore, the position is closer to that analysed by the …Kelly J. in McAnenley …. It will be recalled that the breach in McAnenley was fatal even in circumstances where the content of … one of the*

missing documents, i.e. the planning authority's decision, was available in an almost identical form."

31. It was argued in that case that there was no significant difference between a 2017 bat survey which had been posted on the Board's website and the 2018 bat survey which had been omitted. However, Simons J. concluded that it could not be said that the differences between the two surveys could be regarded as insubstantial. He came to the conclusion, in the circumstances, that the right to effective public participation had been undermined as a result of the failure to post the report on the website. This denied members of the public (including the applicant in that case) the opportunity to make submissions in relation to the survey and as to the conditions which should be imposed by the Board.

32. Although counsel for the Board made a number of submissions at the hearing as to why the decision in *Southwood* should be distinguished, I cannot avoid the conclusion that the failure to include the appeal in this case in the weekly list published on 28th February, 2018 was a substantial failure to comply with the Board's obligations under Regulation 72 (1). The failure had serious consequences in that any member of the public (including the applicant) who happened to read the weekly list on 28th February, 2018 would not be aware that an appeal had been taken against the decision to grant permission for this extensive solar farm development in County Cork. This had very serious implications for the right of public participation and in particular the right available under s. 130 of the 2000 Act. I appreciate that, of course, the appeal was included one week later in a revised list. However, if a member of the public was unaware of the publication of the revised list, the right to make submissions would be entirely lost. Even if a member of the public happened to notice the appeal in the revised list, the fact that the revised list was not published until one week later meant that there was a shorter time in which to make submissions. While it was suggested by counsel for the Board that this was not a substantial interference with the right to make submissions, I regret that I cannot accept that submission. The legislature has determined that a period of four weeks should be available for the making of submissions. The legislature has not given the Board any discretion to extend that period. In circumstances where the relevant four-week period runs from the date of lodgement of the appeal, the effect of the late publication of the revised list means that any member of the public who happened to see the revised list would have only two weeks in which to make submissions or observations. This is because the relevant four-week period runs from 22nd February, 2018 and the revised list was not published until 8th March, 2018. This was only two weeks prior to the date of expiry of the time for making submissions. By my calculation, the relevant time for the making of submissions expired on either 21 or 22 March 2018. That represents a substantial curtailment of the time available to make submissions. I cannot accept that this curtailment can be regarded as insubstantial particularly in circumstances where the appeal in this case related to such a significant development and where there were a substantial number of documents to consider and digest before any member of the public could reasonably be expected to make detailed submissions or observations in exercise of the right available under s. 130. In the circumstances, there is no scope for application of the *de minimis* principle. That principle might be capable of application if, for example,

the appeal in this case had been published in the weekly list on 28th February, 2018 but some other appeal (in which the applicant had no interest) had not been included in that list. In that event, there would obviously have been a breach by the Board of its obligations under Regulation 72 (1). However, as between the applicant and the Board, the breach would be of a technical or insubstantial nature because it would not have prevented the applicant from making submissions or observations in the present appeal. In contrast, for the reasons discussed above, the breach of Regulation 72(1) here cannot be said to be insubstantial, trivial or merely technical.

Discretion of the Court

33. Counsel for the Board also submits that, in any event, the court should, in the exercise of its discretion, decline to quash the decision of the Board in this case. In making this submission, counsel relies on a number of matters including the fact that the applicant has had an opportunity (albeit belated) to exercise his right of public participation in that he is entitled to pursue an argument in these proceedings that there was a breach of the EIA Directive and the Habitats Directive. The Board also contends that there is no evidence or justification offered by the applicant for his failure to make a submission or observation to the Board following the publication of the revised list on 8th March, 2019. The Board further draws attention to the fact that the underlying planning application to the Council was duly advertised and was included in the Council's weekly list.

34. I do not, however, propose to address, at this point, the arguments made by the Board in relation to the exercise of the court's discretion. It seems to me that I should defer doing so until I have considered the remaining issues in these proceedings. Obviously, if the applicant succeeds in any of the remaining issues, it would be unnecessary to address the question of discretion.

EIA

35. The Board (through adoption of the report of its inspector) took the view that there was no requirement for an EIA in this case. The inspector took the view that solar farms are not a class of development that is listed in either Part 1 or 2 of Schedule 5 to the 2001 regulations (which mirror the provisions of Annex I and Annex II to the EIA Directive). In reaching this conclusion, the inspector referred to Class 3 (a) (dealing with industrial installations for the production of electricity, steam and hot water) Class 10 (b) (iv) (dealing with "*Infrastructure Projects-urban development which would involve an area greater than … 20 hectares…"*) and Class 10 (d) (d) (private roads which would exceed 2,000 metres in length). She expressed the view that solar farms do not fall into any of these classes. In turn, her report was adopted by the Board.

36. This view taken by the Board is now challenged by the applicant in these proceedings. In the statement of grounds, it is pleaded (at para. 41) that the proposed development is: *"an industrial development for the generation of electricity set out over a significant area within the Munster Blackwater Catchment … that at the very least requires a screening for EIA under EU and Irish law*". At para. 45 of the statement of grounds, it is also pleaded that the proposed development should be characterised as an industrial estate development project listed in Annex II of the EIA Directive.

37. At the hearing, the main argument advanced by counsel for the applicant, in the context of the EIA element of the case, was that the proposed development fell within the ambit of Class 3 (a) of Annex II which covers industrial installations for the production of electricity, steam and hot water. In turn, when counsel for the Board came to make his submissions, he suggested that this issue had not been adequately pleaded. It is true that, although the applicant's case against the Board is otherwise very clearly, logically and succinctly pleaded, there is no specific reference in the statement of grounds to installations for the production of electricity, steam and hot water. Nonetheless, as outlined above, para. 41 does refer, in somewhat broad-brush terms, to "*industrial development for the generation of electricity*…". When read in conjunction with the report of the inspector, I think it is reasonably clear that the applicant intended to refer to Class 3 (a) development. This certainly appears to be the way in which the matter was understood by each of the respondents. When it came to delivery of their respective statements of opposition, each of them specifically referred to Class 3 (a). In para. 50 of the statement of opposition delivered on behalf of the Board, it is expressly pleaded that Class 3 (a) refers to installations for the production of combined heat and power from electricity, steam and hot water and therefore does not include the proposed development. Similarly, in para. 11 of the statement of opposition filed by the State respondents, it is pleaded that the project is not an industrial installation for the production of electricity, steam and hot water, as envisaged by Class 3 (a). It therefore appears to be the case that both sets of respondent understood the plea at para. 41 of the statement of grounds to refer to Class 3 (a) projects. In the circumstances, it seems to me that the Class 3 (a) issue falls within the ambit of the case made by the applicant in his statement of grounds and therefore falls to be considered as a live issue in the case. I am accordingly required to consider the case made by the applicant with regard to the Class 3 (a) issue. I must also, in due course, address the other contention made by the applicant namely that the development should be characterised as an industrial estate development project within Class 10 (a) of Annex II (although this was not strongly pressed at the hearing).

38. Under Article 2 of the EIA Directive, Member States are required to adopt all necessary measures to ensure that, before development consent is given, projects likely to have significant effects on the environment should be subject to EIA. The final sentence of Article 2 (1) clarifies that the projects in question are those defined in Article 4.

39. In turn, Article 4 (1) provides that the projects listed in Annex I must be made subject to an EIA in accordance with Articles 5-10. Article 4 (2) addresses projects listed in Annex II. In the case of such projects, Member States are required to determine whether the project should be made subject to EIA either through:

    (a) A case-by-case examination; or

    (b) Thresholds or criteria set by the Member State (or by a combination of such an examination and thresholds).

40. As noted above, the applicant contends that the proposed development falls within Class 3 (a) in Annex II which is in the following terms:

> *"(a) Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I)".*

41. The Board submits that the reference in Class 3 (a) to *"the production of electricity, steam and hot water"* must be read conjunctively and, accordingly, the proposed project does not fall within the ambit of that class since it will not generate any steam or hot water. In contrast, the applicant contends that the reference to "*electricity, steam and hot water*" should be read disjunctively and that the proposed project is therefore captured as an industrial installation for the production of electricity.

42. On behalf of the applicant, it was submitted that, in accordance with the decision of the CJEU in Case C-72/95 *Kraaijeveld* [1996] ECR I-5431, the language of the EIA Directive indicates that it has a wide scope and a broad purpose and should therefore be interpreted with that principle in mind. In *Kraaijeveld*, the CJEU had to consider whether the expression "*canalization and flood-relief works*" in Annex II to the EIA Directive must be interpreted as including certain works on a dyke running alongside waterways. The works in question in that case were designed to alter the frequency with which river banks and the surrounding areas were submerged. The works required the erection of dykes along the river banks of a river in the Netherlands. The relevant class of project was contained in para. 10 (e) of Annex II. However, there was a divergence in how that class was described in a number of different language versions of the Directive. The English and Finnish versions referred to "*canalization and flood-relief works*" while the German, Greek, Spanish, French, Italian, Dutch and Portuguese versions referred to canalization and regulation of watercourses. The Danish and Swedish versions contained only a single expression reflecting the idea of regulating watercourses. Given the divergence between the different language versions, the CJEU indicated that it was necessary to bear in mind the purpose and general scheme of the Directive and the court then continued at para. 31 in the following terms:

> *"The wording of the directive indicates that it has a wide scope and a broad purpose. That observation alone should suffice to interpret point 10(e) of Annex II to the directive as encompassing all works for retaining water and preventing floods — and therefore dyke works — even if not all the linguistic versions are so precise".*

43. The applicant placed particular reliance on a subsequent decision of the CJEU in Case C-117/17 *Comune di Castelbellino* which concerned a project to increase the capacity of a plant for the production of electricity from biogas. The underlying facts of the case are somewhat complex. In 2012, the relevant Italian authorities authorised the project to increase the capacity of the plant in question. They did so under a law which was subsequently invalidated by the Italian Constitutional Court. Italian law was thereafter amended but in 2015 the authorities again gave permission for the project to proceed. On both occasions, the Italian authorities came to the conclusion that EIA was not necessary. The CJEU came to the conclusion that the project fell within Class 3 (a) of

Annex II. The applicant contends that, in taking that approach, the CJEU effectively treated an installation for the production of electricity as falling within the ambit of Class 3 (a) even where it did not involve the generation of heat or steam. In making that submission, counsel for the applicant referred in particular to the observations of the CJEU in paras. 35-36 of the judgment:

> *"35. First of all, it should be noted that a project for a plant for the production of electricity from biogas with a nominal power rating of less than 1 kW does not come within the scope of paragraph 2(a) of Annex I to [the EIA Directive], which covers thermal power stations and other combustion plants with a heat output of at least 300 MW, but within that of paragraph 3(a) of Annex II …, which covers projects for industrial installations for the production of electricity not included in Annex I.*
>
> *36. Work to increase the capacity of a plant such as that in question in the main proceedings therefore constitutes a project in respect of which the Member States must determine whether it is to be subject to an EIA …".*

44. Counsel for the applicant placed significant emphasis on the way in which the CJEU in these paragraphs simply referred to *"industrial installations for the production of electricity"* without any reference to the production of steam or heat. However, counsel for the Board disputed this interpretation and suggested that it is clear that the CJEU was using the words *"installations for the production of electricity*" as shorthand for the full terms of Class 3 (a). Counsel for the Board also suggested that the production of electricity from biogas was likely to generate both heat and steam. Counsel for the Board suggested that when paras. 35 and 36 are read together, it is clear that the CJEU was addressing its mind to whether the relevant project was within Annex I or Annex II. It is unsurprising in the circumstances that the CJEU made no reference to either hot water or steam. I agree with the observations made by counsel for the Board. Furthermore, having regard to the considerations outlined in paras. 45-48 below, I believe there can be no doubt that the generation of electricity *simpliciter* does not fall within Class 3 (a) unless the relevant project also generates heat and steam.

45. Counsel for the Board submitted that a significantly more relevant decision of the CJEU is to be found in its judgment in Case C-215/06 *Commission v. Ireland* which concerned the Derrybrien windfarm. One of the complaints made by the Commission in that case was that Ireland had failed to ensure that a planning permission relating to a windfarm and associated works was not made subject to EIA. Notably, the complaint made by the Commission was not founded on the suggestion that the generation of electricity by a windfarm fell within Class 3 (a) of Annex II. The complaint made was that the construction of the windfarm involved the extraction of peat and minerals and also significant road construction such as to fall within Class 2 (a), Class 2 (c) and Class 10 (d). Counsel for the Board argued that it is inconceivable that, if the EU legislature had regarded the generation of electricity (without any heat or steam) to fall within Class 3 (a), the Commission would not have relied on Class 3 (a) in its complaint against Ireland in that case. It is clear from paras. 96-103 of the judgment in that case that the

complaint successfully maintained by the Commission against Ireland was confined to aspects of the construction of the windfarm and no suggestion was made that the generation of electricity was itself covered by Annex II. It should be noted that the relevant development of the Derrybrien Windfarm commenced prior to the coming into force of the amendments made to the EIA Directive by Directive 97/11/EC (addressed in more detail in para. 47 below). At paras. 96-103, the CJEU said:

"96. Moreover, while it is common ground that installations for the harnessing of wind power for energy production are not listed in either Annex I or Annex II …, it is not disputed by Ireland that the first two phases of construction of the wind farm required a number of works, including the extraction of peat and of minerals …, and also road construction, which are listed in Annex II …, respectively in point 2(a) and (c) and in point 10(d).

97. Consequently, [the EIA Directive] was applicable to the first two phases of construction of the wind farm ….

98. It follows that Ireland was bound to subject the work on the projects to an impact assessment if they were likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location (see, to that effect, Case C 72/95 Kraaijeveld …).

99. However, Ireland states that the competent authorities took the view that Annex II … was not applicable, since the ancillary works of peat extraction and road construction were minor aspects of the project of wind farm construction itself.

100. The competent authorities therefore considered that there was no need either to investigate whether the intended projects were likely to have significant effects on the environment or, … to conduct an [EIA]….

101. However, the fact that the … projects falling under Annex II … may have been of secondary importance vis-à-vis the wind farm construction project taken as a whole did not mean that, by virtue of that fact alone, those projects were not likely to have significant effects on the environment.

102. The intended projects of peat and mineral extraction and road construction were not insignificant in terms of scale by comparison with the overall area of the wind farm project which covered 200 hectares of peat bog and which was the largest project of its kind in Ireland, …. In addition, those works were carried out on the slopes of Cashlaundrumlahan Mountain, where there are layers of peat up to 5.5 metres in depth, ….

103. It follows from those factors, which are not disputed by Ireland, that the location and size of the projects of peat and mineral extraction and road construction, and the proximity of the site to a river, all constitute specific characteristics which demonstrate that those projects, which were inseparable from the installation of 46

wind turbines, had to be regarded as likely to have significant effects on the environment and, accordingly, had to be subject to an assessment of their effects on the environment."

46. In my view, it is plain from the approach taken in Commission v. Ireland, that the generation of electricity through wind energy (which does not involve the generation of heat and steam) was not considered to fall within Class 3 (a). this conclusion is strongly reinforced by a consideration of what is now Class 3 (h) of Annex II. This coincides with the provisions of Class 3 (j) of the original version of the Directive (namely Directive 85/337/EEC). Class 3 (h) (as it now is) provides as follows:

"(h) Installations for hydroelectric energy production".

47. If the generation of electricity (without the concomitant generation of heat and steam) fell within Class 3 (a) it is difficult to understand why the EU legislature would have considered it necessary to include Class 3 (h) (i.e. Class 3 (j) in the original version). It is equally difficult to understand why, in 1997, the EU legislature would have considered it necessary to include a new class within Annex II to specifically capture wind farm installations. If the generation of electricity was already covered by Class 3 (a), there would have been no need to amend the Directive in 1997 to include this new class. Yet, in 1997, as part of an extensive overhaul of the Directive, the EU legislature (in Directive 97/11/EC) expressly included an entirely new class of project in Class 3 (i) of Annex II. This remains the case under the current version of the Directive. Class 3 (i) provides as follows:

"(i) Installations for the harnessing of wind power for energy production (wind farms)".

48. In light of the considerations outlined in paras. 45 to 47 above, I have come to the conclusion that the generation of electricity (without the concomitant generation of heat and steam) does not fall within Class 3 (a) of the Directive. Like any provision of the Directive, Class 3 (a) must be read in context. While, of course, the provisions of the Directive must be given a broad scope, it is clear that, when Class 3 (a) is read in conjunction with Class 3 (h) and 3 (i), it does not extend to the generation of electricity unless the project in question also generates heat and steam. There would have been no need to include Class 3 (h) and 3 (i) if the generation of electricity was already covered by Class 3 (a).

49. There was some debate at the hearings as to whether the use of the words "*or*" and "*and*" in other classes within Annex II could be said to throw light on whether the word "*and*" in Class 3 (a) should be read in a conjunctive or disjunctive sense. In light of the conclusions which I have reached (as set out in paras. 45-48 above) I do not believe that it is necessary to express any final view on those arguments. In any event, I have significant doubt as to whether it is helpful to try to interpret the meaning of the word "*and*" as used in Class 3 (a) by reference to the use of the word "*and*" or "or" in wholly different classes. While each class must be read in context and in light of the purpose and objective of the Directive, the syntax and punctuation used appears to be peculiar to

each class and it is not possible, in my view, to identify any clear pattern to the way in which the EU legislature has used either the word "*and*" or the word "*or*". All I can say is that, on a straightforward reading of the language of Class 3 (a), the word "*and*" appears to be used conjunctively rather than disjunctively. I stress, however, that my reasons for concluding that Class 3 (a) does not extend to the generation of electricity *simpliciter* are set out in paras. 45 to 48 above.

50. In these circumstances, I have come to the conclusion that the applicant's case in relation to EIA must fail. With regard to the alternative case made by the applicant that the development falls within the ambit of Class 10 (a) which covers *"industrial estate development projects", I can see no basis for this contention*. No sufficient argument was addressed to me on this issue to persuade me that a solar farm of this nature could be said to constitute an "*industrial estate development project*". In this regard, it is well settled that the onus lies on the applicant, in judicial review proceedings, to prove his or her case. In these proceedings, the applicant has failed to demonstrate that the development falls within Class 10 (a).

Screening for appropriate assessment

51. This element of the applicant's case is based on the judgment of the CJEU in Case C-323/17 *People Over Wind v. Coillte Teo* which addressed the issue as to whether mitigation measures could be relied upon by a competent authority when carrying out a screening exercise (otherwise known as a Stage 1 assessment) for the purposes of Article 6 (3) of the Habitats Directive. It is now well established as a matter of EU law that, where a development is proposed in the vicinity of a Natura site, the competent planning authority must carry out a screening exercise essentially to assess whether there is a prospect that the development may have a deleterious effect on the site in question. If there is such a prospect, the authority must then carry out a full appropriate assessment in order to ascertain whether deleterious effects can be avoided. The *People over Wind* case concerned a project involving the connection of a windfarm to the national electricity grid. The project in question was in close proximity to a Natura 2000 site namely the River Barrow and River Nore SAC which contained a habitat for the Irish subspecies of the freshwater pearl mussel which is included in Annex II to the Habitats Directive. Under the relevant Irish regulations, Coillte was itself responsible for any necessary appropriate assessment of the project. Coillte retained consultants to conduct a screening exercise as to whether the development could have the potential to have adverse impacts on the pearl mussel. The screening report prepared by the consultants suggested that, in the absence of protective measures, the project had the potential for the release of suspended solids into watercourses which could lead to the release of silt or pollutants into the pearl mussel population through the pathway of such watercourses. It is well established that any increase in silt or sedimentation is deleterious to the pearl mussel and adversely affects its ability to reproduce. However, a conclusion was reached that, on the basis of the protective measures which were proposed, there was no risk to the SAC and accordingly it was unnecessary to carry out a full appropriate assessment. The approach taken by Coillte was challenged by the applicants who contended that, it was impermissible, as part of a screening exercise for appropriate assessment, to take

mitigation measures into account. In the High Court, Barrett J. referred a question to the CJEU for a preliminary ruling as to whether mitigation measures can be taken into account when carrying out screening for appropriate assessment under Article 6 (3) of the Habitats Directive. The CJEU concluded that such measures could not lawfully be taken into account at the screening stage. At paras. 34-40 of its judgment, the CJEU explained the rationale for its decision in the following terms:

"34. … it is settled … that Article 6(3) … 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 … will have a significant effect on the site concerned. In the 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 …

35. … the fact that … 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 presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

36. That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

37. Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes … an essential safeguard provided for by the directive.

38. In that regard, the … case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned ….

39. It is, moreover, from Article 6(3) … that persons such as the applicants … derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment ….

40. In the light of all the foregoing considerations, the answer to the question referred is that Article 6(3) … must be interpreted as meaning 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."

52. As appears, in particular, from para. 40 of the judgment of the CJEU, it is not permissible to take into account, at the screening stage, measures which are intended to avoid or reduce the harmful effects of a plan or project. The effect of the judgment appears to be that a court, in a case of this kind, is required to reach a conclusion as to what was the intention underlying the particular measures in question. This is an issue which has been considered in a number of recent High Court decisions (which are examined in more detail below).

53. The applicant in the present case submits that the Board erroneously took into account, as part of its screening exercise under Article 6 (3) of the Habitats Directive a number of mitigation measures which IGP proposes to put in place which the applicant contends are intended to ensure that the construction and operation of the proposed solar farm will not have a deleterious impact on the freshwater pearl mussel in the River Blackwater.

54. In order to understand the applicant's case, it is therefore necessary to consider some of the underlying facts. The proposed site of the development is approximately one kilometre from the Blackwater River (Cork/Waterford) SAC ("*the SAC*"). There is a population of freshwater pearl mussel approximately nine kilometres from the site. The freshwater pearl mussel is among the species designated as qualifying interests for the purposes of the SAC. The qualifying interests also include the Atlantic salmon. According to the conservation objectives for the SAC, there are three populations of pearl mussel in the River Blackwater which are composed entirely of aged adults with no evidence of recruitment for at least 20 years. The habitat for the species is currently unsuitable for the survival of adult mussels or the recruitment of juveniles. This is largely due to over sedimentation. Thus, any release of sediment into watercourses draining into the Blackwater would have an obvious deleterious impact on the mussel. It is clear from the materials before the Board that the construction of the proposed development would require (*inter alia*) the potential stripping of overburden material, the stockpiling of such material on site, the stockpiling of building materials (such as sand and cement), the storage of fuel on site, and excavation works for construction of fencing, trenching and the laying of ducts and cables. There are a number of streams in the general vicinity of the proposed development including the Ardglass stream, the Oakfront stream and several drainage channels within the site. During the course of the planning process, it was acknowledged that the primary potential water pollution receptors were these streams and the drainage channels. The Oakfront stream runs along the eastern boundary of the site while the Ardglass stream runs close to the western boundary of the site.

55. According to the screening reports submitted by the developer, IGP, to the Council (which formed part of the material considered by the Board) there is no "*significant potential source-pathway-receptor link"* to the SAC from the development site. The relevant screening report dealt with the freshwater pearl mussel as follows:-

"These are not found within nine kilometres of the site and the drains within the site would not create a clear connection by which they would be affected within the area of their known occurrence".

56. However, as the report of the inspector makes clear, she identified that, contrary to the impression created in the consultants' screening reports, there is, in fact, a hydrological connection between the site and the SAC. At p. 32 of her report, the inspector stated:-

"The Ardglass Stream to the west and the Oakfront River to the east discharge to the Blackwater SAC c.662 m and 1.9 km downstream of the site respectively. The nearest mapped qualifying interests in the SAC are the whiteclawed crayfish c.3 km to the south…of the appeal site.

There is a hydrological connection between the site via the drainage ditches to the designated site. Field drains within the site discharge into the adjacent watercourses noted above. As a consequence, there is potential for indirect effects from emissions to ground and surface water during the construction phase such as silt laden runoff, hydrocarbons or other pollutants".

57. However, it was argued by counsel for the Board in the course of the hearing before me that, in circumstances where the developer, IGP, had proposed the protective measures in issue in the belief that there was no hydrological connection between the development site and the SAC, the protective measures cannot have been intended to avoid or reduce the harmful effects of the project on the SAC. Counsel submitted that, in any event, it was clear from the materials submitted on behalf of IGP during the planning process that the measures were designed to protect flora and fauna on the development site itself and that they had not been designed with a view to protecting the SAC.

58. Counsel for the Board drew attention, in this context, to the preliminary construction environmental management plan ("*CEMP*") which stated on p. 5 that the mitigation measures discussed in s. 6 of the same document were "*to ensure that there are no adverse negative impacts on the hydrological, hydrogeological and ecological features of the proposed development site*". (Emphasis added). However, it should be noted that, in s. 5 of the same document, the authors state that the primary potential water pollution receptors are the Oakfront stream and the Ardglass stream. The tributaries to those streams and the various drainage channels within the proposed development site were identified as potential secondary water pollution receptors. In s. 6 of the CEMP, the authors identify the steps that would be taken to prevent contamination of watercourses. In particular, it identified that, in advance of construction works taking place, silt fences would be put in place to prevent any silt laden waters entering the drainage ditches or seasonal streams which discharge to the Oakfront stream or the Ardglass stream. The CEMP made clear that these silt fences would remain in place until the site had been fully landscaped and the risk of silt laden run-off had been minimised. Any trapped silt would be spread on site prior to any landscaping or grass seeding.

59. In addition, s. 6 of the CEMP described how straw bales would also be used as an additional precaution. These would be placed in the ditches to intercept any silt laden or potentially polluting run-off (which had not been kept in place by the silt fences) migrating towards the Oakfront or Ardglass streams. The CEMP also set out measures in relation to dust minimisation. Section 6.2.3 stated that no concrete production would take place on site "*due to the sensitivity of the watercourses in the vicinity of the site".* In addition, no washing down of lorries or any other construction vehicles would take place on the site.

60. The CEMP also provided that a protection protocol would be put in place which would implement (*inter alia*) any recommendations made by Inland Fisheries Macroom "*to ensure the protection of the River Blackwater and its tributaries and the associated aquatic fauna and any fisheries connected to the site by the river*". In addition, it stated that weather conditions would be "*considered*" during all construction operations and no plant would enter within 100 metres of the Oakfront or Ardglass stream during or following heavy rain or *"other conditions likely to lead to large-scale or additional water flow that would carry soil or silt into the watercourses*". There were also further details in relation to the grid connection, site tidiness, operational controls and storm water management.

61. There were additional mitigation measures set out in the screening reports which were prepared in the course of the planning process by consultants retained by IGP. The first such report was prepared in February 2017 in which it was stated that:-

> *"Construction measures are the only ones that create any major modifications to the site as its operation will not have any ongoing impacts".*

62. In s. 6.0 of the February 2017 screening report, it was stated that there would be no effect on Natura 2000 sites as a result of the project *"following standard best practice procedures and mitigation measures*". In s. 6.1 a number of mitigation measures were outlined. Hedgerow removal was to be undertaken outside of the bird nesting period. There was to be avoidance of all marsh areas watercourses and wet drains "*to prevent any downstream effects on water quality and to protect marsh areas".* The marsh areas in question appear to have been within the development site itself. Cleaning of solar panels would involve the use of non-toxic cleaning agents and there would be ongoing monitoring of the site to determine whether any of the measures would require modification.

63. In response to the February 2017 screening report, the Council in September 2017 sought a revised screening report detailing the proposed grid connection and its potential for significant impacts on the SAC. Thereafter, in November 2017, a revised screening report was submitted. In the summary at the beginning of the November version of the screening report, it was stated that:-

> *"Mitigation measures are proposed for the site's flora and fauna and none is required for any Natura sites".*

64. The November 2017 screening report provided more detail in relation to (*inter alia*) the SAC. As noted in para. 55 above, it stated that there was no significant potential source-pathway-receptor link to the SAC. In s. 5.1.1 (dealing with the effects on the SAC) it now contained additional information in relation to the grid connection. Section 5.1.1 stated:-

> *"In the normal execution of construction operations … there will not be any impact upon habitats or species within or directly adjacent to Natura 2000 sites…. The watercourses crossed by the electrical ducts required to connect the solar park with the national grid will not be entered by equipment and the ducts incorporated into the existing bridges….*
>
> *In the eventuality of inappropriate construction procedures or timing, it is highly improbable that any protected sites are placed at high risk. Ecological risks are created by the movement of materials to and from the site during excavations, demolition and construction.*
>
> *Further to this, run-off during construction can pose a risk of siltation or the transfer of contaminants within the water. There are no major rivers through the site. There are drains within the site but no stream. There will be no operations likely to affect these drains as the project primarily involves the installation of banks of solar panels on metal frames that are constructed on-site and can be introduced without significant modification to existing hedgerow or disturbance to the minor watercourses…."*

65. In s. 5.2.1 it was stated that there will be no significant or "*measurable*" impact on any protected habitat, flora or fauna from the construction or operation of the project *"following good construction and operation practice".*

66. Section 6.0 replicated what had previously been said in the same section of the February 2017 report. It stated that there would be no effect on Natura 2000 sites as a consequence of the use of standard best practice procedures. It also stated that no further mitigation measures were required. The report also made clear, at this point, that a number of measures were intended to be implemented within the site for biological diversity enhancement and protection. The mitigation measures which are set out in s. 6.1 replicate the measures previously contained in the February 2017 report.

67. When the matter was appealed to the Board, a detailed report was prepared by the inspector appointed by the Board. In that report, she summarised the grounds of appeal submitted by Fiddane Solar Action Group. One of the concerns raised in the appeal was in relation to the streams running along the boundaries of the site (as noted in the CEMP). The case was made that these should have been identified and considered in the appropriate assessment screening exercise.

68. The inspector, in her report, also summarised the submission made by the developer in response which (*inter alia*) highlighted that extensive measures were proposed within the CEMP that "*will protect the watercourses from any risk of pollution or contamination*".

69. In s. 7.4.3 of the report, the inspector notes that the construction process for the solar farm is "*relatively low impact*". In particular, she notes that the metal uprights supporting the solar panels will be driven into the soil without any separate foundation. Nonetheless, she notes in s. 7.4.4 that there is a potential for silt laden run-off to enter adjoining watercourses during construction and that this is addressed in the CEMP. In s. 7.4.5 she observes:-

> *"On the basis of the information provided it is reasonable to conclude that the proposed development will not impact upon the prevailing drainage conditions or water quality in the area".*

70. As noted previously, the inspector (in s. 7.11.3 of her report) notes that there is a hydrological connection between the development site and the SAC. The relevant extract from the report is quoted in para. 56 above. In the same paragraph, the inspector identifies that, as a consequence of the hydrological connection, there is the potential for harmful effects in particular during the construction phase as a consequence of (*inter alia*) silt laden run-off. In the immediately following paragraph, the inspector explains why, notwithstanding this hydrological connection and the potential for harmful effects, she concludes that the SAC will not be affected by the proposed development:-

> *"Taking into consideration the incorporation of best practice methods during the construction phase which are considered an integral part of the development to protect against sediment and hydrocarbon release, I would concur with the conclusions of the screening report submitted that no indirect impacts are envisaged. In terms of the operational phase discharge from the development is to be to existing greenfield run-off rates. It is not proposed to remove any existing on-site drainage ditches".*

71. Counsel for the applicant strongly argued that it is clear from this paragraph that the inspector did take the protective measures proposed in the CEMP into account in reaching her conclusion that there would be no adverse impacts on the SAC. Counsel argued that, having regard to the decision of the CJEU in *People Over Wind*, this was impermissible. He also drew attention to what had been said by the inspector in the immediately preceding paragraph (quoted in para. 56 above) where she had acknowledged that, as a consequence of the hydrological connection there is *"potential for indirect effects from emissions to ground and surface water during the construction phase such as silt laden run-off, hydrocarbons or other pollutants".* Thus, counsel argued that it was clear that the inspector had taken into account at the screening stage measures which were designed to avoid or reduce the harmful effects of the project.

72. Having regard to the approach taken by the CJEU in para. 40 of the judgment in *People Over Wind*, the outcome of this issue depends on whether it can be said that the measures in question were intended to avoid or reduce the harmful effects of the proposed development. The CJEU did not offer any guidance as to how a national court is to determine the intention underlying a measure. As a matter of principle, it appears unlikely that the CJEU could have in mind that the national court would assess this issue

by reference to the declared intention of the developer. That approach would give rise to a fairly obvious potential for abuse. As a matter of principle, it would therefore appear to be necessary and appropriate for the national court to adopt an objective approach. This is the view which has been taken by Simons J. in the *Heather Hill* case discussed below.

73. The nature of the approach to be taken by the court has been considered in a number of recent decisions by Barniville, Simons and Quinn JJ. In the first of those decisions, namely *Kelly v. An Bord Pleanála* [2019] IEHC 84, Barniville J. dealt with a judicial review challenge to a decision of the Board to grant permission to Aldi Stores for the development of a supermarket in Laytown, County Meath. The grounds of challenge included a contention that the Board had, impermissibly, taken into account mitigation measures at the screening stage. In that case, the measures in question were Sustainable Drainage Systems ("*SUDS*") measures which were incorporated into the development design. The Board and the developer resisted the case made by the applicant on the basis that the SUDS measures were not by way of mitigation but were standard drainage systems which are required (with limited exceptions) to be incorporated into all new developments. It should also be noted that, in that case, there was also affidavit evidence before the court to the effect that there was no direct pathway between the development site in question and the shoreline in the vicinity of the relevant Natura designated site.

74. Barniville J. came to the conclusion that SUDS measures could not be considered to be mitigation measures as understood in *People Over Wind*. At pp. 72-73 of his judgment, Barniville J. explained that there were a number of reasons why he had reached that conclusion:-

> *"130. 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 … 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"…. I have considered the relevant provisions of the GDSDS … . I note that among the key issues driving the policy contained in the GDSDS … was the operation of storm water and fire water drainage systems…. The legal requirements behind the policy are derived from the Water Framework Directive …. It is clear … from a review of the extracts from the GDSDS and from the uncontested affidavit evidence … 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"….*
>
> *131. Furthermore, the policy behind requiring … 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 …. It is clear that the key driver for the requirement to incorporate SUDS … 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 a particular development.

132. In my view, SUDS measures are not 'measures that are intended to avoid or reduce the harmful effects' of a particular development of a European site. They are not 'intended' to have that effect as they are required to be incorporated in developments for the reason set out in the GDSDS…. They are not required to be incorporated by reason of the potential effect of a development on a European site. SUDS measures cannot, therefore, … be regarded as measures that are 'intended' to 'avoid or reduce' the harmful effects of a development on a European site. …

75. The issue of protective or mitigation measures was subsequently considered by Simons J. in *Heather Hill Management Company v. An Board Pleanala* [2019] IEHC 450. That case was concerned with a proposed residential development at Bearna, County Galway. The applicant challenged the decision of the Board to grant permission for the development on a number of grounds. One of the grounds was that, in carrying out a screening exercise for appropriate assessment, the Board had wrongly taken into account "*best practice measures"* and thus had invalidly determined, on the basis of those measures, that there was no likely effect on the Galway Bay Complex SAC ("*the Galway Bay SAC*") and the Inner Galway Bay SPA *("the SPA").* There was a hydrological connection between the proposed development site and the Galway Bay SAC and SPA. The matter was dealt with as follows in the inspector's report:-

"The only potential pathways for effects on the SPA and SAC are through hydrological connections, i.e. the Trusky Stream discharging to Galway Bay at Barna. There will be no run-off from the site directly to any SAC or SPA. Best practice measures will be undertaken to minimise emissions to the Trusky Stream during the construction and operation of the development. These measures will ensure the protection of water quality and fisheries resources in the Trusky Stream. Emissions into Galway Bay at Barna from the Trusky Stream will be negligible and any slight emissions that do enter Galway Bay … will be quickly dissipated by tidal currents….

It is reasonable to conclude that on the basis of the information on the file … that the proposed development … would not be likely to have a significant effect on … Galway Bay…. SAC … and [the] SPA… and a Stage 2 Appropriate Assessment … is not therefore required".

76. The question which fell for determination in that case was whether the "*best practice measures*" mentioned by the inspector were intended to avoid harmful effects on the Galway Bay SAC and on the SPA or whether they were intended for some other purpose.

77. In considering the issue, Simons J., at para. 156 of his judgment, observed that the distinction between measures intended to avoid harmful effects and measures intended for some other purpose *"can readily be applied in cases where the competent authority has adopted a stepped-approach in its screening determination, such as that adopted on*

the facts of People Over Wind. In that case, the screening report … had, first, identified a potential impact upon the qualifying interest, and, secondly, put forward measures to avoid and reduce that impact".

78. In the course of the hearing before me, counsel for the applicant submitted that, on the basis of the report of the inspector, a stepped approach was adopted here in that the inspector (in the passage quoted in para. 56 above) drew attention to the hydrological connection with the SAC and stated that, as a consequence, there was a potential for indirect effects during the construction phase – in particular from silt laden run-off or other pollutants. However, counsel for the Board sought to emphasise what was said by Simons J. in para. 158 of his judgment where he warned against the "*temptation*" to work backwards from the existence of measures and to assume that "*but for*" such measures, the proposed development would be likely to have a significant effect. Simons J. stressed that the emphasis must always be on the intended purpose of the measure. That said, Simons J. also stressed (in para. 164 of his judgment) that the label which the parties choose to attach to a particular measure is not dispositive. Intention must be determined on an objective basis. Simons J. considered the judgment of Barniville J. in Kelly and observed at para. 162:-

> *"It follows from this case law that the question of whether a particular measure is an avoidance / reduction measure falls to be answered by reference to the intended purpose of the measure. This will require consideration of the rationale for the imposition of the measure. If, as in People Over Wind, a measure is expressly described as a protective measure, then it falls within the category of avoidance / reduction measures which cannot legitimately be taken into account as part of a stage 1 screening exercise. Conversely, if, as in Kelly …, the measures are required for purposes entirely unrelated to the Habitats Directive, then the mere fact that reference is made to same in the context of the discussion of the screening determination does not invalidate that decision. It all depends on what reliance is placed upon same. As appears from the inspector's report in Kelly …, there was no watercourse on the application site … which could act as a pathway to any European site …".*

79. While Simons J., in that passage, stressed that the mere fact that reference is made to such measures does not *per se* invalidate a screening decision, he also made clear in para. 170 that the fact that the measures might also have a purpose unrelated to the Habitat's Directive does not preclude a finding that the measures were also intended to avoid or reduce the impact of the development on European sites.

80. Simons J. analysed the approach taken by the inspector in the passage from her report quoted in para. 75 above. At para. 168 he drew attention to the fact that there were two strands to her reasoning:-

(a) In the first place, she drew attention to the use of best practice measures intended to minimise emissions into the stream; and

(b) She also concluded that any slight emissions from the stream that do enter Galway Bay at Bearna will be quickly dissipated by tidal currents.

81. Simons J. observed in the same paragraph that the inspector did not rely solely on dispersal by the tide in reaching her screening determination. The avoidance/reduction of emissions to the Trusky Stream also featured in her reasoning.

82. Simons J. rejected the argument made by the Board and the developer in that case that the "*best practice measures*" were intended to address the impact of the proposed development on the immediate locality rather than on the Natura sites. At para. 170 of his judgment he said:-

> *"With respect, this argument cannot be reconciled with the language of the inspector's recommended screening determination when taken as a whole. It cannot be overlooked that the inspector chose to make express reference to 'best practice measures' in what is the very summary of the screening exercise. The inspector self-evidently attached importance to these measures. The fact that the measures would have a benefit to flora and fauna within the application site does not preclude a finding that the measures would also avoid / reduce the impact on the European sites. The two outcomes are entirely compatible. There is nothing in the judgment in People Over Wind which says that the effect on the European sites has to be the only intended purpose."*

83. Simons J. then analysed the underlying documents in that case including a report prepared by an ecologist which set out a number of mitigation measures which, in substance, are quite similar to those proposed in the present case. Simons J. set out his ultimate conclusion as follows at paras. 177-178:-

> *"177. On the facts of the present case, there is a potential hydrological connection between the application site and the European sites, via the Trusky stream. The stream enters the sea at Barna pier, some 1.4 km to 1.5 km east of the Galway Bay SAC and SPA. Whereas the screening determination does state that any emissions into Galway Bay would be quickly dissipated by tidal currents, the determination does not rest exclusively on this factor. Rather, the inspector's screening determination, which was accepted and adopted by An Bord Pleanála, makes express reference to 'best practice measures' being undertaken to minimise emissions to the Trusky stream during the construction and operation of the development. The structure of the screening determination, and the fact that the inspector thought it necessary to make reference to 'best practice measures', in what is a very short determination, indicates that the inspector was relying upon the combined effect of the 'best practice measures' and dissipation by tidal currents in reaching her determination.*
>
> *178. The reference to 'best practice measures' can only be understood as referring to the 'mitigation measures' as enumerated in s. 6 the ecological report. …".*

84. The judgments of Barniville J. and Simons J. were subsequently analysed and applied by Quinn J. in *Uí Mhuirnin v. Minister for Housing Planning and Local Government* [2019] IEHC 824. That case was concerned with the validity of a foreshore licence granted by the respondent Minister ("*the Minister*") in respect of a renewable energy wind wave and tidal test facility near Spiddal, County Galway. The decision to grant the licence was challenged by the applicant on a number of grounds including on the ground that the Minister unlawfully took mitigation measures into account when carrying out a screening exercise for appropriate assessment. For the purposes of the screening report in that case consultants were retained to produce a screening report. That report identified a number of Natura sites which were relevant for the purposes of the exercise but it came to the conclusion that there was no potential for significant effects on those sites from the proposed activity such that a stage 2 appropriate assessment was not required. This conclusion was set out in s. 3 of the report. No mitigation measures of any kind were identified in that section of the report. However, s. 4 of the report contained an assessment of the likely significance of the proposed activity on marine mammals and in that section of the report a number of mitigation measures were proposed. The report stated that these mitigation measures were proposed in order to ensure a "*low risk*" to marine mammals.

85. The consultants' report in *Uí Mhuirnin* was subsequently considered by a committee which concluded that the proposed activity was unlikely to have a negative impact on the Natura sites. It was specifically stated that:

> *"with the application of mitigating/best practice measures described in the environmental report, it is likely to reduce the potential impact to negligible levels".*

86. The committee produced its own screening report in which a number of potential impacts on the relevant Natura sites both during the installation phase and the operational phase were identified. The report identified the *"best practice measures*" which were proposed to protect marine mammals. It contained a statement that there would be no direct or indirect impact and that the *"overall integrity of the Natura 2000 sites will not be affected*". It then stated that "*on the basis of the above*" a conclusion could be reached that there were not likely to be any significant effects as a result of the proposed project.

87. In his judgment, Quinn J. observed that the People over Wind principle is only violated if, in the first place, potential harmful effects of the project on the relevant Natura site have been identified. In para. 144 he drew attention to the screening report of the Committee which had identified a number of harmful effects during both the installation phase and the operational phase.

88. Quinn J. next considered whether the Committee had taken into account measures which were designed to avoid or reduce the harmful effects in question. In this context, he rejected the suggestion made by the Minister that the measures in question were directed solely at the impact on marine mammals. He observed, in para. 148, that the assessment of impact on marine mammals was interwoven with the assessment of impact on other species. In the circumstances, Quinn J. concluded that the Committee clearly

fell into error having regard to the principles laid down by the CJEU in *People over Wind* as further explained in *Kelly* and in *Heather Hill*.

89. Taking the decision of the CJEU in People over Wind together with the judgments in *Kelly, Heather Hill* and *Uí Mhuirnín*, it is possible to summarise the relevant principles as follows:-

(a) In carrying out a screening exercise, the precautionary principle must be applied;

(b) A stage 2 appropriate assessment must be carried out if, on a screening exercise, it is not possible to exclude the risk that a proposed development will have a significant effect on a Natura site;

(c) The appropriate time to consider measures capable of avoiding or reducing any significant effects on the site concerned is at the stage 2 appropriate assessment when a comprehensive analysis of those measures can be carried out and a determination reached as to whether they will or will not be effective;

(d) Taking account of such measures at the screening stage is liable to undermine the protections afforded by the Habitats Directive. To take account of the measures at the screening stage runs the risk of circumventing the stage 2 assessment which constitutes an essential safeguard under the Habitats Directive;

(e) It is accordingly impermissible, at the screening stage, to take account of measures intended to avoid or reduce the harmful effects of a proposed development;

(f) The question of the intention underlying the measures in question is to be assessed objectively. Thus, the language used in any document generated in the course of the screening exercise is not determinative;

(g) On the other hand, there may be cases where, having regard to the language used by the competent authority (or in some document relied upon by the competent authority) it is obvious that the measures in issue were designed to avoid and reduce any impact on the relevant site. As Simons J. observed in *Heather Hill*, this is what happened in *People over Wind* where the measures concerned were expressly described as "*protective*" with reference to the relevant site;

(h) On the other side of the coin, there may be cases where it is clear that the measures in question were adopted not for the purpose of avoiding or reducing the potential impact on the relevant site but were adopted solely and exclusively for some other purpose. This is exemplified in the decision of Barniville J. in *Kelly* where the relevant measures were found, as a matter of fact, to be a standard component in virtually all projects; they were not in any way directed to the protection of any Natura site.

(i) On the other hand, the fact that one of the purposes of the measures in question may have no connection with a Natura site does not exclude the possibility that

there may be more than one purpose for the measures. In cases where such an unconnected purpose is identified, it is therefore necessary to consider whether, as a matter of fact, the measures were also intended to avoid or reduce the impact of the development on the Natura site.

(j) That said, it is not legitimate to work backwards from the existence of measures and to assume from their existence that the proposed development must be likely, in the absence of such measures, to have a significant effect on the relevant site. As Simons J. observed in *Heather Hill*, any such temptation to take that course must be resisted;

(k) In considering whether measures fall foul of the *People over Wind* principle, it is not usually helpful to consider whether the measure is "*integral*" to the project or is something "*additional*". This is because it may be difficult in practice to draw a meaningful distinction between the two. A developer may well anticipate the need for particular mitigation measures and arrange for those to be "*built in*" to the project.

(l) In each case, it is essential to analyse the measures in question in the context of the screening exercise carried out by the competent authority (and any documents relevant to that exercise) and to determine, on an entirely objective basis, whether the measures can be said to have been intended to avoid or reduce harmful effects on a Natura site or whether the measures were designed solely for some other purpose.

90. It is now necessary to apply the principles summarised above to the particular circumstances of this case. In my view, it is clear from the CEMP and the screening exercise carried out by the inspector on behalf of the Board that the measures set out in the CEMP to protect watercourses from pollution (in particular silt laden run-off) were intended to avoid or reduce the harmful effects on the SAC. I have reached that conclusion for the following reasons:-

(a) In the first place, although the screening exercise carried out by the consultants on behalf of the developer suggested that no mitigation measures were required for any Natura sites, the information contained within that report was somewhat equivocal. As noted in para. 64 above, the report stated that "*no significant potential source-pathway, receptor link"* (emphasis added) to the SAC had been identified. While the purpose of a screening exercise is to identify whether a proposed development may have a significant effect on a Natura site, it would be difficult to form the view that there was no possibility of there being a significant effect on the SAC as a consequence of any migration of silt (or other pollutants) through any pathway (however small) that might exist between the development site and the SAC.

(b) On page 11 of the same report, it was stated, with regard to the freshwater pearl mussel, that: *"the drains within the site would not create a clear connection by*

which they would be affected within the area of their known occurrence".(Emphasis added). Again, having regard to the precautionary principle, that seems to me to be a somewhat equivocal conclusion;

(c) Notwithstanding the somewhat guarded statements in the consultants' screening report, it is clear from the CEMP that there was, in fact, a concern about the possible impact of the development on the River Blackwater. As noted in para. 60 above, the CEMP specifically stated that any recommendations by Inland Fisheries, Macroom would be implemented "*to ensure the protection of the River Blackwater and its tributaries and the associated aquatic fauna and any fisheries connected to the site by the river".*

(d) The concern about the potential impact on the River Blackwater is reinforced by what is said at p. 11 of the CEMP which described the silt fences and other protective measures to be undertaken. The express purpose of these measures was stated to be to prevent any silt laden waters entering the drainage ditches/seasonal streams and in turn discharging to the Oakfront stream or the Ardglass stream. It should be recalled, in this context, that neither of those streams traverse the proposed development site itself. As noted previously, the Ardglass stream flows approximately 75 metres beyond the western boundary of the development site while the Oakfront stream flows, at its closest point, adjacent to the eastern boundary of the site. There appears to be a clear recognition within the CEMP that there is a connection between the drainage ditches and seasonal streams on site and the Oakfront stream and the Ardglass stream. This is reinforced by what is said on p. 11 about the use of straw bales as an added protection to intercept any silt laden or other polluting run-off "*migrating towards the Oakfront stream or the Ardglass stream due to any potential unforeseen failure of silt fencing".*

(e) Thus, even prior to considering the report of the inspector, it is evident that the protective measures described in the CEMP were designed to prevent discharge to the Oakfront stream and the Ardglass stream. In circumstances where neither of those streams traverse the development site, this gives the lie to the suggestion that the measures were intended to protect the development site itself. Furthermore, the CEMP clearly demonstrates that the construction phase of the development may give rise to silt. Otherwise, it would not be necessary to put the measures in place to prevent the migration of silt-laden material. This runs directly counter to what had been stated in the screening report prepared by the consultants where, at p. 17, it had stated that: "*there are drains within the site but no stream. There will be no operations likely to affect these drains as the project primarily involves the installation of banks of solar panels on metal frames that are constructed on-site and can be introduced without significant modification to existing hedgerow or disturbance to the minor watercourses";*

(f) Crucially, both the Ardglass stream and the Oakfront stream discharge to the River Blackwater which is protected by the SAC. This is confirmed by what is stated by the inspector at p. 32 of her report. As noted above, she found that there was a hydrological connection between the development site and the SAC as a consequence of the field drains which had the potential to discharge into the nearby Ardglass stream and Oakfront stream. However, even before the inspector reached that conclusion, it is evident from the CEMP itself that there was an understanding on the part of the developer of the potential impact of the construction phase of the development on the River Blackwater and its tributaries. That was expressly acknowledged on p. 17 of the CEMP (quoted in subpara. (e) above). Given the contents of the CEMP, it is difficult to understand how the authors of the screening report prepared by the consultants could have reached the conclusions which they did. Based on the content of the CEMP, it is impossible to avoid the conclusion that the purpose of the silt fences and the other protective measures described in the CEMP were intended for any purpose other than the protection of the watercourses draining into the River Blackwater where the various species in that river (including the freshwater pearl mussel) could potentially be adversely affected by ingress of silt-laden water migrating from the construction works on the development site. I do not believe that there is any plausible basis to suggest that the measures were designed to protect the flora and fauna on the development site itself. In light of the contents of the CEMP, and in light of the fact that both the Ardglass and Oakfront streams were off-site, the silt fences cannot have been designed to protect the development site itself;

(g) Thus, it seems to me that it should have been obvious to the Board on considering the materials before it, that the principal purpose of the silt fences and other protective measures was to protect against the migration of silt or other pollutants from the construction phase of the development to the SAC.

(h) In fact, the inspector clearly saw that there was not just a hydrological connection between the development site and the SAC but also that there was the potential for harmful effects during the construction phase of the development. While the relevant section of her report has already been quoted above, it is worth reiterating what she said here:-

> *"Field drains within the site discharge into the adjacent watercourses….As a consequence there is potential for indirect effects from emissions to ground and surface water during the construction phase such as silt run off, hydrocarbons or other pollutants".*

(i) Having identified the potential that the construction phase of the development could have adverse impacts on the SAC, the inspector then took into account what she described as "*best practice methods*" during the construction phase, in coming to the conclusion that the development would not have an adverse impact on the SAC. In reaching that conclusion, the inspector does not appear to have considered

the intention underlying what she described as the "*best practice methods*". In light of the terms of the CEMP, it is clear that the measures in question were intended to prevent silt-laden run-off. They were not intended to protect the development site itself but were intended to protect the downstream effects of any such run-off. From an ecological perspective, the most important feature downstream of the development is the SAC. It should therefore have been clear to the Board that the principal purpose of the proposed measures was to protect against harm to the SAC. In those circumstances, having regard to the decision of the CJEU in *People over Wind*, the measures in question could not be taken into account at the screening stage;

(j) In fairness to the inspector, she appears to have placed some emphasis, in this context, on the fact that she considered the measures in question to form *"an integral part of the development"*. However, subsequent to her report, Simons J. has made clear in *Heather Hill*, that this is not the appropriate test. Moreover, any consideration of the CEMP would demonstrate that the purpose of the measure was to protect against silt-laden or other deleterious run-off. This could not be said to have been done for the purposes of projecting flora and fauna on site. It was clearly aimed at ensuring that there would be no migration of silt into watercourses which flow into the River Blackwater and hence into the SAC.

91. In the circumstances, it appears to me that the Board was not entitled to take into account the measures described in the CEMP in carrying out the screening exercise for appropriate assessment in this case. As a consequence of the decision of the CJEU in *People over Wind*, the Board was not entitled to proceed in this way. That error goes to the jurisdiction of the Board. In the circumstances, the decision of the Board of 15th November, 2018 appears to me to be invalid and the applicant must be entitled to an order of *certiorari* quashing the decision to grant planning permission for the solar farm development. I will, however, hear the parties as to whether the matter can now be remitted to the Board in order to carry out a fresh screening exercise and, very probably, a full appropriate assessment.

The complaint about Cooliney Bridge

92. For completeness, it should be noted that the applicant also contends that the decision of the Board is invalid in circumstances where (so the applicant contends) the Board had no scientific information before it on the risks to the SAC of modifications to Cooliney Bridge, a structure crossing the Oakfront stream. In this context, it appears that this bridge was shown in the wrong place on the maps submitted with the planning application. It is therefore suggested that the bridge in question was never inspected or assessed. I do not believe, however, that it is necessary to spend time on this issue. While the bridge may have been shown in the wrong location, it is clear from the screening report prepared by the consultants retained by the developer that two bridges were considered for the purposes of the screening exercise. No one has suggested that there were more than two bridges to be assessed. The view was taken that while the bridges would be altered to provide access for electrical ducts (that would connect the solar farm with the

national grid) this would not involve any operations within the watercourses crossed by the ducts. I am not, therefore, satisfied that the applicant has made out a case that there was a failure to consider Cooliney Bridge. While the bridge may have been shown in an incorrect place on the map, it seems to me that the bridge was nonetheless assessed.

The case against the State Respondents

93. In light of the fact that I have found the decision of the Board to be invalid, there is, strictly speaking, no necessity to consider the case against the State Respondents. As counsel for the State Respondents correctly observed in the course of the hearing, the case against the State Respondents is contingent on the court reaching a conclusion that the Board acted in accordance with Irish law. The case is made in paras. 48 and 51 of the statement of grounds that, if the Board made its decision in accordance with Irish law, then the State Respondents failed to adequately transpose the Habitats Directive and the EIA Directive. However, one of the striking features of the case made against the State Respondents is the complete lack of any attempt in the statement of grounds to set out any basis on which the court might conclude that Irish law fell short of the requirements of EU law. It seems to me that if a case is to be made against the State alleging that there has been a failure to properly transpose EU law, any such case requires to be pleaded specifically and with appropriate particularity. As Barniville J. explained in *Kelly*, this is a requirement of O.84 r. 20 (3) which, as Barniville J. observed, was inserted by way of amendment to give effect to the views expressed by the Supreme Court in *A.P. v. DPP* [2011] 1 I.R. 729. Order 84 r. 20 (3) provides as follows:-

> *"'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'*. (Emphasis added).

94. In *Kelly*, Barniville J. was prepared to excuse the breach of O. 84 r. 20 (3) in circumstances where the affidavit evidence provided some additional material which assisted in the understanding of the case made. In contrast, in the present case, there is nothing in the affidavits sworn in support of the statement of grounds or indeed in the written legal submissions furnished in advance of the hearing which throws any light on the basis for the applicant's case that there has been a failure to properly transpose either the EIA Directive or the Habitats Directive.

95. Essentially, what the applicant, in his case against the State respondents, has sought to do is to reserve his position against those respondents pending a determination as to whether the Board acted in accordance with Irish law. This is clear, for example, from para. 50 of the statement of grounds where it is alleged that:-

> *"Errors in the application documentation, particularly in the AA Screening Report have created lacunae, for which the First Named Respondent should have sought best scientific information, prior to relying on the report. If gaps in scientific knowledge are allowable in Appropriate Assessment screenings under Irish law,*

then the significance of effects on the environment cannot be measured scientifically or in accordance with the precautionary principles and there has been an incorrect transposition of the Directive".

96. No basis whatever is set out as to whether there is any provision of Irish law which allows a competent authority such as the Board to proceed on the basis of gaps in scientific knowledge. Furthermore, no such provision was identified in the course of the hearing. In fact, there was no suggestion made during the course of the hearing that there was a difference between Irish law, on the one hand, and EU law on the other insofar as screening for appropriate assessment is concerned.

97. Similarly, insofar as the EIA Directive is concerned, the only plea which is made (other than the contingent and unsubstantiated allegation of a failure to properly transpose the EIA Directive is contained in para. 52 where the following is alleged:-

"The purported EIA Screening was not done in accordance with Annex IIA and Annex III of the Directive. If the Court determines that the First Named Respondent carried an EIA screening in accordance with the Directive then it has been incorrectly transposed" (Emphasis added).

98. It is impossible to understand how a case of incorrect transposition arises on the basis of the second sentence in para. 52 (as highlighted above). It is assumed that the words *"carried out*" should be read as "*did not carry out*". However, even on that basis, it is impossible to understand how it could be said that the failure of the Board to carry out an EIA screening in accordance with the EIA Directive must mean that there has been a failure by the State to properly transpose that directive.

99. The approach taken by the applicant in this case has echoes of the approach taken in *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311. In that case, as here, the principal case was made against the Board. However, the State respondents were also joined to the proceedings on the basis (*inter alia*) that, if the Board had made its decision in a manner consistent with the 2000 Act and the 2001 Regulations, then the statutory scheme was inconsistent with the EIA Directive and that, as a consequence, the State would, in such circumstances, have failed to appropriately transpose the requirements of the EIA Directive. Although that formed part of the grounds on which the applicants in those proceedings sought relief, there was no claim made against the State respondents in part D of the statement of grounds. In those circumstances, the State respondents sought an order dismissing the proceedings as against them. Among the arguments made by the State respondents in that case was that the court would first have to determine whether the actions of the Board were lawful or otherwise permitted by Irish domestic legislation before any issue regarding transposition of the EIA Directive could arise. In light of the fact that no relief was sought against the State respondents in Part D of the statement of grounds, Costello J. dismissed the proceedings under O.19 r.28 on the basis that they failed to disclose a cause of action. However, in para. 45 of her judgment she observed *obiter* that she also agreed with the arguments of the State

respondents insofar as they relied on O.84 r.20 (3). In the course of her judgment, Costello J. also said (at paras. 41-44):-

> *"It is noteworthy that the applicants advanced no explanation as to why they did not seek any relief expressly against the State defendants. It was open to them, … to have sought declaratory relief to the effect that the Directive had not been properly transposed into Irish law, …. Of course, such a case would have to be properly pleaded in accordance with the requirements of O. 84, r. 20 (3)…. No explanation was provided to the court as to why the applicants did not seek to identify any provisions of either the Directive or Irish statute law or regulations upon which they wish to advance their case that Irish law had failed properly to transpose the Directive.*
>
> *42. It appears that the applicants wished to reserve their position to see what position was adopted by the Board. Once the Board had clarified its position then the applicants would respond. This was made clear in the letter of the 20th March, 2017, which I have quoted above. They stated that '… the extent to which any such domestic law provision appropriately transposes the requirements of the Directives must be reviewed …' once the Board has made clear which if any provision of domestic law it may rely upon. It expressly stated that the issues will become clearer when these statements of opposition and replying affidavits are filed.*
>
> *43. The implications of the letter are inescapable. The applicants wish to finalise their case in relation to the alleged or possible failure properly to transpose the Directive into national law when they have received opposition papers from the Board. This is clearly impermissible and contrary to the rules of court. The applicants are required to advance the case they wish to make in full in the statement of grounds. They must do so within time. …. The rules cannot be implicitly circumvented…".(Emphasis added).*

100. As noted above, Costello J. went on to hold that, since no relief was sought against the State respondents in those proceedings in part D of the statement of grounds, the case should be dismissed under O.19 r.28. However, it is clear from the passage from her judgment quoted above that she took the view that it is impermissible and contrary to the Rules of the Superior Courts for an applicant to make a generalised allegation of a failure to transpose EU law without specifically identifying the relevant provisions of Irish law and EU law in issue and explaining how the alleged failure to transpose arises. This follows from the clear language of O. 84 r. 20 (3) which, in turn, follows from the approach taken by the Supreme Court in *A.P. v. DPP*. In that case, Murray C.J. at p. 732 said that:-

> *"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. …"* (Emphasis added).

101. In the same case Denham J. (as she then was) said at p. 734:-

"The process requires the applicant to set out precisely the grounds upon which the application is to be advanced."

102. In the same case Hardiman J. said at p. 739:-

"In too many judicial review cases, it will be found that little attention has been paid to the absolute necessity for a precise defining of the grounds on which relief is sought until the case is actually before the Court. In my view, this case furnishes an extreme example of this unfortunate tendency. …". (Emphasis added).

103. In my view, the case against the State respondents was never properly pleaded in Part E of the statement of grounds. As Costello J. observed in *Alen-Buckley* at para. 43 (quoted above), an applicant for judicial review is required to advance the case he or she wishes to make in full in the statement of grounds. It is not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it is contended that a specific provision of Irish law fails to comply with a specific obligation imposed by the Directive concerned. An allegation of a failure to transpose an obligation of EU law is a serious and significant allegation and accordingly it is particularly important, in such a case, that the requirements of O.84 r. 20 (3) should be observed. It is unacceptable that an applicant should make an allegation of failure to transpose purely on the basis that the applicant apprehends that the relevant competent authority (in this case the Board) may be in a position to demonstrate, in an area of activity ultimately governed by European law that it has acted fully in compliance with its obligations under the relevant Irish law implementing the EU law measure in question. That is precisely the form of procedure which was condemned by Costello J. in *Alen-Buckley.*

104. It should, in any event, be noted that, even if there were a divergence between Irish law and EU law (and no such divergence has been identified in this case) that would not avail the competent authority whose decision is in issue in the proceedings. It is clear from the decision of the CJEU in Case C-378/17 Minister for Justice and Equality v. Workplace Relations Commission that a competent authority such as the Board is always required to apply EU law where there is a conflict between a provision of EU law and national law. In that case, an issue arose as to whether the Workplace Relations Commission ("WRC") in Ireland was entitled to disapply Irish law where the WRC came to the conclusion that the national provision in question was contrary to EU law. The CJEU (in a decision rendered by the Grand Chamber) held that the WRC was required to disapply national law where it was incompatible with EU law. At paras. 36-39 of its judgment the CJEU said:-

"36. any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law….

37. …

38. As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law ….

39. It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules."

105. It is therefore clear that, even if there was a concern that EU law and national law were not on all fours, the Board could not, if its decision was contrary to EU law, successfully defend the claim made against it by the applicant in these proceedings on the basis that it had properly applied Irish domestic law.

106. For the reasons outlined in paras. 93 to 105 above, I have come to the conclusion that, irrespective of the outcome of these proceedings as against the Board, the claim against the State respondents must be dismissed as the statement of grounds failed to properly plead a case against the State as required by O. 84 r.20 (3).

Conclusion

107. On the other hand, it is clear that the applicant must be entitled to appropriate relief as against the Board in respect of the decision of 15th November, 2018. In light of the findings which I have made above in relation to the screening exercise carried out by the Board, the decision of the Board is invalid and must be quashed on that ground. In addition, the applicant has succeeded in his case insofar as Regulation 72 (1) of the 2001 Regulations is concerned. However, the applicant has failed to make out any case that the proposed solar farm requires to be assessed under the EIA Directive.

108. I will hear the parties in due course as to (a) the precise form of order to be made, (b) the costs of the proceedings, and (c) whether the matter should now be remitted to the Board for further consideration in light of the conclusions reached by me in this judgment.

109. In light of my finding in relation to the invalidity of the screening exercise, it does not seem to me to be worthwhile to consider whether I should withhold relief in relation to Regulation 72 (1) on any discretionary ground. I will nonetheless hear any submissions that may be appropriate in relation to the form of relief to be granted in respect of the Regulation 72 (1) issue.