THE HIGH COURT

[2020] IEHC 400

[2018 No. 880 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000, AS AMENDED

BETWEEN

CREKAV TRADING GP LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CLONRES CLG, PETER SWEETMAN, JOHN CONWAY and LOUTH ENVIRONMENTAL GROUP

NOTICE PARTIES

JUDGMENT of Mr. Justice David Barniville delivered on the 31st day of July, 2020

Introduction

1. This judgment concerns a controversial strategic housing development which the Applicant, Crekav Trading GP Limited, wishes to carry out on a site which forms part of lands previously associated with, and located to the east of, St. Paul's College, a boy's secondary school, in Raheny, Dublin 5, which is bound to the east, south and north by St. Anne's Park, Raheny. The proposed development involves the construction of 536 residential

units (104 houses and 432 apartments) and ancillary works. The application for permission was made under s. 4 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the "2016 Act"), the fast track planning process for strategic housing developments.

2. The respondent, An Bord Pleanála (the "Board"), granted permission for the proposed development in a decision made on 3rd April, 2018 (the "original decision"). On 14th June, 2018, I granted leave to Clonres CLG ("Clonres"), Peter Sweetman, and John Conway and Louth Environmental Group each to bring separate proceedings by way of judicial review to challenge the original decision on several different grounds. The Board did not defend those proceedings. It accepted that there was an error on the face of the record of the original decision in the way in which it recorded the test applied by the Board in carrying out an appropriate assessment ("AA") under the EU Habitats Directive and indicated that it was prepared to consent to an order of *certiorari* in respect of the original decision.

3. Having indicated its consent to an order quashing the original decision, the Board proposed that a further order should be made remitting the application for permission to the Board on a particular basis. The Applicants in those proceedings (who are now the notice parties in the present proceedings) did not agree with the terms of the proposed order. In particular, they did not agree that the application should be remitted to the Board on the basis proposed or at all. The Applicant in the present proceedings was a notice party in those proceedings. It supported the remittal proposed by the Board.

4. Having heard submissions from all of the parties, I delivered a judgment in those proceedings on 31st July, 2018 ([2018] IEHC 473) (the "remittal judgment") in which I considered the respective submissions of all of the parties and explained the reasons why I had decided to grant an order of *certiorari* quashing the original decision on the terms consented to by the Board, as well as orders remitting the Applicant's application for

permission to the Board to be determined in accordance with law, with such remittal taking effect from the point in time immediately following the time at which the Board's inspector had signed her report on 23rd March, 2018. I also made an order deeming that the time period set out in s. 9(9)(a) of the 2016 Act would, in respect of the remitted application, expire six weeks from the date of the perfection of the orders made. I awarded the Applicants in those proceedings their costs.

5. In circumstances explained in greater detail later in this judgment, the Board reconsidered the Applicant's remitted application for permission in respect of the proposed development on a *de novo* basis. On 10th September, 2018, the Board made a fresh decision refusing permission for the proposed development for the reasons set out in its decision (the "impugned decision"). The reasons given by the Board for refusing the permission sought related both to screening for AA (and, in particular, to the fact that bird species apart from the Light-bellied Brent Goose had been screened out by the inspector) and to the AA itself (as a result of an alleged lack of adequate qualitative analysis in respect of the Light-bellied Brent Goose). The impugned decision also set out reasons why the Board disagreed with the inspector's recommendation to grant permission. The Board had not referred the application to an inspector for further consideration or for the preparation of a new or updated report in advance of making the impugned decision following the remittal of the application to the Board.

6. In these proceedings, the Applicant challenges that decision on several grounds, ultimately relying on three essential grounds in support of its challenge. The Applicant's challenge is opposed by the Board and by all of the notice parties, although Clonres was the only one of the notice parties actively to participate in the proceedings.

7. This is my judgment on the Applicant's challenge to the impugned decision. The judgment principally addresses issues in relation to (a) the reasons given by the Board for its

decision, (b) the alleged powers of the Board to seek further information from an applicant for permission in respect of a strategic housing development under the 2016 Act and (c) the Board's treatment of what it terms "*mitigation*" in its decision.

8. After judgment was reserved in these proceedings, the Applicant made a new application for permission to develop the site at St. Paul's. The Board granted permission on foot of that application. However, the Board very recently consented to an order quashing that decision and an order was made in those terms by the High Court on 11th June, 2020. The issues the subject of that further decision and the further proceedings which led to the quashing of that further decision, were not brought to my attention and are not relevant to the issues addressed in this judgment.

Summary of Decision

9. For the reasons set out in this judgment, I have concluded that the Applicant must succeed in one of its grounds of challenge in respect of the impugned decision, namely, the ground which alleged that the reasons given by the Board for refusing permission and for disagreeing with the inspector's recommendation to grant permission were inadequate on various grounds. That finding in itself is sufficient to require me to grant an order of *certiorari* quashing the decision. While, strictly speaking, it may be unnecessary for me to consider the other grounds of challenge advanced by the Applicant, I have nonetheless proceeded to do so. I have concluded that the two other grounds of challenge advanced by the Applicant should be rejected. I will consider with counsel the precise terms of the order which should be made in light of the conclusions expressed in this judgment.

Factual Background

10. The relevant facts are not in dispute between the parties. They are set out in the affidavits sworn by the parties and, in respect of one area of contention, in correspondence

exchanged between the Applicant's solicitors and the Board's solicitors shortly prior to the hearing, which was admitted in evidence without objection from any party.

The Applicant's Application for Permission

11. On 14th August, 2017, the Applicant made a request to the Board under s. 5 of the 2016 Act to enter into consultations with the Board in relation to a proposed strategic housing development ("SHD") on lands located to the east of St. Paul's College in Raheny (the "St. Paul's site"). The proposed development the subject of that request comprised 536 residential units and associated access and site works on the St. Paul's site. On 30th August, 2017, the Board refused the Applicant's request, for reasons which are not relevant at this stage. The Applicant resubmitted its request to the Board on 11th September, 2017. The pre-application consultation process under the 2016 Act fast-track procedure then took place.

12. On 6th November, 2017, the Board issued a notice of pre-application consultation opinion (the "opinion") under s. 6 of the 2016 Act. In the opinion, the Board concluded that the documents submitted with the request to enter into consultations required further consideration and amendment in order to constitute a reasonable basis for an application for a SHD. Various issues were raised in the opinion, the most relevant of which, for present purposes, concerned AA. At para. 5 of its opinion, under the heading "*Appropriate Assessment*", the Board concluded that the following would be necessary:-

> *"Further consideration of the documents as they relate to potential effects on adjoining designated sites with regard to their conservation objectives, specifically potential effects associated with the usage of the development site by Brent Geese for winter feeding. The further consideration of this issue may require amendments to the documents and/or design proposals submitted."*
>
> (p. 2 of the Opinion)

13. It was further stated by the Board that, amongst other information which ought be submitted with any application for permission, the Applicant would also have to submit the following:-

> *"Natura Impact Statement to assess potential effects on relevant designated sites with regard to their conservation objectives, including potential effects associated with the usage of the development site by Brent Geese for winter feeding."*

(p. 3 of the Opinion)

14. On 22nd December, 2017, the Applicant submitted an application to the Board for permission for the proposed SHD on the St. Paul's site. As noted earlier, the development consisted of the construction of 536 residential units along with associated access and site works on the lands in question. The application was accompanied by an Environmental Impact Assessment Report ("EIAR"), a screening report for AA and a Natura Impact Statement ("NIS"), the latter two documents being significant for present purposes.

The Screening Report

15. The "*Screening Report: Provision of Information Regarding Appropriate Assessment Screening*" in respect of the proposed development (the "screening report") was dated 21st December, 2017 and was prepared by Scott Cawley Limited. The purpose of the screening report was to assist the competent authority, in this case, the Board, to screen the proposed development for AA, in order to determine whether it was likely to have a significant effect on any European site. The screening report concluded that it was sufficient to examine the effects of the proposed development on all of the European sites within 15 kilometres of the proposed development (para. 4.1.1). The screening report identified eight candidate special areas of conservation ("cSACs") or special areas of conservation ("SACs") within that zone of influence, of which the most significant were the North Dublin Bay cSAC and the South Dublin Bay cSAC. The screening report also identified eight special protection areas

("SPAs") within that zone of influence, of which the most significant were the North Bull Island SPA, the South Dublin Bay and River Tolka Estuary SPA, the Baldoyle Bay SPA, the Malahide Estuary SPA and the Rogerstown Estuary SPA.

16. In respect of the North Bull Island SPA (which is located approximately 1.1 kilometres to the south east of the St. Paul's site), the screening report identified a potential linkage between the proposed development and the European site, following an assessment of the results of wintering bird surveys undertaken in 2015-2016 and re-sighting data reports provided by the Irish Brent Goose Research Group ("IBGRG"). The potential linkage was the usage of the St. Paul's site as an *ex-situ* feeding site by *"internationally-important numbers"* of Light-bellied Brent Geese (for ease of reference, I refer to this bird species in this judgment as the "geese") (i.e. over 401 plus birds), a special conservation interest ("SCI") species of that European site. An *ex-situ* site is a habitat situated in the immediate hinterland of the SPA or ecologically connected to it, which may at times be used by some water bird species. The screening report concluded, therefore, that as the possibility of significant effects on the geese caused by the loss of the feeding site could not be excluded in view of the relevant conservation objectives, this European site was *"screened in"*.

17. The screening report further noted that during the 2015-2016 wintering bird surveys, the only other SCI species of that European site observed feeding on the St. Paul's site were Black-Headed Gull (maximum 69 birds recorded on 22nd December, 2015), the Black-Tailed Godwit (maximum 400 birds recorded on 5th January, 2016), the Curlew (maximum 86 birds recorded on 22nd December, 2015) and the Oyster-catcher (maximum 58 birds recorded on 5th January, 2016).

18. The report noted (at footnote 5 on p. 18) that the threshold for a site to be of *"international importance"* is greater than 1% of the international population. For the Black-Headed Gull, that is 20,000 birds, for the Black-Tailed Godwit, it is 610 birds, for the

Curlew, it is 8,400 birds and for the Oyster-catcher, it is 8,200 birds (Bird Watch Ireland, 2017). The report concluded that the season peak counts of these four species were below the threshold of *"international importance"* and that there was no possibility of significant effects on those four species at the level of the European site as a consequence of the proposed development, *"due to the infrequency of their use of the lands and the low numbers involved"* (p.18).

19. As regards the South Dublin Bay and River Tolka Estuary SPA (which is located approximately 1.6 kilometres south of the St. Paul's site), the screening report concluded that with respect to the geese, there was a potential linkage between the proposed development and that European site, which was identified following an assessment of the results of the surveys undertaken in 2015-2016 and sighting data reports provided by the IBGRG and that potential linkage was the usage of the St. Paul's site by the geese, a SCI species of the European site. The report concluded, therefore, that as the possibility of significant effects on that species caused by the loss of the feeding site could not be excluded in view of the relevant conservation objects, that European site was also "*screened in*". The report considered other potential SCI species of that European site, recorded feeding on the St. Paul's site, namely, the Black-Headed Gull and Oyster-catcher, but concluded that the season peak counts were below the threshold of international importance (as before) and concluded, therefore, that there was no possibility of significant effects on those two SCI species as a consequence of the proposed development. Similar conclusions were provided in respect of the Baldoyle Bay SPA, the Malahide Estuary SPA and the Rogerstown Estuary SPA.

20. Section 5 of the screening report set out its conclusions on the information provided to the competent authority to perform its statutory function of carrying out screening for AA (at pp. 27-28). The report concluded that, in respect of a number of the European sites, the possibility could be excluded that the proposed development would have a significant effect

on any of those sites. However, the report concluded that it was not possible to exclude, on the basis of objective information, that the proposed development, individually or in combination with other plans or projects, would have a likely significant effect on five of the SPAs and two of the cSACs. In respect of the SPAs, for which the possibility of significant impacts could not be excluded, the report stated that the *"likely significant risks arises (sic) from the loss of inland feeding habitat which is currently being utilised by the Light-bellied Brent Geese, as an external site connected to each of these SPAs"*. The report noted, therefore, that *"further investigation was required to provide scientific data to support the determination by the competent authority whether or not the proposed development, in the context of this potential linkage, could potentially result in adverse effects on site integrity of these five European sites in view of their conservation objectives"* (p. 27). The screening report concluded, therefore, that a stage 2 AA of the proposed development was required in respect of those European sites.

The NIS

21. The Applicant also submitted a NIS dated 26th November, 2017. The NIS was also prepared by Scott Cawley Limited. The NIS provided information to the Board for the stage 2 AA required to be carried out by it. The NIS provided information in respect of the following European sites relevant to the stage 2 AA: North Bull Island SPA, South Dublin Bay and River Tolka Estuary SPA, Baldoyle Bay SPA, Malahide Estuary SPA, Rogerstown Estuary SPA, North Dublin Bay cSAC and South Dublin cSAC.

22. The NIS assessed the proposed development in the context of the conservation objectives attributes *"population trend"* and *"distribution"* and their specific targets for each SCI species of the relevant European sites (s: 4.6, p. 15). The NIS noted that there were two attributes underpinning the SCIs of the five SPA sites at issue which might potentially be impacted upon as a result of the proposed development, namely, foraging habitat and food

supply. The NIS noted that the proposed development would result in the loss of the St. Paul's site as an *ex-situ* inland feeding site, currently used by geese and that that in turn might result in a reduction in the proportion of the existing foraging habitat in the Dublin area available to the geese and might impact on the existing terrestrial food supply of the geese in Dublin (s. 4.6, p. 16). The NIS considered the relevant qualifying interests of each of the relevant European sites (table 1, pp. 17-19) and the site specific objectives for each of the European sites (table 2, pp. 20-29). The NIS explained the wintering bird survey methodology in section 5 (pp. 30-33). It explained the wintering bird surveys at the St. Paul's site, St. Anne's Park and North Bull Island for 2015-2016 and 2016-2017, the all-day wintering bird surveys at other inland feeding sites which were undertaken in January-March, 2016 and January-March, 2017 (s. 5.2, p. 32), the collection of site suitability data during the all-day wintering bird surveys in January-March, 2017 (s. 5.3) and the consultation undertaken by Scott Cawley Limited with the National Parks and Wildlife Service ("NPWS"), and others, including Birdwatch Ireland and the IBGRG. The results were then set out in s. 7 of the NIS. At s. 7.1 (p. 37), it was noted that long-term population trends of the geese at the national level and at the European site level (for each of the five relevant European sites) indicated that the population of geese, both at national and local level was increasing and that that was in line with the population trend target (outlined in the site-specific conservation objectives) for the particular species, in respect of each of the five relevant European sites, namely, *"long term population trend stable or increasing"*. The detailed results were then set out in the remainder of section 7. Data analyses were provided in section 8.

23. The identification of potential inland feeding habitat feeding sites and network was contained in section 9. At s. 9.2 (p. 68), the NIS provided the following summary of the overall potential inland feeding habitat network for the geese in Dublin:-

"The overall potential network of inland feeding habitat for brent geese in Dublin may be described as all the identified known inland feeding sites of which there are 132 (excluding St. Paul's, but including the 16 sites previously described as potential sites where Brent Goose droppings were noted) and all the potentially suitable inland feeding sites of which there are 29. This suggests that there are potentially 161 inland feeding sites, which encompass the overall potential inland feeding habitat network for Brent Geese in Dublin, 29 of which do not appear to be currently utilised. This figure is significantly greater than 132 sites which encompass the current known foraging network of Brent Geese in the Dublin area."

24. Section 10 of the NIS provided a summary of the overall results where amongst other results stated (on pp. 69-70) were the following:-

"
- *The long-term mean population of light-bellied brent geese in Ireland has increased by 4.68% over the period from 1995/1996 to 2009/2010;*
- *The long-term population trend of Light-bellied Brent Geese at each of the five relevant European sites is increasing over the periods of 1995/1996 to 2009/2010 (for North Bull Island SPA, South Dublin Bay and Rover Tolka Estuary SPA, Malahide Estuary SPA and Rogerstown Estuary SPA) and 1995/1996 to 2007/2008 (for Baldoyle Bay SPA);*
- *According to the results of the wintering bird surveys undertaken by Scott Cawley Limited, a greater number of light-bellied brent geese were recorded roosting in North Bull Island SPA in 2017 compared to the average number of geese recorded roosting at the same site in 2016;*
- *The Highest peak count recorded at St. Paul's during the 2016-2017 season was 1,530 Brent Geese, compared to 820 geese during the 2015-2016 season;*

...

- *Based on this assessment, an additional 29 sites were identified as being potentially suitable inland feeding sites for Brent Geese.*
- *The overall potential network of inland feeding habitat for brent geese in Dublin may consist of a total of 161 sites. This includes the 132 known inland feeding sites (excluding St. Paul's, but including the 16 sites previously described as potential sites where Brent Goose droppings were noted) and the 29 potentially suitable inland feeding sites;*
- *These 161 inland feeding sites encompass the overall potential inland feeding habitat network for brent geese in Dublin, 29 of which do not appear to be currently utilised. This figure is c.22% greater than the original number of 132 sites which encompass the current known foraging network of Brent Geese in the Dublin area."*

25. Section 11 of the NIS provided an appraisal of the potential impacts of the proposed development on the relevant European sites with respect to habitat loss of *ex-situ* inland feeding sites (s. 11.1, pp. 71-72). At s. 11.1 (p. 71), the NIS stated:-

> *"Light-bellied brent geese (a special conservation interest species of...* [the five relevant SPAs]*... utilise the proposed development site as an ex-situ inland feeding habitat. The proposed development site, which is considered to be of major importance, forms part of a network of inland feeding sites, of varying importance, that the geese utilise each year over the wintering bird season. It is an ex-situ feeding site of all aforesaid European sites.*
>
> *The proposed development will result in the loss of St. Paul's as an ex-situ inland feeding site currently utilised by light-bellied brent geese. This in turn may result in a reduction in the proportion of the existing foraging habitat in the Dublin area*

available to light-bellied brent geese, which is a finite resource, and may impact on the existing terrestrial food supply of light-bellied brent geese in the Dublin area. The potential for these two conditions underpinning the site integrity of all five European sites (i.e. foraging habitat and food supply) to be impacted upon due to the proposed development alone was investigated as part of this assessment in context of the conservation objectives' attributes "population trend" and "distribution" and their specific targets (listed in Table 2) for light bellied-brent geese (a SCI species of the five relevant European sites). The detailed findings of this assessment are presented in the relevant sections above and summarised in Section 11.1.1 below. As noted in the supporting documentation for the conservation objectives of each of the five relevant European sites, the loss of an ex-situ feeding site of a SPA may have the potential to result in a reduction in their numbers within the SPA and as such, it is referred to as a factor that could potentially adversely affect the achievement of the conservation objectives 'to maintain the favourable conservation condition, (NPWS, 2014)."

26. The NIS then set out at s. 11.1.1 the potential impact from the loss of an *ex-situ* site, in the context of the conservation objective attributes *"population trend"* and *"distribution"* and found as follows (pp.71-72):-

> *"● Light-bellied brent geese currently utilise a large network of known sites located across the Dublin area... Based on all data available, the number of the sites where Brent Geese have been recorded for the last five consecutive seasons varies… suggesting that the current network of 132 known sites may not be fully utilised by the geese at present. There may be unused capacity within this network to absorb the loss of St. Paul's and to support the increasing populations of the five relevant European sites. This should also*

ensure that there will be no significant decrease in the range or timing of use of sites utilised by light-bellied brent geese;

- *Based on results of the all-day surveys undertaken by Scott Cawley Limited, there appeared to be variation in the usage of some sites by light-bellied brent geese in January-March 2017 compared to the usage of the same sites in January-March 2016, as demonstrated by the different peak counts… This suggests there may be some degree of flexibility in inland feeding site preference of light-bellied brent geese. Following the loss of St. Paul's, it is possible that the displaced geese may use other known sites to a greater intensity to that of previous years, suggesting that there will be no significant decrease in the intensity of use of sites utilised by light-bellied brent geese; and*
- *According to criteria devised from the results of the statistical analyses of this assessment..., an additional 29 sites (located within short distances of the current known network of sites) were considered to be potentially suitable as inland feeding habitat for light-bellied brent geese. Based on all data available, these sites appear to be not currently utilised by the geese. It is possible that light-bellied brent geese, displaced from the loss of St. Paul's, may utilise these additional sites in the future as alternative inland feeding sites, thus resulting in no potential impact on the current population trend or range of sites for light-bellied brent geese."*

27. In its submissions to the Court, the Board stressed, what it regarded as, the less than definitive terminology used to describe these findings in terms of the legal test for AA under Part XAB of the Planning and Development Act, 2000 (the "2000 Act") and the Habitats

Directive, as considered by the CJEU and by the Irish Courts. The Applicant, however, relies on the following statement which immediately followed those findings, at p. 72 of the NIS:-

> *"Therefore, the potential for adverse effects on site integrity to arise as a consequence of the proposed development negatively impacting on the conservation objectives' attributes of 'population trend' and 'distribution' alone was assessed and it was determined that there would be no impact on the population trend of this SCI at any of the five relevant European sites."*

28. Section 12 of the NIS considered the potential effects of the proposed development in combination with other plans and projects and specifically addressed (at s. 12.1) the in-combination effects of the loss of inland feeding sites. The NIS concluded (at s. 12.1.5, p. 81) that:-

> *"The protective policies and objectives outlined in Appendix F* [being the protective policies and objectives incorporated into the various development plans] *and section 11.4.4 of this report should ensure that the overall potential network of inland feeding habitat for brent geese, which encompasses a total of 150 sites (i.e. 124 known and 26 potential inland feeding sites) in the Dublin area, will be maintained. The availability of these potential sites should ensure that there be adequate capacity in the potential network to absorb the loss of St. Paul's in-combination with the potential loss of the other 11 inland feeding habitat sites (outlined in Appendix F)."*

29. Section 13 of the NIS set out the overall conclusions on the stage 2 AA process. It did so by setting out (at s. 13.1) responses to a series of key research questions which had been set out earlier in the NIS. The overall conclusion on the responses to the questions set out was provided at p. 84 where it was stated:-

> *"In conclusion to the above responses, as considered as part of this assessment (see section 11.1 for more details), the potential for adverse effects on site integrity to*

arise as a consequence of the proposed development negatively impacting on the conservation objectives' attributes of 'population trend' and 'distribution' alone was assessed and it was regarded that there would be no impact on the population trend of this Special Conservation Interest species [i.e. the geese] *at any of the relevant European sites."*

30. Section 13.2 summarised the conclusions on the stage 2 AA process with respect to potential in-combination effects on site specific conservation objectives. The conclusion was that the overall potential network of inland feeding habitat for the geese, a total of 150 sites (124 known and 26 potential inland feeding sites) in the Dublin area, *"will be maintained"* and that:-

"The availability of these potential sites would ensure that there be adequate capacity in the potential network to absorb the loss of St. Paul's in-combination with the potential loss of the other 11 inland feeding habitat sites (outlined in Appendix F)"

(s. 13.2, p. 84).

The Dublin City Council Report

31. The Chief Executive of the planning authority for the area of the proposed development, Dublin City Council (the "Council"), submitted a report to the Board under s. 8(5)(a) of the 2016 Act on 26th February, 2018. That report set out a number of concerns which the Council had in relation to the geese. In the summary of the Parks and Landscape Services report, the report stated (at p. 5), under the heading *"Loss of ex-situ Bird Feeding Site"*, as follows:-

"The Parks and Landscape Services report indicates that: the application site is the most important ex-situ feeding site for Brent Geese in Dublin; the proposal is likely to result in significant impacts; the proposed mitigation is questionable in terms of its

achievability; and the remaining options are to provide suitable compensatory habitat or not to proceed with the development."

32. The report reproduced the views of the Council's Parks and Landscape Services (at p. 18). The report indicated that:-

- *"● St. Paul's can be regarded as the most important ex-situ feeding site for Brent Geese in Dublin based on highest peak counts of Brent Geese, regularity of use, its geographical location in relation to North Bull Island, its size, and the relative lack of disturbance.*
- *The submitted Natura Impact Statement concludes that the impacts of the proposed development will be mitigated by the availability of a network of alternative inland feeding sites (124 known sites and 25 potential sites) which have the capacity to absorb the loss of the St. Paul's site, in-combination with the loss of 12 other identified sites. It states that this network of sites is subject to protective policies and objectives as outlined in Appendix F of the report.*
- *If mitigation measures are insufficient, or are not actually practicable and achievable to avoid the risk entirely, then, in the light of a negative assessment, the plan or project may not proceed.*
- *There is no indication that the Applicant has control over the management of the sites within the proposed network of alternative inland feeding sites, which comprises lands in both public and private ownership, with varying land-use zonings, and located in different local authority areas.*
- *The report also notes that thirty of the sites (as of July 2017) have planning permissions granted or pending, and it is conceivable in the context of the current economic climate, that this number is likely to rise, increasing developmental pressure on the network.*

- *It is contradictory to suggest that the policies and objectives as outlined in Appendix F of the report can ensure the protection of the network of alternative feeding sites for Brent Geese, but not the current SHD application site that is also subject to the same policies and objectives.*
- *The proposed development is likely to result in significant impacts. In this regard, the proposed mitigation (i.e. the capacity of the network of alternative feeding sites to absorb the loss of St. Paul's) is questionable in terms of its achievability.*
- *In such an event, the remaining available options, under the relevant regulations, are to identify and provide suitable compensatory habitat, or not to proceed with the development."* (p. 18)

33. The report then concluded:-

"*Taking the above into account and applying the precautionary principle, the planning authority is not satisfied that the proposed development would maintain the favourable conservation condition of light-bellied Brent Geese and would not adversely affect the integrity of the North Bull Island Special Protection Area."*

(p. 18)

The Inspector's Report

34. The Board appointed an inspector to prepare a report in respect of the Applicant's application. The inspector's report is dated 23rd March, 2018. The inspector received 1102 third party submissions, including a joint submission by Birdwatch Ireland and the IBGRG dated 5th February, 2018. The inspector referred in her report to the report received from the Chief Executive of the Council (referred to above) (s. 8.0, pp. 20 and 21 of 126), as well as submissions made by a number of prescribed bodies, including the Minister for Culture, Heritage and the Gaeltacht (the "Minister"), and An Taisce. The inspector described the

submission received from the Minister in relation to AA and, in particular, in relation to the potential impact of the proposed development on the geese, which was a *"main concern"* set out in the Minister's submission which noted that the Brent Geese population listed for the North Dublin Bay SPA was reliant, to a large degree, on the availability of suitable grassland feeding resources within the Dublin area outside of the SPA network and that the extent of potentially suitable feeding areas within Dublin City is finite. The submission also stressed the need for the Board to consider as part of its AA, the in-combination effects of the proposed development with other developments and plans in the area, as well as the cumulative effects of the proposed development (para. 9.1, pp. 25 and 26 of the report).

35. The inspector outlined in her report the submission made by An Taisce which also focused on concerns in relation to the impact of the proposed development on the integrity of the five relevant SPAs, as a result of inland feeding habitat used by the geese. An Taisce noted that the St. Paul's site was considered to be *"one of the most important ex-situ inland feeding sites located within the existing network of known sites for the last five seasons"* and that it was *"clear that the inland feeding site of St. Paul's has a relationship with the aforementioned SPAs, in particular the North Bull Island SPA and the South Dublin Bay and River Tolka Estuary SPA"*. An Taisce considered that the impacts on the SPAs and the Brent Geese population had not been adequately assessed. As summarised by the inspector in her report, An Taisce contended that the considerations (put forward on behalf of the Applicant) did not appear to be *"scientifically founded"* and that the language used (on behalf of the Applicant) *"includes an element of assumption"* (p. 26).

36. The inspector did not consider it necessary to hold an oral hearing (and specifically referred to s. 18 of the 2016 Act in that regard at s. 10.0, p. 27).

37. The most significant part of the report for present purposes is s. 12.0 which concerns AA (pp. 52 to 65). With regard to the screening report and the NIS, the inspector stated at para. 12.2 (p. 52) as follows:-

> *"I am satisfied that adequate information is provided in respect of the baseline conditions, potential impacts are clearly identified and sound scientific information and knowledge was used. The information contained within these reports is considered sufficient to allow me to undertake an Appropriate Assessment of the proposed development."*

38. The inspector agreed with the conclusion in the screening report and in the NIS that the stage 2 AA could be confined to the seven European sites and that the other European sites were *"of a sufficient distance so as not to be affected by the proposal…"* (para. 12.4, p. 53).

39. The inspector considered the screening out of all bird species other than the geese. She noted that many of the submissions received objected to the screening out of the potential impacts of the proposed development on other species of SCI, such as the Curlew, the Oystercatcher and the Black-Tailed Godwit. The inspector referred to the conclusions in the screening report to the effect that as the season peak counts of each of those species were below the threshold of international importance (namely, less than 1% of the international population), it was concluded that there was no possibility of significant effects on those SCI species from the proposed development. The inspector noted that the season peak counts of those species fell significantly below the thresholds required to be of international importance (by reference to the figures for international importance for those species, as set out in the screening report and referred to earlier). The inspector concluded (at para. 12.6, pp. 54 and 55) that, in relation to those species which were screened out, she considered it:-

> *"...reasonable to conclude that on the basis of the information on file, which I consider adequate in order to issue a screening determination, that the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on nearby European sites with a view to their conservation objectives for the SCI species identified in Table 11 above, and a Stage 2 Appropriate Assessment (and submission of a NIS) is not therefore required in relation to these Special Conservation Interest species."*

40. This conclusion by the inspector is of particular significance to the case on reasons made by the Applicant to which I will turn later in the judgment.

41. At para. 12.14 (p. 58 and 59), the inspector noted that in the case of the five relevant SPAs, the potential impacts of the proposed development were identified as the loss of the St. Paul's site as an *ex-situ* feeding site for the population of geese currently using it and that this may result in a reduction in the proportion of the existing foraging habitat in the Dublin area available to the geese which, she noted, is a *"finite source"* and may impact on existing terrestrial food supply in the Dublin area, which could adversely affect the achievement of the conservation objectives *"to maintain the favourable conservation condition"*. She noted that the St. Paul's site is an *ex-situ* feeding site for all of the five European sites referred to.

42. The inspector noted that the NIS concluded that there were potentially 161 inland feeding sites encompassing the overall potential inland feeding habitat network for the geese in Dublin, 29 of which did not appear to be currently utilised. She observed that that figure was recognised as being significantly greater than the 132 sites encompassing the currently known foraging network for the geese in the Dublin area (para. 12.15). She then referred to the summary of overall results of the assessment contained in s. 10 of the NIS (at paras. 12.16 and 12.17, pp. 59 and 60).

43. At para. 12.18, the inspector referred to the submissions received from the prescribed bodies (including the Minister) and from the Council. She summarised those in the following paragraphs of her report, noting the current known network of inland feeding sites, excluding St. Paul's as being 132, comprising 116 known sites plus 16 sites previously described as potential sites where Brent Geese droppings were noted and that, in addition to those sites, 29 further sites were identified as potentially suitable feeding grounds, bringing the overall potential network of feeding habitat for Brent Geese to 161 feeding sites (29 of which appeared not to be currently used by the geese).

44. At para. 12.20, the inspector concluded that the data before her demonstrated that the geese appeared to use a network of numerous inland feeding sites across Dublin, including St. Paul's, but not exclusive to it. She noted (at para. 12.21) that the NIS showed that the long term trend was consistent with the conservation objective for the long term population trend to be stable or increasing, as the long term population trend was increasing for all five sites. At paras. 12.22 and 12.23, the inspector summarised the conclusions of the NIS, referring, for example, to the NIS, stating that if the St. Paul's site were lost, it is *"possible"* that the geese would feed elsewhere on other known sites to a greater intensity than previously, suggesting that there would be no significant decrease in intensity of sites used by the geese. She referred to the finding in the NIS that 29 additional sites were identified within short distances of the current known network which were considered to be *"potentially suitable"* as feeding grounds and that it was *"possible"* that the geese may utilise those potential sites in the future, thereby resulting in *"no potential impact"* on the current population trend or range of sites for the geese. She noted that based on those findings, the NIS concluded that there *"would be no impact on the population trend of this SCI at any of the five relevant European sites"* (para. 12.22, reproducing what was said at para. 11.1, p. 72 and para. 13.1, p. 84 of the NIS).

45. At para. 12.23, the inspector referred to s. 12 of the NIS and to the potential effects of the proposed development in combination with other plans and projects. She observed that the statement in para. 12.1.1 of the NIS that 83% of all known and potential sites have a zoning objective that generally corresponds to *"open space and amenity"*, and that that means that there was a potential for development on the remaining 17% of the 161 sites. She noted the conclusion (at para. 12.15 of the NIS) that the availability of these *"potential sites should ensure that there will be adequate capacity in the potential network to absorb the loss of St. Paul's in-combination with the potential loss of the other 11 inland feeding habitat sites"* (para. 12.23, p. 63).

46. At para. 12.25, the inspector noted that, if permitted, the proposed development would result in the loss of St. Paul's as an *ex-situ* feeding site for the Brent Geese currently using it and that that appeared to be accepted by all parties. She observed that the *"key question"* arising, was whether or not the proposed development would have an adverse effect on the integrity of any of the identified European sites and that that was where a difference of opinion arose between the various interested parties. She stated that she had examined the information and that *"on balance"* she noted that the *"current known network of such inland feeding sites at 132 no. is relatively substantial given the relatively small distances involved within the Dublin area"*. She observed that that figure did not include potential sites of which 29 were identified. Nor did it account for any possible, but as yet unknown, sites that might be utilised in the future. The 29 sites were not currently being used by the geese for feeding. She noted that while the St. Paul's site was acknowledged to be one of the most important *ex-situ* sites within the existing network of known inland feeding sites, it was one of 15 such sites of major importance for the geese in the Dublin area, with eight such sites identified as being of similar status over the previous five consecutive seasons. She further noted that the mean population of the geese was shown to be increasing in Ireland and that that was

reflected in the population trend at the five relevant sites, which she stated was a *"positive"*. She noted that the information provided showed that the current network of 132 inland feeding sites *"may not be fully utilised"* by the geese. She then referred (at para. 12.26) to the land use zonings of the 161 sites and that the zoning of 83% of those sites generally corresponded with the *"open space and amenity zoning"*, with the presumption against development. The inspector considered that the information contained within the NIS concerning cumulative impacts and in-combination effects of the proposed development with other plans and projects was reasonable.

47. At para. 12.27, the inspector expressed her conclusion, based on her assessment of the information contained in the NIS, as follows:-

> *"The numbers of inland feeding areas are relatively significant, the geese appear to be thriving based on their increasing population and I consider that the loss of this site as a feeding ground will not adversely impact on the conservation objectives of any of the five designated sites. In light of this assessment, I am of the opinion that there is capacity for the existing ex-situ inland feeding areas to absorb the loss of St. Paul's and I consider it reasonable to conclude on the basis of the information on the file, which I consider adequate in order to carry out a Stage 2 Appropriate Assessment, that the proposed development, individually or in combination with other plans or projects would not adversely affect the integrity of the five relevant European sites, in view of their Conservation Objectives."* (pp. 64 and 65)

48. Having otherwise assessed the application and having carried out an Environmental Impact Assessment, the inspector set out her conclusion and recommendation at s. 14.0 of her report. Her conclusion in relation to AA was set out at paragraph 14.2 (p. 78). In that regard, she stated:-

"…The proposal will result in a loss to the ex-situ feeding grounds of Light-bellied Brent Geese. However, I am of the opinion that the proposed development, individually or in combination with other plans or projects would not adversely affect the integrity of the five relevant European sites, in view of their Conservation Objectives. Based on all of the information before me, I am satisfied that the existing feeding sites are not being used to their full potential; there is variation in usage and importantly, I believe that the loss of this site can be absorbed by the remaining 100 plus sites within the Dublin area."

49. The inspector considered the development to be in compliance with a proper planning and sustainable development of the area and recommended that permission be granted subject to 24 conditions.

The Board's Original Decision

50. The Board proceeded to grant permission for the proposed development by way of the original decision which was recorded in the Board Direction dated 28th March, 2018 and the Board Order dated 3rd April, 2018. The original decision was, of course, quashed and there is a significant dispute between the parties as to the status of the original decision. At this point, however, I am merely recording what the Board decided in the original decision and will come later to considering the status of that decision.

51. In the Board Direction of 28th March, 2018, the Board noted that it had decided to grant permission *"generally in accordance with the inspector's recommendation"* (p. 1 of 13). In that direction and the Board Order of 3rd April, 2018, the Board said the following in relation to AA:-

"The Board completed an Appropriate Assessment in relation to the potential effects of the proposed development on designated European Sites, taking into account the nature, scale and location of the proposed development within a zoned and serviced

urban area, the Natura impact statement submitted with the application, and the Inspector's report and submissions on file. In completing the Appropriate Assessment, the Board adopted the report of the Inspector and concluded that, subject to the implementation of the proposed mitigation measures contained in the Natura impact statement, the proposed development, by itself or in combination with other development in the vicinity, would not be likely to have a significant effect on any European Site in view of the sites' conservation objectives."

(Board Direction, p. 2 of 13; Board Order, p. 4 of 15)

52. The Board decided to grant permission for the proposed development subject to 23 conditions.

Challenge to Original Decision

53. Clonres, Peter Sweetman and John Conway and Louth Environmental Group each brought judicial review proceedings seeking various reliefs, including *certiorari* in respect of the original decision. On 14th June, 2018, I gave leave to each of the Applicants to bring the three sets of proceedings on several different grounds. The return date for the motions in each of those proceedings was 28th June, 2018. On that date, it was indicated to the Court on behalf of the Board that the Board accepted that there was an error on the face of the record in the Board's decision, in terms of the recording of the test applied by the Board in carrying out an AA for the purposes of the Habitats Directive. The Board was prepared to consent to an order of *certiorari* in respect of the original decision. The proceedings were adjourned to enable the parties to consider how best to proceed in light of the position adopted by the Board.

54. In subsequent correspondence, in addition to consenting to an order of *certiorari* in respect of the original decision, the Board sought various other orders including an order remitting the application to the Board on certain terms and an order in respect of the time

period set out in s. 9(9)(a) of the 2016 Act for the making of a decision following the remittal of the application to the Board. While Crekav, which was a notice party to the three sets of proceedings, and is the Applicant in these proceedings, supported the various orders and directions sought by the Board, the Applicants in those proceedings did not. They did not agree that the application for permission should be remitted to the Board on the basis proposed or at all.

The Remittal Judgment and Order of 31st July 2018

55. I heard submissions from the parties as to whether the application should be remitted to the Board and, if so, the basis on which that should be done. I gave my decision in the remittal judgment, delivered on 31st July, 2018. For the reasons set out in the remittal judgment, I decided to make an order of *certiorari* in the terms proposed by the Board. I made it clear, however, that I had not adjudicated on or determined any of the other grounds advanced by the Applicants in any of the proceedings before the court and that no issue of *res judicata* or issue estoppel arose by virtue of the order of *certiorari* which I had decided to make on the basis of the limited concession made by the Board. I also decided to remit the application for permission to the Board to the particular point in time immediately after the inspector finalised her report on 23rd March, 2018. I was requested by the Board to give further directions consequent upon the remittal of the application to the Board. For reasons set out in the remittal judgment, I decided that it was appropriate that to do so. The Board had requested that I make an order deeming that the time period set out in s. 9(9)(a) of the 2016 Act should, in respect of the remitted application, expire four weeks, from the date of perfection of the orders made. Having considered the terms of ss. 9(9)(a) and 9(13) of the 2016 Act, and previous case law, I concluded that it was open to me to make an order of the type sought by the Board. However, for various reasons, I decided that it would be

appropriate to make an order deeming the relevant time period to expire six weeks, rather than four weeks, from the date of perfection of the orders.

56. While some of the Applicants in those proceedings had submitted that, in the event of a remittal, I should direct that the application be considered by a differently constituted Board to that which made the original decision, I decided not to make such a direction. I stated (at para. 51 of the remittal judgment) that it was a matter for the Board to decide what members should be involved in deciding the application following its remittal. I went on to say, however, that:-

> *"…it may well be prudent for the Board, if it is practically and administratively possible, to try to ensure that members who were involved in the original decision are not involved in the decision following its remittal…"* (para. 51)

57. I noted that, as the Board may itself decide to constitute its membership differently when considering the application following its remittal and having regard to the timing issues involved, it was appropriate to deem the time period set out in s. 9(9)(a) of the 2016 Act to expire six weeks from the date of perfection of the orders, rather than the four weeks requested by the Board. The orders ultimately made were set out at para. 55 of the remittal judgment.

58. As one of the orders made (and perfected) on 31st July, 2018 was an order deeming that the time period set out in s. 9(9)(a) of the 2016 Act would, in respect of the remitted application, expire six weeks from the date of the perfection of the orders made, the Board was under a statutory obligation under s. 9(9)(a) of that Act to make a decision on the remitted application by 11th September, 2018, failing which the Board would become liable to pay a financial penalty to the Applicant under section 9(13). The interaction between those subsections of s. 9 and the nature and extent of the obligations which they impose on the

Board were the subject of some debate between the parties and are discussed further later in this judgment.

The Impugned Decision

59. On 6th and 7th September, 2018, a differently constituted division of the Board was convened to consider the remitted application, including the submissions on the file and the inspector's report. The Board did not request the inspector to prepare an updated report or to supplement her report. The Board decided to defer consideration of the application on 6th and 7th September, 2018, to a further meeting. The Board met to consider the application on 10th September, 2018 (the day before the final date for making a decision on the application within the time period provided for under s. 9(9)(a) of the 2016 Act, having regard to the terms of the order made on 31st July, 2018).

60. The Board decided to refuse permission for the proposed development in the impugned decision made on 10th September, 2018. That decision was recorded in the Board Direction dated 10th September, 2018 and the Board Order dated 11th September, 2018. The Board Direction stated that the Board had considered the case *"de novo"* and had decided to refuse permission for the proposed development for the reasons and considerations set out in the Direction. The same reasons and considerations were set out in the Board Order.

61. It is appropriate now to set out the reasons and considerations stated by the Board in its impugned decision for refusing the permission sought. The Board provided two reasons for refusing permission. It then set out two reasons why it disagreed with the inspector's recommendation. The Board concluded its decision by stating that it *"generally agreed with the Inspector's assessment in relation to other aspects of the proposed development"*, with the exception of a recommendation in relation to the removal of car parking spaces and also that it considered that all open space areas, roads and pedestrian linkages to St. Anne's Park should be taken in charge by the planning authority.

62. The first reason in the impugned decision concerned screening for AA and was in the following terms:-

> *"Having regard to the information provided in the Screening Report dated 21st December 2017, the Board could not be satisfied that the exclusion from the Natura impact statement of Relevant Species of Special Conservation Interest associated with European sites within the Zone of Influence of the proposed development, on the basis of the infrequency of their use of development lands and the low numbers of species involved was appropriate, and therefore that the proposed development, either individually or in combination with other plans or projects, would not be likely to have a significant effect on the* [five relevant SPAs], *or any other European site in view of the sites' Conservation Objectives."*

63. The first reason, therefore, related to the screening out in the screening report as part of the stage 1 screening exercise required to be carried out by the Board of all relevant species of SCI apart from the geese.

64. The second reason provided by the Board was as follows:-

> *"Having regard to the fact that the subject site is one of the most important ex-situ feeding sites in Dublin for the Light-bellied Brent Goose, a bird species that is a qualifying interest for the* [five relevant SPAs] *and having regard to the lack of adequate qualitative analysis and accordingly the lack of certainty that this species would successfully relocate to other potential inland feeding sites in the wider area, as proposed as mitigation for the development of the subject site in the submitted Natura impact statement, the Board cannot be satisfied, beyond reasonable scientific doubt, that the proposed development, either individually or in combination with other plans and projects, would not adversely affect the integrity of these European sites in view of the sites' Conservation Objectives. The Board considered that the*

proposed development would contravene materially a development objective (GI23) indicated in the Dublin City Development Plan (2016-2022) for the protection of European sites. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

65. The second reason, therefore, concerned the stage 2 AA carried out by the Board in light of the information before the Board, including the NIS submitted by the Applicant.

66. As we shall see, the Applicant takes issue with the adequacy of the reasoning given by the Board as contained in the two reasons set out in the impugned decision.

67. The Board also provided in the impugned decision an explanation as to why it had decided not to accept the inspector's recommendation to grant permission. The Board gave two reasons for that. The first concerned the stage 1 screening for AA. The second concerned the stage 2 AA.

68. With regard to the first reason or explanation as to why the Board had decided not to accept the inspector's recommendation, the Board stated:-

"…the Board noted that the Screening Report recorded that a total of forty-four site visits were carried out at the development site over the wintering bird seasons of 2015- 2016 and 2016-2017 and that season peak counts of relevant species of Special Conservation Interest associated with European sites within the Zone of Influence of the proposed development, were detailed within the Screening Report. However, the Board could not be satisfied in the absence of the survey data from the site visits that the season peak counts recorded were in fact infrequent and/or in low numbers and were thus a reasonable basis for the exclusion from the Natura impact statement of the relevant species of Special Conservation Interest for the [five relevant SPAs], *or any other European site in view of the sites' Conservation Objectives."*

69. This first reason or explanation for disagreeing with the inspector was directed to the stage 1 screening for AA. It must, therefore, be read with the first reason set out in the impugned decision.

70. With regard to the second reason or explanation for disagreeing with the inspector, the Board stated:-

> *"The Board also noted the Inspector's conclusions that the long-term mean population of Light-bellied Brent Geese at each of the five relevant European sites included in the Natura impact statement is increasing over the periods surveyed and that the network of known and potential alternative feeding sites for the Light-bellied Brent Goose was substantial, that they were all located within relatively close proximity to each other within the Dublin area and that variation in the usage of the sites from season to season was recorded. However, the Board could not be satisfied beyond a reasonable scientific doubt that the Light-bellied Brent Geese that would be displaced by the proposed development, would successfully relocate to other sites and/or that these sites would represent suitable alternatives to the subject site, which was acknowledged to be of one of eight ex-situ feeding sites of major importance in the Dublin area."*

71. This second reason or explanation for not accepting the inspector's recommendation to grant permission is directed to the second reasons set out in the impugned decision and concerns the stage 2 AA carried out by the Board.

72. It is clear from the impugned decision (and expressly stated in the decision) that the Board considered the application remitted to it on foot of the orders made on 31st July, 2018 *de novo*. It is accepted by all the parties to these proceedings that there was no additional information before the Board when it made the impugned decision, as compared with the information before it when it made the original decision and that there had been no change in

environmental or planning circumstances in the period between the date of the original decision and the date of the impugned decision. The Board maintains, however, that that does not mean that the Board could not lawfully make a different decision concerning screening for AA and AA itself in the impugned decision made in September, 2018.

The Applicant's Challenge to the Impugned Decision in these Proceedings

73. I granted the Applicant leave to challenge the impugned decision by judicial review on 1st November, 2018.

The Applicant's Case

74. In its statement of grounds, supported by affidavits sworn by Patrick Crean and Simon Clear, the Applicant sought an order of *certiorari* quashing the impugned decision, various declarations and an order remitting the application to the Board to be determined in accordance with law and with the Court's judgment. In very brief summary, the Applicant sought a declaration to the effect that the Board failed to give reasons, or adequate reasons, for departing from the original decision to grant permission for the proposed development. The Applicant contended in that regard that it had a legitimate expectation that the Board would grant permission in the absence of any change in the environmental or planning circumstances and where no additional information was sought or was considered by the Board in the period between the original decision and the impugned decision. The Applicant also contended that the Board failed to give any or any adequate reasons for departing from the original decision where there was no change in the environmental or planning circumstances and no additional information before the Board in the period between the two decisions and where the inspector had accepted that there was adequate information before the Board to screen for AA and to carry out an AA itself and had recommended that permission be granted. The Applicant contended that the Board acted in breach of the rules of natural and constitutional justice in failing to give any or any adequate reasons for departing

from the original decision in respect of screening for AA and AA in the absence of any change in the environmental or planning circumstances or in the material before the Board when it made the impugned decision. It also contended that the Board acted in breach of Article 41 of the Charter of Fundamental Rights of the European Union (the "Charter") due to the failure by the Board to give adequate reasons for departing from the original decision.

75. In addition, the Applicant sought a declaration to the effect that the Board had statutory powers to request additional information, both in relation to screening for AA and carrying out the AA itself, under ss. 177U(3) and 177V(2) of the 2000 Act and that it acted unlawfully (and in breach of natural justice and fair procedures) in failing to consider whether it should exercise those powers and in failing to exercise them.

76. Finally, the Applicant also contended that the Board erred in fact and in law in the second reason set out in the impugned decision, in regarding the availability of other potential feeding sites for the geese as a *"mitigation measure"* in the NIS when it was not (although no specific declaration was sought in that regard).

The Board's Response

77. In its statement of opposition, supported by an affidavit sworn by its Secretary, Chris Clarke, the Board rejected each of the main grounds of challenge advanced by the Applicant. It pleaded that three different members of the Board were assigned to deal with the remitted application for permission and that, having considered the application *de novo*, they decided to refuse permission.

78. With regard to the Applicant's claims based on the alleged inadequacy of the reasons given by the Board, the Board made a number of points. It accepted that there was no identified change in the environmental or planning considerations between the original decision and the impugned decision, although it pleaded it that that did not mean that the Board could not lawfully make a different decision in relation to screening for AA and AA in

the impugned decision to that made in the original decision. It stated that in order to avoid the possibility of the perception of prejudgment, the Board was required to consider the remitted application afresh with all outcomes being open and none being preordained. It pleaded that the Board's discretion was not fettered by the original decision, which was unlawful and quashed by the Court. It stated that the Board was entitled to come to a different view on screening for AA and AA in the impugned decision.

79. The Board stressed that it only had jurisdiction to grant permission if it was satisfied to the requisite standard of scientific certainty that the proposed development would not have significant effects on, or adversely affect the integrity of, any European site.

80. The Board disputed the contention that the Applicant had any legitimate expectation that the same decision would be made on foot of the remitted application and pleaded that any such alleged expectation could not fetter the Board's discretion.

81. The Board further pleaded that it was not required to give reasons for departing from the original decision, as that decision had been quashed and was a nullity. The Board accepted that it was required to give the main reasons and considerations for its refusal to grant permission and that it did so (it referred in that context to s. 34(10)(a) and (b) of the 2000 Act but subsequently accepted at the hearing that those provisions did not apply to the Board's decision to refuse permission under the 2016 Act).

82. The Board accepted that it was required to give reasons for its determination on AA under s. 177V(5) of the 2000 Act and pleaded that it did so. It further pleaded that the Board gave reasons for not accepting the inspector's recommendation to grant permission.

83. With regard to screening for AA, the Board pleaded that it disagreed with the inspector that the information contained in the screening report provided an adequate basis to screen out the possibility of significant effects on a number of relevant species of SCI associated with European sites within the zone of influence of the proposed development.

84. With regard to AA, the Board pleaded that it disagreed with the inspector that it could be satisfied beyond a reasonable scientific doubt that the geese which would be displaced by the proposed development would successfully relocate to other sites and/or that those other sites would represent suitable alternatives to the St. Paul's site, such that it could conclude that the proposed development would not adversely affect the integrity of the five relevant SPAs, whose qualifying interests include the geese.

85. The Board denied that it had breached Article 41 of the Charter which it pleaded did not provide any greater obligation upon it in relation to reasons than national law.

86. With regard to the Applicant's claims based on a failure to consider exercising powers or failing to exercise powers to seek additional information from the Applicant, the Board referred to the scheme of the 2016 Act and the regulations made under it (the Planning and Development (Strategic Housing Development) Regulations, 2017 (SI 271 of 2017)) (the "2017 Regulations"), which it pleaded creates a streamlined and time limited procedure for making and determining planning applications for SHDs. It referred to the obligation on the Board under the 2016 Act to determine an application for SHD within 16 weeks of the date on which it was made, failing which the Board would be liable to pay financial penalties to the applicant for the permission and referred to the time already spent in the receipt of submissions and observations in the preparation of the report as well as the terms of the order made by the court on 31st July, 2018, which required the Board to determine the Applicant's remitted application within six weeks of the perfection of the order. The Board further relied on the *"front-loaded"* nature of the statutory process under the 2016 Act, the object of which, it pleaded, was to ensure that the planning application was complete when made.

87. The Board noted that there was no general provision in the 2016 Act under which the Board could request further information from the Applicant for permission. While it admitted that the provisions of ss. 177U and 177V of the 2000 Act were capable of being applied to

applications for permission for SHD, and that the Board could *"in theory"* exercise its discretionary powers under those provisions to request information from the applicant for permission, it contended that the Board had no statutory power in the context of the SHD procedure under the 2016 Act to circulate any information which might have been received from the applicant to other interested parties and to the public and that, as a consequence, the requirement to fair procedures, as well as the strict time period under the 2016 Act for determining an application for permission under that legislation, limited the extent to which the discretionary powers under those provisions could be invoked in the context of a SHD.

88. The Board pleaded that the fact that it did not refuse to deal with the Applicant's application under s. 8(3)(a) of the 2016 Act on the ground that the NIS was inadequate or incomplete and the fact that it did not find that the proposed development would be *"premature"* by reason of any inadequacy or incompleteness of the NIS under s. 9(5) of the 2016 Act did not preclude the Board from refusing to grant permission in respect of the proposed development on the grounds on which it did.

89. The Board further pleaded that its power to request further information under s. 177U and/or s. 177V of the 2000 Act is entirely discretionary and that it was entitled, in the exercise of that discretion in the legislative and factual context of the remitted application, to refuse permission for the reasons given by it without invoking either of those discretionary powers. Finally, in that context, the Board pleaded that it must be presumed to be aware of the full extent of the statutory powers conferred upon it for this purpose of discharging its statutory functions and that it was not obliged formally to decide to invoke or not to invoke each, or any, of those powers with respect to a particular application.

90. With regard to the Applicant's claim in relation to the alleged error of law and/or fact arising from its reference to mitigation in the second reason contained in the impugned decision, the Board pleaded that the term "*mitigation*", as used in the impugned decision is

not a term of art and referred to case law from the CJEU in that regard. It stated that in using the word *"mitigation"* in the second reason for refusal, the Board was noting that the NIS suggested that the availability of alternative *ex-situ* feeding sites for the geese would mitigate the loss of the *ex-situ* feeding site on the St. Paul's site, but that the Board was not satisfied that it could be certain to the requisite scientific standard that that would be so. The Board rejected the contention that it had construed reliance on alternative *ex-situ* feeding sites as a *"mitigation measure"*, in the sense used in the case law of the CJEU. The Board, therefore, rejected the contention that there was any error of fact or law in the impugned decision arising from the reference to mitigation in the second reason given for refusing permission.

The Position of the Notice Parties

91. Clonres was the only one of the notice parties to participate in the proceedings. It did not provide any statement of opposition or affidavit evidence to the Court. It did, however, provide written submissions and was represented and made helpful and concise oral submissions at the hearing in support of the Board's position.

Correspondence Before the Hearing

92. Prior to the hearing there was an important exchange of correspondence between the Applicant's solicitors and the Board's solicitors concerning the second of the main grounds of challenge advanced by the Applicant, namely, that the Board had failed to consider exercising or, alternatively, had failed to exercise discretionary powers to request additional information from the Applicant. Although this correspondence was not put on affidavit and although the assertions made by the Board in the correspondence were not reflected in the pleas contained in the statement of opposition, the Applicant did not object to the Board relying on the assertions contained in the correspondence or to the court taking it into account in its consideration of the relevant ground.

93. On 15th April, 2019, Arthur Cox, the Applicant's solicitors, referred to the Board's statement of opposition and to the Applicant's review of the Board's publicly available file from which it was asserted that there was no document made publicly available which suggested that the Board did consider seeking further information under s. 177U and/or s. 177V of the 2000 Act. The Applicant's solicitors requested the Board to file a further affidavit addressing the following three issues:-

> *"(a) Whether, as a matter of fact, the Board considered whether to seek further information in this case subsequent to an application being remitted by the High Court;*
>
> *(b) If the Board did consider whether to seek further information in this case subsequent to the application being remitted by the High Court and decided, thereafter, not to seek further information, the reasons for this decision not to seek further information; and*
>
> *(c) If the Board did not consider whether to seek further information in this case subsequent to the application being remitted by the High Court, the reasons for this decision not to consider whether to seek further information."*

94. Philip Lee, the Board's solicitors, replied on 21st January, 2019. While making it clear that the Board was not waiving privilege in respect of legal advice provided to it, it was stated that the question of whether the Board had power to request a revised NIS had been raised in open correspondence between the Board's solicitors and solicitors for Clonres prior to the remittal judgment. The letter continued:-

> *"● In response to question (a) in your letter, <u>we are instructed by the Board that it did in fact generally consider whether to seek further information in this case subsequent to the application being remitted by the High Court and that it did so in the specific context of legal advice addressing, inter alia, this issue.</u>*

The advice did not specifically refer to the powers under s. 177U or section 177V.

- *In response to question (b), we are instructed that in circumstances such as these where the Board decides not to seek further information, it does not generally formulate reasons for the non-exercise of what are discretionary powers. We are instructed that the key issue for the Board in deciding not to request further information was the practical and legal difficulty in making such a request because of the limited time available and the absence of a statutory process for further public consultation."* (emphasis added)

95. The letter continued by stating that while the statement of opposition contained an admission that ss. 177U and 177V of the 2000 Act were:-

> *"capable of being applied to SHD applications in theory, they also set out the practical and legal factors which led the Board to decide not to request further information in this specific case."*

96. Arthur Cox replied on behalf of the Applicant on 5th February, 2019. In that letter, it was asserted that the Board's solicitors had not advised whether the reason for the Board's determination that it would not exercise any power to request further information from the Applicant was (a) because of the Board's view that it did not have the power to request such information or (b) because of the *"practical and legal difficulties"* referred to in the Philip Lee letter of 21st January, 2019. Arthur Cox requested Philip Lee to respond setting out the *"exact position adopted by the Board as to why it did not seek further information"* and specifically whether that was:-

> *"(a) because the Board adopted the view that it did not have the power to request such information; or*
>
> *(b) because it believed that it did have the power but by reason of the practical*

and legal difficulties referred to…, determined not to use it."

97. Philip Lee replied on 11th February, 2019. In that letter, they referred to the legal submissions delivered by the Board which noted that the Board considers applications before it *"in a holistic fashion"*. They referred to their previous letter of 21st January, 2019 in which it was stated that the *"key issue"* for the Board in deciding not to request further information was the *"practical and legal difficulty"* in making such a request because of the *"limited time available"* and the *"absence of a statutory process for further consultation"*. The letter continued:-

> *"In circumstances where the Board was of the view that it was not practical or realistic to request further information, it was not necessary for it to formally consider or come to a definitive view on the possible statutory bases upon which it might make such a request."* (emphasis added)

98. This correspondence is of significance in terms of the second of the main grounds of challenge advanced by the Applicant to the impugned decision and will be considered further in the context of that ground of challenge.

The Issues to be Determined

99. While the Applicant's case in respect of the three main grounds of challenge advanced by it was put on a wide basis and the Applicant advanced a range of arguments in support of some of those grounds (such as a claim that it had a legitimate expectation that, in the absence of any change in environmental or planning circumstances and where no additional information was sought, the Board would grant permission and that the Board was under a duty in the particular circumstances of this case to exercise the statutory powers it had to request further information from the Applicant), the Applicant's case was somewhat refined in the written submissions and, still further, in the oral submissions made by the Applicant in the course of the hearing.

100. The Applicant's case can be boiled down to the following three main issues (some of which have a number of sub-issues which I will consider in due course):-

(1) Whether the reasons given by the Board in the impugned decision for refusing permission for the proposed development were inadequate as alleged by the Applicant (the "reasons issue");

(2) Whether the Board erred in failing properly to consider whether to exercise its power to seek further information from the Applicant in relation to the remitted application and/or to exercise that power (the "further information issue") (this issue has a number of sub-issues); and

(3) Whether the Board erred in characterising, and proceeding to refuse to grant permission on foot of, the remitted application, on the basis that the Applicant put forward the availability of other potential inland feeding sites for the geese as "*mitigation*" or as a "*mitigation measure*" (the "mitigation issue").

Preliminary Considerations

101. The Board submitted that, underlying the first of the two issues to be determined by the Court (the reasons issue and the further information issue) was a significant difference between the parties as to two fundamental points. The first concerned the status of the original decision, once it had been quashed by the Court on foot of its order of 31st July, 2018. The second arose from the nature of the exercise which the Board, as the relevant competent authority, was required to undertake in carrying out the stage 1 screening for AA and in carrying out the stage 2 AA itself, having regard to the high level of scientific certainty of which the Board must be satisfied in carrying out those exercises.

102. The Board's position was that the case made by the Applicant in support of the reasons issue and in support of the further information issue afforded to the original decision a status which it could not legally have following the order of the Court of 31st July, 2018 and

that the Applicant's case on both those issues effectively ignored or placed insufficient weight on the scientific certainty required of the Board in carrying out screening and AA itself, as well as the jurisdictional nature of both of these exercises under Part XAB of the 2010 Act and the Habitats Directive. These points were advanced by the Board by way of overarching factors which it maintained had to be considered by the Court in assessing the Applicant's case in relation to both of these issues. It is appropriate that I consider and set out my conclusions on them before addressing in detail the three main issues in the case.

(a) *The Status of the Original Decision*

103. The original decision was quashed by the order of the Court of 31st July, 2018. It was quashed on the ground that the original decision contained an error on the face of the record as regards the recording of the test applied by the Board in reaching its AA conclusion, reflecting the concession made by the Board following the commencement of the previous proceedings. The Board then made the impugned decision which expressly recorded that the Board considered the case *de novo* (p. 1 of the Board Direction).

104. In its written submissions, the Applicant advanced a number of arguments from which it appeared that the Applicant was contending for some form of continued validity or legal effect of the original decision, notwithstanding that it had been quashed. Among those arguments included the contention that the original decision was a voidable decision as opposed to a decision that was null and void (as it had been quashed on the basis of an error on the face of the record).

105. The Applicant relied on a passage from *Craig on Administration Law* (8th Ed.), which stated that a defect in a decision by reason of an error of law on the face of the record of the decision, rendered the decision voidable rather than void (para. 24-021).

106. It also relied on a passage from Hogan & Morgan *Administrative Law in Ireland* (4th Ed.) (2010), where it was stated that *"…the factual existence of a particular Act, although*

later determined to be ultra vires can act as the basis for the invocation of another statutory provision" (para. 11-95). The Applicant also relied on cases such as *The State (Abenglen Properties) Limited v. Dublin Corporation* [1984] IR 381 ("*Abenglen"*) and the decision of the High Court (Costello J.) in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 31 ("*O'Keeffe*").

107. The Applicant also advanced an argument, based on the decision of the High Court in *Grealish v. An Bord Pleanála* [2007] 2 IR 536 ("*Grealish*") and the English decision of *R (Chisnell) v. Richmond upon Thames L.B.C.* [2005] EWHC 134 (Admin) ("*Chisnell*") which emphasised the importance of consistency in planning decisions and the need for reasons to be provided by a planning authority for departing from previous decisions. The Applicant also relied, in support of the importance it said ought to be attached to consistency in planning decision-making, on the decision of the Supreme Court in *The State (Kenny and Hussey) v. An Bord Pleanála* (Unreported Supreme Court (McCarthy J.) 20th December, 1984) ("*Kenny and Hussey*"). The Applicant had also put forward a case in its statement of grounds (and on affidavit) that it had a legitimate expectation that in the absence of any change in environmental or planning circumstances and in the absence of any additional information being before the Board between the date of the original decision and the date of the impugned decision, the Board would grant permission for the proposed development. That case was not pursued in the Applicant's written or oral submissions.

108. The Applicant had also made the case in its statement of grounds that the Board was obliged, not just to consider whether to exercise its powers under the relevant statutory provisions, but had a duty to exercise those powers to request additional information from the Applicant. However, that case was not very strongly pursued in its written or oral submissions (although I have addressed it when dealing with the further information issue).

109. In its written submissions, the Board accepted that void decisions could in certain circumstances have legal effects, but it maintained that a decision which had been made

outside its jurisdiction and which had been quashed by the High Court could not be treated as an extant planning precedent and that, therefore, the position in this case was not equivalent to that at issue in *Grealish*. In its oral submissions, the Board stressed that when the original decision was quashed and the application remitted to the Board, it was remitted on the basis that the application would be decided *de novo*. It was not remitted merely to correct an error on the face of the record. Thus, a new decision was always going to have to be made by the Board following its consideration of the application with effect from the point in time referred to in the order of 31st July, 2018. The Board argued that, once quashed, the original decision ceased to have any legal effect and that the Board could not have had any regard to the original decision when dealing with the application following its remittal. While accepting that there may be a distinction between a decision which is void and one which is merely voidable, in terms of acts done while the decision was in force and before it had been quashed (and reference was made in that regard to the issues in *Abenglen* and *O'Keeffe*),it contended that no issue arose in relation to acts done in the period up to the date the original decision was quashed. The issue in this case concerned the status of the original decision after it had been quashed. While accepting that there should be consistency as between valid planning decisions (as observed in *Grealish* and *Chisnell*), the Board maintained that there was no requirement for consistency of a planning decision with a previous decision which had been quashed. The Board contended that it could not have been constrained, when considering the Applicant's application following its remittal, by the terms or content of the original decision which was quashed and that if it had regard to that original decision, it would be unfair to the Applicants in the previous proceedings who might well have taken a different approach on the remittal application in July, 2018.

110. The position of the Applicant, in terms of the status or weight to be afforded to the original decision, was clarified in its opening oral submissions and in its replying submissions

at the hearing. The Applicant confirmed that it accepted that the Board had to decide on the application *de novo* following its remittal. The Applicant accepted that the Board was not required to follow the original decision or to do so unless there was a change in environmental or planning considerations or additional information provided. However, the Applicant contended that it defied reality, common sense and principle to ignore the fact of the original decision and the contents of that decision and to erase it altogether from history. It contended that it was relevant in a number of respects that the original decision had been made, albeit that it was then quashed by the Court. It maintained that the original decision continued to be relevant in some respects for the purposes of the Court's consideration of the first two issues. First, it was a factual reality that the original decision was made and that the Board was satisfied that it had sufficient information to screen for AA and to carry out and AA and that it was satisfied, having done so, to grant permission for the proposed development. Second, the Applicant contended that the fact of the original decision and the quashing of that decision on the terms set out in the order of 31st July, 2018 was relevant in terms of the time within which the Board had to decide on the remitted application under the 2016 Act which was relevant to the Board's consideration as to whether to request further information from the Applicant. Third, it contended that the original decision, and the order quashing it, was relevant in terms of the Board's obligation to give reasons for the decision made on the remitted application in the sense identified by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31 ("*Connelly*"). It submitted that considering the original decision as part of the context, was not to afford that decision a legal effect which was inconsistent with the fact that it had been quashed by the Court but was to acknowledge the reality of what happened, as well as the entitlement of the Applicant and the public to an explanation as to any apparent inconsistency in decisions made by the Board.

111. In my view, it is unnecessary to express any view on whether the defect in the original decision, by reason of the failure correctly to record the test for AA, was one which rendered the original decision void or voidable. No issue arises as to any alleged legal effects of the original decision between the date on which it was made and the date on which it was quashed by the Court. I agree with the Board, therefore, that that distinction is irrelevant in the present case.

112. No issue now arises between the parties as to the obligation of the Board to decide the remitted application *de novo*. That is precisely what the Board did. The Board is correct in its contention that, once it was quashed, the original decision ceased to have legal effect, in that it could not be relied upon by the Applicant to authorise it to carry out the proposed development.

113. The facts of this case are completely different to those at issue in *Abenglen* and *O'Keeffe* and in other cases in which, notwithstanding that a decision was quashed, it still had legal effect in the sense decided in those cases. For example, in *Abenglen*, the decision, although *ultra vires*, was nonetheless a decision for the purposes of the default provisions in the legislation. In *O'Keeffe*, the High Court (Costello J.) found that the Board had jurisdiction to entertain an appeal, even though the decision of the county manager from which the appeal was sought to be made might have been made *ultra vires*. The decision was, therefore, valid for the purposes of the appeal provisions of the legislation.

114. That is not the case with the original decision nor was that contended by the Applicant. The original decision does not have legal effect or legal consequences as the decisions in *Abenglen* and *O'Keeffe* did. However, that does not, in my view, mean that the Board was required to have no regard whatsoever to the original decision. I agree with the Applicant that the original decision and the circumstances in which it was challenged and came to be quashed by the Court are relevant to the factual context within which the Board

came to consider the remitted application in September, 2018. Those circumstances cannot be airbrushed out of history or removed from the factual record, whatever about the legal record. They form an important part of the factual background and circumstances of the remitted application. The original decision and the circumstances in which it was challenged are, in my view, relevant to the reasons issue and to the Applicant's case that the reasons given by the Board in the impugned decision were inadequate having regard, in particular, to the importance of context and of the particular circumstances of a case when considering the adequacy of reasons given by a decision maker, such as the Board (as is clear from *Connelly*). This context may also be relevant in terms of the considerations taken into account by the Board in deciding whether to seek further information from the Applicant before making the impugned decision.

115. However, apart from requiring the original decision to be taken into account as part of the factual context within which the remitted application had to be considered by the Board, I do not agree that the principle underlying the need for consistency (or for a proper explanation of inconsistency) which underlies the judgments in *Grealish* and *Chisnell*, and, to an extent, the judgment of the Supreme Court in *Kenny and Hussey*, applies with equivalent force where the previous decision has been quashed by the Court. It would be wrong in principle to treat a previously quashed decision, in terms of consistency or a requirement to explain inconsistency, in the same way as a previous valid but expired decision.

(b) *Refusal of Permission on AA Grounds: Nature of the Test*

116. The second overarching factor urged on the Court by the Board arose from the fact that the Board refused permission for the proposed development in the impugned decision for reasons related to AA grounds only. The first reason for refusal given by the Board related to a screening out of other species of SCI associated with European sites within the zone of influence of the proposed development and, therefore, concerned stage 1 screening for AA.

The second reason concerned the alleged lack of adequate qualitative analysis and, therefore, lack of certainty that the geese would relocate to other potential inland feeding sites and arose as part of the Board's carrying out of the stage 2 AA itself.

117. In its written and oral submissions to the Court, the Board outlined the requirements for stage 1 screening for AA and stage 2 AA under the relevant provisions of the Habitats Directive (and the implementing provisions of Part XAB of the 2000 Act) and under the case law of the CJEU, as applied by the Irish Courts. The Board stressed the strict requirements of Article 6 of the Habitats Directive and Part XAB of the 2000 Act as interpreted and applied in the case law of the CJEU and of the Irish Courts. It explained that compliance with the screening for AA and the AA provisions contained in Article 6(3) of the Habitats Directive and Part XAB of the 2000 Act was essential in order for the Board to have jurisdiction to grant permission for a proposed development. The Board referred to some of the leading CJEU judgments on the level of certainty which a competent authority must have before it can reach a valid screening determination that AA is not required and lawfully conclude that a proposed development will not adversely affect the integrity of a European site and in order to carry out a valid AA under EU law. The cases relied on by the Board included Case C-127/02 *Waddenzee* [2004] ECR I-07405 ("*Waddenzee*"), Case C-164/17 *Grace and Sweetman v. An Bord Pleanála* [ECLI: EU: C: 2018: 593] ("*Grace and Sweetman*"), Case C-441/17 *Commission v. Poland* [ECLI: EU: C: 2018: 255] and Case C-323/17 *People Over Wind and Sweetman* [ECLI: EU: C: 2018: 244] as well as the leading Irish cases *Eamon (Ted) Kelly v. An Bord Pleanála* [2014] IEHC 400 ("*Kelly*") and, of course, *Connelly*.

118. Having pointed to the strict requirements contained in those provisions as discussed in the case law of the CJEU (including the recent judgment in Case C-461/17 *Holohan v. An Bord Pleanala* [ECLI: EU: C: 2018: 883] (Judgment delivered on 7th November, 2018) ("*Holohan*")) and of the Irish Courts, the Board in its oral submissions went through the

screening report and the NIS, as well as the submissions made to the Board by a number of interested parties, including Birdwatch Ireland and the IBGRG, An Taisce and the Minister. The Board sought in its submissions to demonstrate that the language used in the screening report and in the NIS was not sufficiently certain as to dispel reasonable scientific doubt about the adverse effects of the development on the European site as required under EU law, as a result of which the Board would not have had jurisdiction to proceed to grant permission for the proposed development.

119. The Applicant did not dispute the nature of the test for screening for AA and for AA itself or that compliance with the test was necessary before the Board had jurisdiction to grant permission in respect of the development. The Applicant did not accept that the language of the screening report and of the NIS fell short of demonstrating compliance with the EU requirements for AA and referred to parts of those reports which it contended contained sufficient material for the Board to be satisfied with the requisite degree of certainty of the absence of likely significant effects on the relevant European sites and of the absence of adverse effects on the integrity of the sites. However, more significantly perhaps for present purposes, the Applicant contended that the fact that compliance with EU requirements for stage 1 screening for AA and for stage 2 AA itself was necessary to confer jurisdiction on the Board to consider whether it should grant permission at all meant that it was particularly important that the Board provided adequate reasons for its decision to refuse permission, as the consequences for the Applicant of an adverse decision on screening and on AA were so serious.

120. There is no dispute between the parties as to the legal requirements for screening for AA and for AA itself under Article 6 of the Habitats Directive, Part XAB of the 2000 Act and the case law of the CJEU and of the Irish Courts. The requirements for screening for AA were discussed by me in *Eoin Kelly v. An Bord Pleanála and ALDI Stores (Ireland) Limited*

[2019] IEHC 84 ("*Kelly/ALDI*") (see paras. 39 to 67) and were summarised by me at paragraph 68. That judgment was delivered shortly before the hearing of these proceedings, but I do not believe that there was any disagreement between the parties that the principles in relation to screening for AA were correctly set out in that paragraph which drew together the statutory provisions, the case law of the CJEU and the Irish cases including, most importantly, the judgment of Finlay Geoghegan J. in the High Court in *Kelly*. Prior to the judgment of the Supreme Court in *Connelly*, *Kelly* was the leading authority in this jurisdiction on the requirements under EU law for a valid stage 2 AA. *Kelly* was extensively considered, approved of, and applied by the Supreme Court in *Connelly*. The judgments in *Kelly* and *Connelly* stress the critical importance of competent authorities, such as the Board, complying with the provisions of Article 6(3) of the Habitats Directive and Part XAB of the 2000 Act. As explained by Finlay Geoghegan J. in *Kelly*, the determination which the Board makes under Article 6(3) of the Habitats Directive and s. 177V of the 2000 Act in carrying out an AA in respect of a proposed development determines the authority's jurisdiction to make the planning decision (para. 34 of *Kelly*). That point was also stressed by the Supreme Court in *Connelly* where, at para. 13.4 of the judgment of that court, Clarke C.J. stated:-

> *"In that context it is important to note that there are, in reality, two different stages to the process which must take place in an appropriate sequence. First there must be an AA and an appropriate decision must be made as a result of the AA in order that the Board have jurisdiction to grant a consent. Thereafter, assuming the Board has jurisdiction, the Board may go on to consider whether it should, in all the circumstances, actually grant permission and, if so, on what conditions."* (para. 13.4)

121. It is well established, therefore, that compliance with the AA provisions (both in relation to screening and in relation to the AA itself) contained in Article 6(3) and Part XAB of the 2000 Act is essential in order to confer jurisdiction on the Board to grant permission

for the proposed development (see also: *Kelly/ALDI* at para. 97 and, more recently, *Rushe v. An Bord Pleanála and ors* [2020] IEHC 122 at para. 129("*Rushe*")).

122. The Supreme Court in *Connelly* adopted and approved the summary produced by Finlay Geoghegan J. in the High Court in *Kelly* of the EU law requirements for an AA, as derived from cases such as *Waddenzee* and others. These requirements were set out at para. 40 of the judgment of Finlay Geoghegan J. in *Kelly* and were quoted in full in the judgment of the Supreme Court in *Connelly* at paragraph 8.14. There is no dispute about what those requirements are and so it is unnecessary to set them out in full here. Having quoted them with approval in *Connelly,* Clarke C.J. then observed:-

> *"Thus, it seems to me because of the foregoing analysis that the overall conclusion which must be reached before the Board has jurisdiction to grant a planning consent after an AA is that all scientific doubt about the potential adverse effects on the sensitive area have been removed. However, there seems, as a matter of EU law, to be a separate obligation to make specific scientific findings which allow that conclusion to be reached. This is apparent from the above passages from Kelly and the European case law therein cited."* (para. 8.15)

123. The Supreme Court summarised the position further in *Connelly* and stated that the analysis in *Kelly* demonstrates that there are *"four distinct requirements which must be satisfied for a valid AA decision which is a necessary precondition to a planning consent where an AA is required"* (para. 8.16). They are:-

> *"First, the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant*

European site. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects. Fourth and finally, where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site." (para. 8.16)

124. It will be necessary for me to refer to *Connelly* in more detail when considering the reasons issue. At this point, however, it is sufficient to note that the parties are agreed as to the nature of the test for screening for AA and for AA itself and as to the jurisdictional consequences of compliance with the EU requirements of both stages of the process. The fact that those requirements are strict and compliance with them is critical to found the jurisdiction of the Board to consider whether to grant permission for a proposed development does not, in my view, undermine the requirement of the Board to provide adequate reasons for its decision in the event that it decides to refuse permission, as it did in the impugned decision. If anything, because of the consequences for a developer of the Board concluding that it is not satisfied to the requisite standard that effects could be appropriately screened out or that adverse effects on the integrity of the site could be ruled out, it is all the more important that the Board provides adequate reasons for a decision to refuse permission for a proposed development on AA grounds. In my view, the strictness of the test does not relieve the Board of its obligation to provide adequate reasons for its decision. I believe that it is a significant factor in considering the adequacy of reasons for a decision of the Board to refuse permission on AA grounds.

125. Having expressed my views and conclusions in relation to the two overarching factors referred to by the Board, I can now proceed to deal with each of the three main issues in the case.

The Reasons Issue

The Applicant's Case on the Reasons Issue

126. In its written submissions, the Applicant submitted that the Board was under a duty to provide reasons for making a diametrically opposing decision to the original decision in the particularly unusual circumstances arising in this case where (a) the Board had previously granted permission in accordance with the inspector's recommendation and (b) where the materials before the Board when it made the impugned decision were precisely the same as those before it at the time of the original decision.

127. The Applicant relied on several matters in support of that submission including:-

(1) The inspector had concluded in her report that the screening report and the NIS were sufficient to enable her to carry out the stage 1 screening for AA exercise and the AA itself.

(2) In its original decision, the Board had completed an AA in respect of the potential effects of the proposed development on the relevant European sites and had stated that, in completing the AA, it had adopted the report of the inspector, which meant that the Board had adopted the inspector's conclusion that the information contained in the screening report and in the NIS was sufficient for that purpose.

(3) Although no additional material was put before the Board, and although there was no change in the environmental and planning circumstances and no new inspector's report was provided, the Board decided in the impugned decision that the screening report and the NIS did not contain sufficient or adequate material for the purpose of screening and AA, which was diametrically opposed to the original decision.

(4) The Board decided to refuse permission in the impugned decision notwithstanding that it had previously granted permission on the basis of

precisely the same documentation and where there had been no change in the environmental or planning circumstances.

128. In those very unusual circumstances, the Applicant contended that the Board was obliged to give reasons why it had decided to depart from the original decision and that it had failed to do so in breach of natural and constitutional justice and in breach of Article 41(2) of the Charter.

129. As noted earlier, the Applicant disagreed with the Board's position that it was not required to give reasons for departing from the original decision in circumstances where that decision had been quashed by the court and was a nullity.

130. The Applicant relied on the judgment of O'Neill J. in *Grealish* and in the judgment of Newman J. in *Chisnell*. While it accepted that the facts of those cases and, in particular, *Grealish*, were different to those arising in the present case, as the original decision had been quashed in this case, nonetheless, the Applicant contended that the Board was required to provide absolute clarity in its reasons for departing from the conclusions it had reached in the original decision. As noted earlier, the Applicant also relied on the judgment of McCarthy J. in *Kenny and Hussey* where he made the point that it was difficult to see how a planning authority could be permitted to come to a new or different view when circumstances had not changed. It was, however, made clear by the Applicant at the hearing that it was not making the case that the Board was required to follow the original decision or that it could only reach a different decision where there was a change in environmental or planning circumstances or where additional information was provided to the Board.

131. Although the Applicant noted that the obligation on the Board to give reasons for its decision under s. 10(3) of the 2016 Act, appeared to apply only where the Board decided to grant permission under s. 9 of that Act, and that the Board had acknowledged that s. 34(1)(b) of the 2000 Act did not apply to a decision taken by the Board to grant or refuse permission

under the 2016 Act, it was nonetheless accepted by the Board that it was obliged to give reasons for its decision.

132. In terms of the legal principles applicable to the obligation to give reasons, the Applicant relied on the judgment of O'Neill J. in *Grealish*, which in turn had referred with approval to the *dicta* of Finlay C.J. in the Supreme Court in *O'Keeffe* and the judgment of Kelly J. in *Mullholland v. An Bord Pleanála (No. 2)* [2006] 1 IR 453 ("*Mullholland*"), as well as a number of English authorities referred to in those cases. However, the principal authority relied upon by the Applicant in support of its case on reasons was the recent judgment of the Supreme Court in *Connelly* (and the various earlier decisions of the Supreme Court which were cited with approval in that case). The Applicant placed great reliance on several passages in the judgment of Clarke C.J. in *Connelly*. It submitted that the Supreme Court had made clear that the extent of the reasons required for a decision depended on the context in which the particular decision was made and the type of decision at issue. The Applicant stressed the purpose behind the requirement on a decision maker to give reasons for its decision discussed in the earlier case law, such as *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59 ("*Mallak*"). It relied on the observation by the Chief Justice in *Connelly* that while a decision maker may not be required to give a *"discursive determination"* as is required in a Superior Court judgment, reasons cannot be *"so anodyne that it is impossible to determine why the decision went one way or the other"* (per Clarke C.J. at para. 10.1). The Applicant also relied on the statement by Clarke C.J. (at para. 9.7) that where the Board differs from its inspector, there is an obligation on the Board to set out its reasons for coming to its conclusion *"in sufficient detail to enable a person to know why the Board differed from the inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable"*. The Applicant contended that aspects of the Board's decision were *"anodyne"*, in that the decision recorded the

conclusion reached by the Board but did not assist the Applicant in understanding the basis on which it reached that conclusion.

133. The Applicant also relied on Article 41 of the Charter and on two judgments of the General Court, Case T-150/17 *Asolo Limited v. European Union Intellectual Property Office* [ECLI: EU: T: 2018: 641] (judgment delivered on 4th October, 2018) ("*Asolo*") and Case T-515/15 *Joint-Stock Company "Almaz-Antey" Air and Space Defence Corp v. Council of the European Union* [ECLI: EU: T: 2018: 545] (judgment delivered on 13th September, 2018) ("*Almaz-Antey*").

134. The Applicant argued that the two reasons set out by the Board in the impugned decision when read with the two further reasons or explanations given by the Board in the decision for deciding not to accept the inspector's recommendation to grant permission, did not comply with the legal test for reasons in the very particular circumstances of this case.

135. With reference to the first reason in the decision concerning screening, the Applicant queried the basis on which the Board concluded that it could not be satisfied that the exclusion of the other species of SCI at the screening stage, on the basis of infrequency of use, was appropriate and whether it was on the basis of an incorrect methodology or for some other reason. On the basis of the oral submissions made on behalf of the Board, the Applicant understood that while the season peak figures had been given for those species screened out, there appeared to be the absence of information in relation to the frequency with which those other species visited the locations in question. However, it contended that the Board had not adequately explained why it disagreed with the inspector who had based her conclusions on the adequacy of the screening report for the purposes of the screening exercise on the season peak counts of the birds at the various locations in question. The Applicant maintained that it was unclear from the impugned decision whether the Board was disagreeing with the inspector's consideration of the season peak counts in terms of the percentage relied on (1%

of international population) or whether the Board's view was that the inspector should have referred to or required the frequency of the visits of those species to the relevant sites to be established and noted that the Board did not state in the decision that it needed to see the survey data from the site visits so that it could assess how frequent the visits of those species to the sites were. While it appeared that the Board felt that a different methodology ought to have been adopted to that adopted by the inspector in terms of screening (in that frequency of the visits by the other species ought to have been considered), the Applicant asserted that that was not said by the Board in the impugned decision and was not clear.

136. As regards the second reason which concerned the AA itself and the alleged *"lack of adequate qualitative analysis"* and lack of certainty that the geese would successfully relocate to other potential inland feeding sites, the Applicant submitted that the decision was also unclear and failed to contain adequate reasons. While in its oral submissions the Board referred to language used in parts of the NIS which it said was less than certain, the Applicant contended that it was necessary to look at the actual conclusions in the NIS (for example, at para. 11.2) and at what the inspector had concluded (at para. 14.2 of her report). If the Board had acted on the basis of the submissions made by various parties expressing concerns in relation to the language and terminology used in the NIS (for example, from Birdwatch Ireland/IBGRG, An Taisce and the Minister), it did not make reference to doing so in the impugned decision. While accepting that the Board did not have to provide a discursive judgment as if it were a judgment of the Superior Courts, the Applicant submitted that the Board nonetheless had to give the principal reasons for the conclusion reached and as to why it had disagreed with the inspector. The Applicant submitted that in relation to the second reason, it was unclear on the basis on which the Board decided that the qualitative analysis was inadequate and, accordingly, lacking in uncertainty. The Board had not identified anywhere how the qualitative analysis was inadequate and it was submitted that the failure to

do so rendered the reason given in respect of that part of the decision deficient on any version of the law.

137. For these reasons (which are apparent from the written submissions and from the transcript of the Applicant's oral submissions at the hearing), the Applicant submitted that the reasons given by the Board in the impugned decision were inadequate and that the decision should be quashed on that basis.

The Board's Case on the Reasons Issue

138. In response, the Board in its written and oral submissions maintained that the reasons given by the Board in the impugned decision for refusing to grant permission in respect of the proposed development were adequate and complied with the relevant legal principles on reasons. The Board rejected the contention that it was required to have regard to the original decision when making the impugned decision or either to achieve consistency with that decision or to explain a departure from it in the impugned decision. It sought to distinguish cases such as *Grealish* and *Chisnell* which were relied on by the Applicant, on the basis that those cases did not involve the suggestion that consistency, or reasons for departing from previous decisions, was required when the previous decision had been quashed. It was in that context that it was argued that Board was not required to have any regard to the original decision as it had been quashed and was a nullity.

139. The Board submitted that the reasons given in the impugned decision satisfied the principles set out by the Supreme Court in *O'Keeffe*, by the High Court in *O'Neill v. An Bord Pleanála* [2009] IEHC 202 ("*O'Neill*") and by the Supreme Court in *Connelly*.

140. The Board further submitted that the requirement to provide reasons under Article 41 of the Charter, as interpreted and applied by the General Court in *Almaz-Antey* and in *Asolo*, did not go further or impose any greater obligation in terms of reasons than already exist

under Irish law, as set out by Kelly J. in the High Court in *Mullholland* and by the Supreme Court in *Connelly*.

141. While accepting that the obligation to provide reasons had to be viewed in the context of the particular decision, the Board argued that the relevant context for the impugned decision was the exercise by the Board of its obligations as the competent authority in carrying out stage 1 screening for AA and the stage 2 AA itself under the Habitats Directive and ss. 177U and 177V of the 2000 Act. The Board stressed the requirement that it be satisfied to the necessary level of scientific certainty set out in the case law of the CJEU (such as *Waddenzee, Grace and Sweetman* and *Holohan*), and in the relevant Irish cases discussed earlier (such as *Kelly* and *Connelly*), that there was no likelihood of a significant effect on the relevant European sites and no adverse effect on the integrity of those sites.

142. While the Board accepted that s. 34(10)(b) of the 2000 Act did not apply to the impugned decision (as that provision did not apply to decisions under the 2016 Act) and that s. 10(3) of the 2016 Act did not apply as it appeared only to apply to decisions by the Board to grant permission under the 2016 Act and not to decisions to refuse permission, the Board referred to s. 177V(5) which imposed an obligation on the Board to give reasons for its AA determination. However, notwithstanding the apparent lacuna in the legislation, the Board did not dispute that it was required to give reasons for its decision to refuse permission on screening and AA grounds and to give reasons for disagreeing with the inspector's recommendation. The Board submitted that it did that as a matter of practice and that it did so in the present case.

143. The Board further submitted that the reasons contained in the impugned decision could not in any sense be regarded as *"anodyne"*, in the sense that that term was used by the Supreme Court in *Connelly*. It submitted that the reasons for its decision to refuse permission and for not accepting the inspector's recommendation were sufficient to ensure that an

intelligent person who had participated in the proceedings and was apprised of the broad issues in the case, would know why the Board refused permission, namely, that the Board did not agree with the conclusions of the inspector that there was sufficient certainty as to the absence of a likelihood of significant effects on certain bird species which had been screened out in the screening report (and, therefore, not dealt with in the NIS) and that there was sufficient certainty that the geese displaced from the St. Paul's site (their most important *ex-situ* feeding site) would successfully relocate elsewhere. The Board further submitted that such a person would consult the inspector's report which recorded the concerns expressed by others, including the Council, Birdwatch Ireland/IBGRG, the Minister and An Taisce in relation to the two issues identified by the Board in the impugned decision. Such a person would also be in a position to analyse the level of certainty with which the inspector reached her conclusions (by reference to the screening report and the NIS).

144. The Board then went through the two reasons given in the impugned decision and the two further reasons or explanations given by the Board for departing from the inspector's recommendation. With regard to the first reason (screening), it was submitted that the only issue taken by the Board concerned the screening out of the other species of SCI on the basis of their infrequency and low numbers. The Board submitted that the conclusions in the screening report were reached on the basis of the season peak counts and not by reference to the infrequency of visits of those species to the relevant sites. There was, it was submitted, a *"mismatch"* between those peak counts and the frequency of visits. The Board submitted that the season peak counts recorded only the numbers of birds counted, but not the frequency of their visits and that this was particularly important with regard to the Black-tailed Godwit. The essential reason for the Board's conclusion in the first reason and in the first explanation given for disagreeing with the inspector's recommendation was that there was a *"mismatch"*

between the season peak counts and the frequency and that this applied to all four of the bird species of SCI which were screened out, but most significantly to the Black-tailed Godwit.

145. With regard to the second reason (AA), the Board relied on the language used in the NIS and in the inspector's report and, in particular, on s. 11.1 of the NIS and the language used there. The Board could not be satisfied on the basis the analysis contained in the NIS to the requisite degree of certainty that the geese would relocate to the other potential inland feeding sites and that there would, therefore, not be adverse impacts on the integrity of the relevant European sites. That was a summary of the explanation given on behalf of the Board as to why the qualitative analysis provided in the NIS on that issue was inadequate. It was contended that that was further explained in the second reason or explanation given for departing from the inspector's recommendation and that the Board identified what the gap in the analysis provided by the Applicant was. That gap concerned the lack of certainty that the geese would relocate to the other potential alternative feeding sites. The Board submitted that the NIS (and the inspector's report) did not use language consistent with the degree of scientific certainty required under Article 6 of the Habitats Directive and s. 177V of the 2000 Act.

146. In summary, therefore, the Board submitted that the reasons given had to be examined in the context of the obligations on the Board as the competent authority under the Habitats Directive and ss. 177U and 177V of the 2000 Act in carrying out the screening and AA obligations under those provisions, as explained in the case law of the CJEU and in the Irish cases referred to earlier. The Board submitted that because of the requirements under EU law for screening and for AA under Article 6(3) of the Habitats Directive, it was sufficient for the Board to identify the gaps or *lacunae* in the analysis. It was further submitted that even if the Court agreed with the complaints made by the Applicant in relation to the reasons given, it would make no difference because, as a result of the second reason given by the Board in the

impugned decision, the Board could not grant permission in respect of the proposed development since there remained gaps or *lacunae* in the analysis, which would preclude the Board from being satisfied to the required degree of scientific certainty that there would be no adverse impacts on the integrity of the relevant European sites.

The Position of Clonres on the Reasons Issue

147. In written and oral submissions, Clonres supported the position of the Board and advanced a similar analysis to the Board in relation to the relevance of the original decision and of cases such as *Grealish* and *Chisnell*. Clonres further agreed with the Board that the Charter, and the cases relied upon by the Applicant, did not impose a greater obligation on the Board than already existed under Irish law. Clonres also referred in that regard to cases such as *Mullholland*, *Mallak* and *Connelly*. Clonres elaborated upon those submissions in a clear and concise submission made in support of the Board's case.

Discussion and Conclusions on the Reasons Issue

148. In determining the reasons issue, I will first consider the various statutory provisions. I will then outline what appeared to me to be the relevant legal principles. Following that, I will seek to apply those principles to the facts, taking into account the submissions summarised above.

(a) Reasons: Relevant Statutory Provisions

149. While there is no dispute between the parties that the Board was obliged to give reasons for its decision and, in particular, that it was obliged to provide reasons for disagreeing with the recommendation of the inspector, there is some uncertainty as to the statutory basis for that obligation in the case of a decision to refuse permission for a SHD under the 2016 Act.

150. Section 10(3) of the 2016 Act provides that a decision of the Board to grant permission under s. 9(4) (that is to grant permission for a proposed SHD under the 2016 Act)

must state *"the main reasons and considerations on which the decision is based"* (s. 10(3)(a)). It is immediately obvious that that obligation is expressly directed to a decision to grant permission under the 2016 Act and not a decision to refuse such permission, notwithstanding that s. 9(4) provides that the Board may decide to refuse to grant permission, for a proposed SHD. There is a further anomaly in s. 10(3)(e) which provides that the decision of the Board to grant permission is required *"in relation to the granting or refusal of a permission in respect of an application accompanied by an environmental impact assessment report, subject to or without conditions"* to state that *"the Board is satisfied that the reasoned conclusion on the significant effects on the environment of the development was up to date at the time of the taking of the decision"* (emphasis added). This subsection is anomalous in that s. 10(3) is predicated on the decision of the Board being to grant permission, whereas the subsection appears to go further than that and to apply also to a decision to refuse permission. However, it is unnecessary to say any more about that as it is, in any event, evident that the express obligation on the Board under s. 10(3)(a) of the 2016 Act to state the *"main reasons and considerations"* on which the Board's decision was made, applies only in the case of a decision by the Board to grant permission and does not apply to a decision to refuse such permission.

151. The parties were unable to point to any other provision in the 2016 Act which imposed an obligation on the Board to state the main reasons and considerations for a decision to refuse to grant permission for a proposed SHD. Nor could they point to any provision in the 2016 Act which imposed an express obligation on the Board to state the main reasons, or indeed any reasons, for not accepting the recommendation of the inspector to grant permission for such a development.

152. It is also common case that s. 34(10)(b) of the 2000 Act does not apply to a decision by the Board to refuse to grant permission in respect of a proposed development under the

2016 Act. That is the section which imposes a general obligation on the Board (and on the planning authority), where its decision to grant or refuse permission differs from the recommendation of an inspector, to state the main reasons for not accepting the recommendation of the inspector. That provision, therefore, does not apply to the impugned decision. Nor does s. 34(10)(a). That subsection imposes an obligation on the Board to state the main reasons and considerations on which a decision by the Board under s. 37 of the 2000 Act was based. The impugned decision was not a decision made by the Board under that section. Therefore, neither s. 34(10)(a) nor s. 34(10)(b) applies to the impugned decision.

153. Sections 177U and 177V of the 2000 Act which concerns screening for AA and AA itself. Both contain provisions which require the Board to provide reasons in certain circumstances. Section 177U(6)(a) requires the Board, where it is the competent authority, to give reasons for its determination (having carried out a screening exercise) that an AA is required. Section 177V(5) requires the Board (again, where it is the competent authority) to provide reasons for its determination under Articles 6(3) of the Habitats Directive as to whether or not a proposed development would adversely affect the integrity of a European site. Neither of those provisions, however, expressly requires the Board to provide reasons for a decision refusing permission for a proposed SHD where that decision differs from a recommendation made by an inspector appointed by the Board.

154. It appears, therefore, that there is no express statutory provision which imposes such an obligation on the Board. That would seem to be a significant omission in the 2016 Act and a significant oversight on the part of the Oireachtas. However, the Board accepts that it is obliged to provide reasons for its decision to refuse to grant permission for a proposed SHD and to provide reasons for differing from a recommendation made by its inspector. The Board states that it does this as a matter of practice. It maintains that it has done so in the impugned decision.

155. I proceed, therefore, on the basis that the Board is under a duty to provide reasons for its decision to refuse to grant permission for a proposed SHD and to provide reasons for differing from the recommendation contained in the report of its inspector to grant permission for such a development.

(b) Reasons: Applicable Legal Principles

156. The extent of the reasoning required by a decision maker, such as the Board, is governed by the legal principles which are set out in the cases and, most significantly, in the judgment of the Supreme Court in *Connelly*. It is to those principles that I now turn. I proceed on the basis that the obligation on the Board to give reasons for refusing to grant permission in respect of a proposed SHD, despite a recommendation from its inspector that such permission should be granted, is analogous to the obligations contained on the Board under ss. 34(10)(a) and 34(10)(b) of the 2000 Act, in the case of decisions of the Board to which those provisions apply, as those provisions have been interpreted by the courts.

157. The leading decision in that regard was, until recently, that of Kelly J. in *Mullholland*. In that case, Kelly J. referred to the changes to the pre-existing statutory position introduced by ss. 34(10)(a) and 34(10)(b) of the 2000 Act. Those provisions imposed obligations upon the planning authority:-

(a) to give reasons irrespective of whether the decision was to grant or refuse permission;

(b) to state the main reasons and considerations on which a decision was based; and

(c) to state the main reasons for not accepting the recommendation of the Board's inspector.

158. Kelly J. further noted that the pre-existing case law on the adequacy of reasons continued to apply. He noted:-

"Thus, there is no obligation to provide a discursive judgment but the reasons given must, if they are to be considered adequate, comply with the requirements set forth in [*O'Donoghue v An Bord Pleanála* [1991] ILRM 750 and *State (Sweeney) v Minister for the Environment* [1979] ILRM 35] *..."* (per Kelly J. at p. 464)

159. In *O'Donoghue* in the High Court, Murphy J. had stated:-

"It is clear that the reasons furnished by the bord (or by any other Tribunal) must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the tribunal that it directed its mind adequately to the issues before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations..." (at p. 757)

160. In *Sweeney*, Finlay P. in the High Court stated that the purpose of the requirement for reasons was:-

"...to give... [to an] *applicant such information as may be necessary and appropriate for him, firstly, to consider whether he has got a reasonable chance of succeeding in appealing against the decision of the planning authority and, secondly, to enable him to arm himself for the hearing of such an appeal."* (at p. 37)

161. Kelly J. further stated that it was *"no more than common sense"* that the Board's reasons for not accepting the recommendation of its inspector *"must be clear and cogent"*. With regard to the requirement to state the considerations on which the Board's decision was based, Kelly J. explained that in order for the statement of considerations *"to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons"* (at p. 465). He held that the statement of considerations, therefore, had to be sufficient to:-

"(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;

(2) arm himself for such hearing or review;

(3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and

(4) enable the courts to review the decision." (at p. 465)

162. In other words, Kelly J. held that the criteria which had to be met for the statement of considerations were precisely the same as those which applied in respect of the statement of the main reasons for a decision. These principles were followed and applied in several subsequent judgments including *Grealish* (and recently by me in *Kelly/ALDI* at para. 201).

163. In *Grealish*, O'Neill J. stated:-

"…the legal obligation resting on the [Board] *to explain their decisions is a very light one, one could even say almost minimal. It is well settled that they do not have to give a discursive judgment."* (para. 40, p. 553)

164. While a *"discursive judgment"* such as is required to be delivered by a judge of the Superior Courts may not be required, it is probably not now correct to say that the obligation on the Board to explain its decisions is *"very light"* or *"almost minimal"*, in light of more recent developments in the law, as outlined by the Supreme Court in *Connelly*. Nonetheless, in *Grealish* O'Neill J. did proceed to agree with Kelly J. in *Mullholland* that the Board's decision must *"provide sufficient information to enable somebody in the position of the Applicant in this case to consider whether he has a reasonable chance of succeeding in judicially reviewing the decision; can arm himself for such a review; can know if the Respondent has directed its mind adequately to the issues it has to consider; and finally give sufficient information to enable the court to review the decision"* (para. 40, p. 553). Those requirements appear to me to be consistent with the explanation provided by the Supreme Court in *Connelly* for requiring proper reasons to be given for administrative decisions.

165. It should also be stated that in considering whether the Board has complied with its obligations to set out the main reasons and considerations in its decision, it is necessary to consider the position from the perspective of an informed participant. In *O'Keeffe*, Finlay C.J. in the Supreme Court stated:-

> *"What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons."* (at p. 76)

166. Similar observations were made by Clarke C.J. in his judgment for the Supreme Court in *Connelly*, to which I will turn shortly. Before doing so, however, I should confirm the views I expressed earlier in this judgment in relation to the alleged requirement by the Board to ensure consistency with previous decisions or at least to explain why the Board may have departed from a previous decision. The Applicant argued that that was the case, principally in reliance upon *Grealish* and *Chisnell*. The Board (and Clonres) disputed any obligation to ensure consistency or to explain inconsistency where the previous decision had been quashed by the court and was a nullity. I accept the submission of the Board that it is not under any obligation, in terms of its obligation to provide reasons, to explain any inconsistency between its decision and a previous decision made by it which was quashed by a court. *Grealish* did not involve previous decisions which were quashed, but involved valid decisions. That is an important distinction. Nor did the English case of *Chisnell* involve a previous quashed decision. In my view, the principle of consistency, if it can be called that, which persuaded O'Neill J. to quash the Board's decision in that case on the basis that it had not explained why a different conclusion was reached to that reached on a number of previous occasions, does not apply in the present case. However, as I explained earlier, I do agree with the Applicant that the original decision is relevant in the sense that it forms part of the

chronology of events and factual context which was required to be considered by the Board when considering the remitted application.

167. In *Connelly*, the Supreme Court considered in great detail the extent of the Board's obligations to give reasons for its decision to grant permission for a proposed wind farm development (where the Board's inspector had recommended that permission be refused for the development). The central issue on the appeal, for present purposes, was whether adequate reasons were given by the Board for its decision. At para. 1.4 of his judgment for the Supreme Court, Clarke C.J. noted that there had been *"significant developments in recent years"* in the law relating to the requirement of a decision maker to give reasons. The particular focus of the issues in that case concerned the application of the principles to be derived from the evolving jurisprudence to decisions made by the Board when exercising its statutory role in relation to planning permission. The Supreme Court also had to consider the extent, if any, to which there may be additional obligations placed on the Board when making decisions which involved the carrying out of either or both an AA or an EIA. I have referred earlier to what the Supreme Court found in relation to the obligations on the Board under EU law in carrying out an AA. The Court dealt with the validity of the AA carried out by the Board in that case in a discrete section of its judgment. It found that neither the decision of the Board at issue nor any other materials, either expressly referred to in it or taken by necessary implication to form part of the process leading to the ultimate determination of the Board, contained *"the sort of complete, precise and definitive findings which would underpin a conclusion that no reasonable scientific doubt remained as to the absence of any identified potential detrimental effects on a protected site having regard to its conservation objectives"*; that such findings were a necessary precondition to the Board having jurisdiction to grant permission where an AA is required; and that, as a result of the failure to make the sort of findings which the jurisprudence of the CJEU requires to be made as part of a valid AA, the

decision to grant permission for the development at issue in that case had to be quashed (see, for example, para. 14.3).

168. Much of the judgment in *Connelly* dealt with the requirement of a decision maker to give adequate reasons for its decision. It is necessary, therefore, to refer in some detail to what the Supreme Court said on that issue. The crux of the Applicant's case on the reasons issue is that the Board failed in the impugned decision to provide reasons which complied with the principles discussed by the Supreme Court in *Connelly*. The position of the Board (and supported by Clonres) is that the reasons contained in the impugned decision comply with those principles.

169. At para. 5.2 of the judgment in *Connelly*, the Court noted that the legal requirements in respect of different types of decisions vary significantly from case to case. In certain types of decisions, the decision maker may be required to determine whether certain criteria have been met and the reasons for the decision will necessarily have to address why the decision maker decided that the criteria either were or were not met in the particular case. The type of decision and the issues which have to be taken into account by the decision maker in making the particular decision will inform the reasoning behind the decision (and the matters which will have to be dealt with in the reasons for the decision). The Court pointed out, however, that other decisions involved much broader considerations involving general concepts and the exercise of judgement and may involve a margin of appreciation on the part of the decision maker. Having regard to these various different types of decisions, involving different issues and concepts, the Court stated that:-

> *"…the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached."* (para. 5.3)

That is an important observation in the context of the present case.

170. By way of further general observation, the Court stated that as it was necessary for a decision maker to take into account all relevant factors and to exclude from consideration all irrelevant factors, it was *"useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met"* (para. 5.4). However, while it may be necessary for the decision to make clear that all appropriate factors were taken into account, the Court stated that it would *"rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons"* (para. 5.4).

171. The Court addressed in some detail the purpose behind the obligation to give reasons and did so by reference to a number of previous judgments of the Supreme Court including *Mallak, Meadows v. Minister for Justice* [2010] 2 IR 701 ("*Meadows*"), *Rawson v. Minister for Defence* [2012] IESC 26 ("*Rawson*"), *EMI Records (Ireland) Limited v. Data Protection Commissioner* [2013] IESC 34 ("*EMI*") and *Oates v. Browne* [2016] IESC 7 ("*Oates*"). The court noted that in *Mallak*, Fennelly J. pointed to at least two purposes served by the requirement to provide reasons (echoing what Kelly J. had said in *Mulholland*), namely:-

> *"…first, to enable a person affected by the decision to understand why a particular decision was reached, but secondly, to enable a person to ascertain whether or not they have grounds on which to appeal the decision where possible or seek to have it judicially reviewed."* (para. 6.9)

172. Having referred to those other decisions, the Court noted that it was possible to identify *"two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker"*. Clarke CJ. Put it as follows:-

> *"First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to*

> *individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."* (para. 6.15)

173. Significantly, however, the Court observed that it had to be emphasised that the application of this general approach *"will vary greatly from case to case as a result of the various criteria identified earlier which might distinguish one decision, or decision making process, from another"* (para. 6.16).

174. This again is an important observation in the context of an assessment of the adequacy of the reasons given by the Board for the impugned decision. It illustrates that reasons which might be adequate in a particular case or in particular circumstances might not be adequate in another case or in other circumstances. I agree, therefore, with the Applicant's submission that the type of decision and the particular circumstances of the case will dictate the extent of the reasoning required to be provided by the decision maker.

175. The Supreme Court was also concerned to identify the materials which might have to be considered in terms of ascertaining the reasons for a decision. Having referred again to *Mallak* and also to the judgment of Clarke J. in the High Court in *Christian v. Dublin City Council* [2012] IEHC 163 ("*Christian*"), the Court stated that it was possible that the reasons for a decision *"may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion"* (para. 7.5). The Court, however, made clear that this was always subject to the requirement that the reasons had to be *"ascertainable and capable of being determined"*. The Court referred to the earlier judgment in *EMI*, where it made clear that legal certainty required that it had to be possible to *"accurately determine*

what the reasons were" for a decision and that there *"should not be doubt as to where the reasons can be found"* (para. 6.8 of *EMI*). The Court observed that where it was suggested that the reasons could be found in materials outside the decision itself, together with materials expressly referred to in the decision, care needed to be taken to ensure that persons affected by the decision could *"readily determine what the reasons"* were, notwithstanding that they did not appear in the decision or in materials expressly referred to in it. Noting that the range of persons who would be permitted to challenge a particular decision would vary from case to case, as would the extent of their involvement be in the process' as a consequence, the Court noted:-

> *"…the requirement that reasons given for a decision must be adequate necessitates that, where the reasons are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision."*
>
> (para. 7.6)

176. In terms of the materials to which regard may be had in ascertaining the reasons for a decision to enable the adequacy of those reasons to be determined, the Court stated that the test was that identified in *Christian*, which it summarised as follows:-

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

177. The Court then noted that planning applications often involve complex issues and the reasons for the decisions in respect of those applications may, therefore, also be complex and scientific. As a result, the Court stated:-

> *"Where a party wishes to engage with the planning process in a case which raises complex issues of that type (whether at the stage of the application for permission or in the context of mounting a court challenge to a permission granted) then it is inevitable that the party concerned will also have to engage with such matters if any part of their opposition or challenge derives from such complex or scientific questions. It could form no part of a legitimate complaint, based on an argument as to reasons or the lack thereof, to suggest that the reasoning was unduly complicated or scientific if the issues which arose in the context of the grant or refusal of permission required engagement with such issues."* (para. 9.3)

178. It is not suggested by the Applicant in the present case that the reasoning provided by the Board in the impugned decision was unduly complicated or scientific, but rather that the reasons did not adequately explain the conclusions reached by the Board in relation to screening for AA and the AA itself.

179. With regard to the source material for the reasons given by the Board for a decision on a planning application, the Court confirmed that the *"reasonable observer"* would look to the inspector's report (including reservations expressed in that report) and to other information, including, on the facts of that case, the NIS which the developer notice party was required to submit, because of the inspector's reservations and the rationale found in the decision itself, where the Board expressed itself as being satisfied that the reservations expressed by the inspector had been met. While those conclusions were directed to the specific facts of *Connelly*, there is no doubt from what the Court stated in the judgment that the reasons for the Board's decision to grant or refuse permission can be found in a range of

different documents, including the inspector's report and in the NIS, as well as in the decision itself. It should also be noted here that the Court in *Connelly* stated that it would be preferable if the Board made expressly clear whether it accepted all of the findings (or recommendations) of an inspector or, if it did not, *"where and in what respects it differs"* from the inspector's findings (and recommendations) (para. 9.6). The Board did set out in the impugned decision the two reasons for refusing permission and two reasons or explanations why it differed from the recommendations of the inspector. At the heart of the reasons issue is whether those reasons complied with the test in *Connelly*, having regard to the range of materials to which reference can be made in determining the adequacy of the reasons given.

180. At para. 9.7, the Court stated that where the Board differed from its inspector, there is *"clearly an obligation for the Board to set out the reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the Inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable"*. In that case, further information was provided between the date of the inspector's report and the final decision of the Board and the Court had to consider whether the Board had given adequate reasons for being satisfied that the initial concerns expressed by the inspector had been adequately dealt with in the further information provided.

181. In terms of the source material to consider for the purpose of assessing the adequacy of the reasons given by the Board for its decision, the Court held that *"at a minimum"*, the reasons could be found in the inspector's report and the documents expressly or by necessary implication referred to it, as well as in the notice seeking further information and in the further information (and NIS) subsequently supplied, as well as in the final decision of the Board itself, including the conditions attached to the decision and the reason given for the inclusion of those conditions (para. 9.8).

182. The Supreme Court made clear, therefore, that in considering the adequacy of the reasons given by the Board for its decision, the Court can have regard not only to the decision itself, but also to the documents expressly referred to in it and those referred to by necessary implication as well potentially to further documentation. In the present case, the adequacy of the reasons given by the Board in the impugned decision must, therefore, be considered by reference to the terms of the decision itself, as well as documents such as the screening report and the NIS and the submissions and observations received by the Board which are referred to in general terms in the Board Direction and Board Order.

183. The Supreme Court in *Connelly* proceeded to consider whether the reasons given by the Board in that case were adequate. In an important passage for present purposes, at para. 10.1 of the judgment, the Court stated:-

> *"As noted earlier, the general duty to give reasons does not involve a box ticking exercise. It will rarely be sufficient to set out, in almost standard form, a generic description of the legal test or principles by reference to which the decision is to be made, to state that that test has been applied, and simply to go on to say that a particular decision has been made. While it has often been said that a decision maker is not required to give a discursive determination along the lines of what might be expected in a superior court judgment, it is equally true that the reasoning cannot be so anodyne that it is impossible to determine why the decision went one way or the other."* (para. 10.1)

184. While accepting that the Board was not required to give a *"discursive determination"* as in the case of a judgment of the Superior Courts, the Applicant contended that the reasoning given by the Board in the impugned decision was *"anodyne"*, as that term was used by the Court in *Connelly*. For reasons set out below, I do not entirely agree with that description.

185. At para. 10.3, the Court stated that there is a *"middle ground"* between the *"sort of broad discursive consideration that might be found in the judgment of a court"* and *"an entirely perfunctory statement that, having regard to a series of factors taken into account, the decision goes one way or the other"*. The Court held that there was *"at least an obligation on the part of decision makers to move into that middle ground, although precisely how far will depend on the nature of the questions which the decision maker had to answer before coming to a conclusion"*. While I do not believe that the reasoning given by the Board for the impugned decision was *"anodyne"*, the crucial issue for me to determine is whether the Board had moved into the *"middle ground"* so that interested parties and the Court itself could know why that the Board decided as it did.

186. The Supreme Court then analysed the reasons given by the Board for its decision to grant permission in *Connelly*, notwithstanding the reservations expressed by the inspector. It emphasised that the Court was not concerned with whether the findings made by the Board were open on the basis of the materials before it or with second guessing the judgment of the Board in that regard (as is the case here). The Court was satisfied that on the facts that the Board had given adequate reasons for disagreeing with the inspector's report on the relevant issues. The Court concluded that an interested party would, as a result of reading the decision in conjunction with the inspector's report together with documents either expressly referred to in the decision or which must by necessary inference be taken to have formed part of the reasoning, have sufficient information (a) to inform itself as to why the Board ultimately came to the conclusions which it did and (b) to consider whether there was any basis for challenging the conclusions reached by the Board (para. 10.15). The Court stated that the law does not require *"a level of reasoning which goes beyond that required to afford an interested party reasonable information as to why the Decision was made and whether it can be challenged"*. The Court concluded, therefore, on the facts of the case that the reasoning

given by the Board was adequate. As noted earlier, however, the Court went on to hold that the Board had not carried out a valid AA in light of the requirements of Article 6(3) of the Habitats Directive and the jurisprudence of the CJEU.

187. It can be seen, therefore, that the Supreme Court in *Connelly* drew together, and set out comprehensively, the principles to be applied in considering the adequacy of reasons given by the Board for a decision to grant or refuse planning permission. *Connelly* is, in effect, the touchstone by reference to which the adequacy of the reasons given by the Board in this case must be assessed. I have assessed the reasons given by the Board by reference to the principles set out in *Connelly* and set out my findings and conclusions below.

188. Before doing so, however, I should make reference to another very recent judgment of the Supreme Court in the planning area which postdated the argument in this case but, which stresses the importance of a decision maker giving reasons which explain why particular submissions have not been accepted. In *Balz v. An Bord Pleanála* [2019] IESC 90 ("*Balz*"), O'Donnell J., who delivered the judgment of the Court, observed (although not expressly in the context of an EIA or an AA), where the Board's inspector had determined that he could not entertain particular submissions and so discounted them and treated them as irrelevant, an approach adopted and approved by the Board, that:-

> *"It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live…"* (para. 57)

Those observations were cited with approval by McDonald J. in *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888 (at para. 38).

189. While clearly important, I have assessed the adequacy of the reasons given by the Board for its decision in this case on the basis of what was said in *Connelly*, as the judgment in *Balz* had not been delivered at the time of the argument in this case. However, I do not believe that the observations in *Balz* significantly add to the extent of the obligation to give reasons as discussed by the Supreme Court in *Connelly*, at least so far as this case is concerned.

190. To recap, I approach my consideration of the reasons issue, recognising that there are three separate, but closely related, requirements to be considered in determining the adequacy of reasons given for a decision. The first is that any person affected by the decision should know at least in general terms why the decision was made. The second is that an affected person is entitled to have enough information to consider whether he or she can or should seek to appeal or to judicially review the decision. Third, and related to the second requirement, is that the reasons provided for the decision must allow the court (or other body) hearing an appeal from the decision or conducting a judicial review of that decision, properly to do so.

191. In summary, the extent of the obligation on the Board to ensure that there were adequate reasons for the impugned decision may be summarised as follows.

192. The Board was required to set out the reasons for its decision and, in particular, for differing from the recommendation of its inspector, in sufficient detail to enable a person affected (in the widest sense of that term) to know why the Board differed from the inspector and to determine whether there was any basis for forming the view that the decision of the Board was not sustainable. The level of reasoning required must be such as to provide an interested party with reasonable information as to why the particular decision was made and

whether there are grounds for challenging it. However, it was not necessary for the reasoning to go beyond that.

193. Nor was it necessary for the Board to provide a discursive judgment such as would be required by one of the Superior Courts. However, the reasons given cannot be so *"anodyne"* that it was impossible to determine why the decision went the way it did. A "*middle ground*" was required to be achieved by the Board. That "*middle ground*" must comply with the essential requirements just summarised. Further, the adequacy of the reasoning must be assessed from the viewpoint of a reasonable observer carrying out a reasonable enquiry.

194. The materials to be considered in determining the adequacy of the reasons given include not just the decision itself and the reasons contained in it but also other documents such as the inspector's report, the screening report, the NIS and other documents expressly or by necessary implication referred to in the decision and other materials.

(c) Application of Legal Principles to the Reasons Issue in this Case

195. Applying those principles, I have formed the view that the Applicant's complaints in relation to the reasons given by the Board for the impugned decision and its reasons for differing from the inspector's conclusions and recommendations are well founded. While I have a great deal of sympathy for the Board in terms of the onerous obligations upon it in providing reasons for its decisions in light of the prevailing legal principles and in light of its obligations under EU law, I have concluded that the reasons provided by the Board in the impugned decision, in the very unusual circumstances of this case, were not adequate and did not adequately explain why the Board disagreed with the inspector's conclusions and recommendations, to the standard required by the Supreme Court in *Connelly*.

196. While I entirely accept the submission advanced by the Board that there is no obligation on the Board to ensure consistency between a decision which it proposes to take and an earlier decision which has been quashed by the Court, the fact that the inspector

reached the conclusions which she did in relation to the adequacy of the material before her for the purposes of screening and for the purposes of the AA itself and the fact that the Board in the original decision which was quashed accepted that the material before it was sufficient to carry out an AA, are relevant to the extent of the reasoning which the Board was required to provide in the impugned decision. These facts form an important part of the factual context and background to the impugned decision and did, in my view, affect the extent of the obligation on the Board to provide reasons for its decision to refuse permission and for its disagreement with the conclusions and recommendations of the inspector. This is in no sense to impose any obligation of consistency on the Board or to accept the existence of any legitimate expectation on the part of the Applicant that the Board would reach the same decision when considering the application remitted to it on foot of the court's orders of 31st July, 2018 (and no legitimate expectation could or did exist). It is, however, to acknowledge the reality of the fact that the inspector had formed the views and conclusions, and made the recommendations, which she did in relation to screening and in relation to the AA itself and that her conclusions and recommendations were accepted by the Board in the original decision which was quashed. It is also a reflection of the fact that all parties accept that there was no change in the planning or environmental considerations between the date of the original decision and the date of the impugned decision and no additional information was provided to the Board when it came to consider and make the impugned decision. All of these factors combined, in my view, bear upon the extent of the Board's reasoning obligation and how the legal principles set out in *Connelly* should be applied to the very particular and unusual circumstances of this case.

(i) The First reason and Explanation: Screening

197. As noted earlier, the first reason given by the Board must be read with the first explanation given by the Board for not accepting the inspector's recommendation. Both

concern the screening out of the other relevant species of SCI associated with the relevant European sites. While it is the case that, in the screening report, the Applicant made reference (in table 1 on p. 18) to the *"infrequency"* of the use by the four SCI species of the North Bull Island SPA as part of its conclusion that there was, with respect to that European site, no possibility of significant effects on the four relevant SCI species as a consequence of the proposed development, the principal focus was undoubtedly on the season peak counts of the four relevant species by reference to the threshold of international importance (that is, 1% of the international population) and the low numbers involved and not on frequency. When referring to the other European sites in table 1, the screening report made no reference to the frequency of the use of the species of the relevant European sites and based the conclusion that there was no possibility of significant effects on those other species on the season peak count which, in each case, was below the threshold of international importance.

198. As also noted earlier, when the inspector came to consider the stage 1 screening for AA in her report (and, in particular, at s. 12.6), the inspector expressly referred to the season peak counts of the other species of SCI (and, in particular, the Curlew, the Oystercatcher and the Black-tailed Godwit) as being below the threshold of international importance. Her consideration of that issue expressly concentrated on the season peak counts of the relevant species and how they fell significantly below the threshold of international importance. The inspector made no reference to the frequency or otherwise of the use of the relevant European sites by any of those other species and did not appear to regard the question of frequency of use as a significant or even relevant factor in reaching her conclusion that the other species of SCI could be screened out.

199. However, when the Board came to make the impugned decision, the Board expressly stated in the first reason that it could not be satisfied with the screening out of the other relevant species of SCI, on the basis of the infrequency of their use of *"development lands"*

(which appears to be a reference to the St. Paul's site) and the low numbers of species involved was appropriate. The Board regarded as relevant and significant, the issue of the frequency or otherwise of the use of the other relevant species of SCI of "*development lands*". The inspector did not regard the question of the frequency of the use of those species of the St. Paul's site as relevant. While, as noted above, the Applicant did refer in the context of one of the European sites to the question of the frequency of use of the relevant species of SCI of the St. Paul's site, it did not do so with respect to the other affected European sites. It is not clear to me from the decision how the Board came to consider the question of the frequency or otherwise of the use of the other relevant species of SCI of the St. Paul's site. Nor was it clear to the Applicant whether the Board was agreeing or disagreeing with the relevance of the 1% figure in terms of the international significance of the low numbers of the species identified in the season peak counts. Nor also is it clear to me from the impugned decision or from the other material which a reasonably informed observer would consult in determining the adequacy of the reasons given by the Board for its conclusion on screening in the first reason contained in the impugned decision.

200. The first reason or explanation given by the Board for deciding not to accept the inspector's recommendation to grant permission adequately explain why the Board decided as it did does not fill this significant gap. The Board referred to the absence of survey data from the site visits at the St. Paul's site. The Board stated that it could not be satisfied in the absence of the survey data that the season peak counts recorded were *"in fact infrequent and/or in low numbers"*. This explanation is not particularly clear and the use of *"and/or"* compounds the lack of clarity. On one view, the explanation suggests that the absence of the survey data is relevant, both to the frequency or otherwise with which the other relevant species of SCI visited the St. Paul's site and to the low numbers of those birds recorded. However, my understanding from an intervention by the Board's counsel in the course of the

Applicant's counsel's reply is that, the absence of the survey data was regarded by the Board as being significant to the frequency issue only and not to the numbers of the birds counted at the site visits.

201. As noted earlier, the Board submitted in the course of the hearing that the screening report had not taken account of the infrequency of the visits of the other bird species and that there was a *"mismatch"* between the season peak counts and the frequency of the visits of the birds. However, I agree with the Applicant that that is not what the Board said in its first reason in the impugned decision or in its first reason or explanation for deciding not to accept the inspector's recommendation. Nor, in my view, could a reasonable observer, carrying out a reasonable enquiry, discern from the impugned decision or from the other materials which must be considered for the purpose of assessing the adequacy of the reasoning given that that was in fact the reason for the Board's dissatisfaction with the screening report and for its disagreement with the inspector's recommendation. I have no reason to doubt what was said on behalf of the Board that the absence of the survey data was relevant to the frequency issue and was not intended to cast doubt upon the season peak numbers provided. However, that is not what the Board said in the impugned decision. While I accept that the reason given was not *"anodyne"* and while the Board did attempt to set out the reasons for its decision and for disagreeing with the inspector's conclusions and recommendations in relation to screening, I am not satisfied that the Board did so in such a way that the Applicant, or any other reasonable observer carrying out a reasonable enquiry, would have known that the essential basis for the Board's disagreement with the inspector was that the Applicant and the inspector ought to have looked at the frequency of the visits of the other relevant species of SCI to the St. Paul's site, as opposed to any issue which the Board had in relation to the figures provided for the season peak counts or as to the acceptance or otherwise by the Board of the 1% figure

in terms of the assessment of the international significance of the numbers of birds recorded at the site visits.

202. In my view, recognising the burden upon the Board and the fact that it does not have to provide a discursive judgment as if it were one of the Superior Courts, I am nonetheless of the view that the Board could, and should, have provided more extensive reasoning in order to explain to the Applicant and to others the precise deficiencies which it had identified in the screening report provided by the Applicant and in the screening exercise carried out by the inspector. I should add that, as indicated earlier, I do not believe that the Board's obligation to provide adequate reasons for its decision is diluted by the strictness or stringency of the test which the Board must apply in screening a proposed developed for AA under Article 6(3) of the Habitats Directive and under s. 177U of the 2000 Act. If anything, that factor renders the reasoning given all the more important.

(ii) The Second reason and Explanation: AA

203. I now turn to the second reason contained in the impugned decision which must be read with the second reason or explanation given by the Board for deciding not to accept the inspector's conclusions and recommendations. Both of these are directed to the Board's conclusion, in carrying out the AA, that it could not be satisfied to the required standard that the geese would successfully relocate to other potential inland feeding sites in the wider area beyond the St. Paul's site. In the second reason, the Board referred to the *"lack of adequate qualitative analysis"* provided by the Applicant and drew a conclusion from that that there was a *"lack of certainty"* that the geese would successfully relocate.

204. However, nowhere in the impugned decision does the Board explain what it means by the *"lack of adequate qualitative analysis"*. It does not specify in what respects, and for what reasons, it concluded that the *"qualitative analysis"* provided by the Applicant (presumably in the NIS) was inadequate, such that there was a lack of certainty that the geese would

successfully relocate to other potential inland feeding sites as stated in the NIS. The alleged *"lack of adequate qualitative analysis"* which gave rise to the alleged *"lack of certainty"* appears, from the second reason given by the Board in the impugned decision, to have formed the basis for the Board's conclusion that it could not be satisfied to the requisite standard that the proposed development would not adversely affect the integrity of the relevant European sites in view of the conservation objectives of those sites.

205. In its submissions to the court, the Board closely analysed the language used in the NIS and in the inspector's report in order to demonstrate why the Board could not be satisfied to the requisite standard of the lack of adverse effects on the integrity of the European sites. The Board closely analysed the language used and pointed to various parts in the NIS in which it contended that the language used was less than definitive or certain. The Board did so in order to explain the conclusions contained in the second reason in the impugned decision.

206. As noted earlier, the Applicant pointed to language of a more certain or definitive nature in various parts of the NIS and cautioned the Court from picking out isolated language or words in the document. It pointed, for example, to the concluding comments at the end of s. 11.1 of the NIS and again in s. 13.1, as well as to the conclusions expressed by the inspector in s. 14.2 of her report.

207. Accepting for present purposes that the less than definitive language contained in the NIS, in the context of the required test for AA, formed the basis for the second reason contained in the impugned decision (and the second reason or explanation for differing from the inspector's conclusions), as was submitted by the Board, it is not clear to me why the Board did not expressly say so in the impugned decision. That would not have required a discursive judgment, but would have enabled the Applicant (and the Court) to ascertain why the Board had formed the view that it had and why it had differed from the inspector's

conclusion and would also have enabled the Applicant to assess whether there were grounds for challenging the Board's decision (such as by relying on those parts of the NIS and of the inspector's report to which the Applicant referred to at the hearing). In my view, there was no good reason why the Board could not have expressly done so when setting out the second reason in the impugned decision. I accept, of course, that a number of the bodies that made submissions to the Board referred to the language used in the NIS (such as the submissions made by Birdwatch Ireland/IBGRG, An Taisce and the Minsiter). However, the Board did not make express (or even implied) reference to these when setting out the relevant reason in the impugned decision (although there was a general reference to the submissions received). Nor did the Board refer, even in general terms, to the language used in the NIS as effectively constituting the *"lack of adequate qualitative analysis"*, if that indeed was what it was referring to. In my view, there was no reason why the Board could not have done so.

208. I do not believe that reading the second reason or explanation provided by the Board in the impugned decision for disagreeing with the inspector's conclusions adds in any significant way to what was said in the second reason itself. The Board noted the inspector's conclusions in relation to the other known and potential alternative feeding sites for the geese and went on to state that it could not be satisfied to the requisite standard that the geese displaced by the proposed development would successfully relocate to other sites or that those sites would represent suitable alternatives to the St. Paul's site. However, the Board does not explain why it was not satisfied and the conclusion does not appear necessarily to follow from what the Board noted in the first part of the explanation given. It is perhaps implicit that what the Board was relying on was the *"lack of adequate qualitative analysis"* and the consequent *"lack of certainty"* to which the Board referred in the second reason. However, the Board did not expressly state this in the explanation. If that was what the Board was referring to then the explanation falls down and is inadequate on the same basis as the

second reason itself, namely, by reason of its failure to explain how the qualitative analysis was inadequate.

209. In my view, the second reason, when read with the second explanation provided for differing with the inspector's conclusions bordered on, but did not quite venture into the territory of being *"anodyne"*, but in any event did not occupy the necessary *"middle ground"*, by providing sufficient detail to enable the Applicant (and the Court) to know why the Board had differed from the inspector and to determine whether there was a basis for forming the view that the Board's decision on that issue was not sustainable.

210. In my view, the second reason contained in the impugned decision when read with the second explanation given by the Board for not accepting the inspector's conclusions and recommendations were inadequate and failed to comply with the principles set out by the Supreme Court in *Connelly*.

211. As I explained earlier, in relation to the reason given for its decision on screening, I do not believe that the strictness and stringency of the test for AA under Article 6(3) of the Habitats Directive and s. 177V of the 2000 Act dilutes the Board's obligation to give adequate reasons for its decision to grant or refuse permission in respect of a SHD, including that part of its decision which represents the AA carried out by it. On the contrary, in my view, because of the jurisdictional consequences of a decision by the Board carrying out an AA, it is all the more important, that adequate reasons are given for the Board's decision.

(iii) The Charter

212. While the Applicant also relied in support of its case on the reasons issue on Article 41 of the Charter and on two judgments of the General Court, *Almaz-Antey* and *Asolo*, and while the Board submitted that Article 41 and the case law of the General Court did not add anything to the Irish law requirements on reasons (as they were set out and discussed by the Supreme Court in *Connelly*), it seems to me that in light of the conclusion that I have reached

in applying the Irish principles, it is unnecessary for me to dwell on the Applicant's case under Article 41 of the Charter. While I see much force to the Board's contention that Article 41 of the Charter, and the case law from the General Court referred to, do not add anything to what the Supreme Court explained in *Connelly* were the principles to be applied for determining the adequacy of reasons under Irish law, I would prefer not to express a concluded view on that point until it is necessary to do so. It is not necessary in the present case, in light of my conclusions under Irish law.

213. In conclusion, on the reason issue, in my view, the reasons given by the Board in the original decision were inadequate and the Applicant is entitled to succeed on that issue.

The Further Information Issue

The Applicant's Case on the Further Information Issue

214. The Applicant contended that the Board had the power to request further information in relation to the remitted application, and that it ought to have considered exercising that power to request further information from the Applicant and failed lawfully to do so, in circumstances where the Board did not specifically consider the particular statutory provisions which conferred that power and that, having considered whether to exercise the power, the Board ought to have proceeded to request the further information from the Applicant. The Applicant based those submissions on the fact that, in respect of the first reason and first explanation given by the Board for not accepting the inspector's recommendation to grant permission due to its dissatisfaction with the material provided to enable the Board to carry out its stage 1 screening obligation by reason of the absence of survey data from the site visits which the Board appeared to assume the Applicant had and which it could have requested from the Applicant. As regards the second reason and second ground on which the Board differed from the inspector's conclusion, in relation to the stage 2 AA itself, the Board referred in the impugned decision to the *"lack of adequate qualitative*

analysis" in relation to the successful relocation of the geese to other potential inland feeding sites in the wider area. The Applicant contended that the Board could, and should, have sought further or additional information in relation to both of these areas before it reached the decision to refuse permission on foot of the remitted application.

215. The Applicant's pleaded claims in relation to the further information issue were set out at paras. 25 to 33 of the statement of grounds. The case made in the statement of grounds was that the Board was not only required to consider whether to exercise the powers which the Applicant contended the Board had to request further information in respect of the remitted application, but that, in the particular circumstances of the application, where the Board was going to reach a diametrically opposite decision to that made in the original decision, it had a duty to exercise its powers to request the further information. The Applicant's written submissions did not go quite as far as contending that the Board had an obligation to exercise its powers to request further information. Rather, despite making references to the paragraphs in the statement of grounds which made that case (at paras. 14(b) and (C), the case made in the written submissions was that the Board had an obligation to consider whether to exercise the powers and failed lawfully to do so, as a consequence of which the Applicant's application should be remitted to the Board for a second time so as to allow the Board to consider the issue again in accordance with law (para. 40 of the Applicant's written submissions). The Applicant in its written submissions advanced the argument that, if the Board did consider exercising a power to seek further information, its purported decision not to do so was arrived at after the Board took into account irrelevant considerations and erred as to the nature and scope of its statutory powers (para. 38 of the Applicant's written submissions). In its oral submissions at the hearing, the principal focus of the Applicant's submissions on this issue was directed to the Board's failure to consider whether to exercise its statutory powers to request further information properly, or at all, and

to the Board's erroneous reliance on practical reasons for its decision not to request further information from the Applicant, by reason of the date by which the Board was required to make its decision on the remitted application and the alleged lack of power on the part of the Board to request further information and to circulate that information to others in respect of an application for permission in respect of a SHD. However, the Applicant did not expressly abandon its claim that the Board ought to have actually exercised its statutory powers to request further information from the applicant.

216. The Applicant contended that the Board did have the power to request further or additional information in respect of the application, both in terms of the screening obligation required to be carried out by the Board and in terms of the AA itself. The Applicant maintained that those powers were contained in s. 177U(3) of the 2000 Act, in respect of the Board's screening determination, and under s. 177V, in respect of the Board's AA determination. The Applicant accepted that there was no express power under the 2016 Act for the Board to seek further information in respect of an application under s. 4 of that Act. However, the Applicant submitted that the powers under ss. 177U(3) and 177V(2) can be applied by the Board to seek further information in respect of an application for permission for a SHD under s. 4 of the 2016 Act. The Applicant noted that the Board had admitted in its statement of opposition that ss. 177U and 177V of the 2000 Act were capable of being applied to applications for permission for SHD and that the Board *"could in theory exercise its discretionary powers thereunder to request information from the Applicant for permission"* (para. 24 of the Board's statement of opposition). However, the Board had also pleaded that it had no statutory power to circulate any information which might be provided on foot of a request for further information in respect of an application for permission for a SHD to other parties and that, for that reason, and having regard to the strict time period for the making of decisions under the 2016 Act, the extent to which its discretionary powers to

seek further information in respect of such applications could be invoked in practice in the case of an application for a SHD was limited. The Applicant contended that the Board was incorrect in its view that it had no statutory power in the context of an application for permission for a SHD to circulate any further information received to other parties. The Applicant's case was that such power did exist under s. 131 of the 2000 Act (as applied by s. 17 of the 2016 Act). Further, the Applicant did not accept that the fact that the Board was required to make its decision by 11th September, 2018, having regard to s. 9(9) of the 2016 Act, provided a lawful reason for the Board not to request further information from the Applicant in the particular circumstances of this case, where the Board had previously decided to grant permission in respect of the development on foot of the inspector's recommendations.

217. The Applicant noted the correspondence exchanged between its solicitors and the Board's solicitors prior to the hearing and highlighted some of the statements contained in that correspondence on behalf of the Board. In particular, the Applicant noted that the Board's solicitors stated that while the Applicant did *"generally consider"* whether to seek further information and did so in the context of legal advice received, the advice did not specifically refer to the powers under s. 177U or s. 177V; the key issue for the Board in deciding not to request further information was the *"practical and legal difficulty in making such a request because of the limited time available and the absence of a statutory process for further public consultation"*; and that, as the Board was of the view that it was not *"practical or realistic to request further information, it was not necessary for it to formally consider or come to a definitive view on the possible statutory bases upon which it might make such a request."* (See the Philip Lee letters of 21st January, 2019 and 11th February, 2019.

218. The first basis on which the Applicant sought to challenge the Board's decision not to request further information was the failure by the Board specifically to consider the provisions of ss. 177U and 177V before deciding whether or not, for practical reasons or otherwise, the power should be exercised. The Applicant relied, therefore, on the alleged failure by the Board to address its mind to the particular sections under which it was empowered to request further information from the Applicant in respect of the remitted application. The Applicant contended that the Board ought to have looked at the particular provisions of those sections, considered the sections in the context of the 2016 Act and applied them to the very specific facts of this case. However, the Board failed to do that.

219. The Applicant further contended that insofar as the Board did consider exercising a power to seek further or additional information and decided not to do so on the basis of (a) the deadline of 11th September, 2020 for making a decision on the remitted application (under s. 9(9) of the 2016 Act) and (b) a view a that it did not have the statutory power to circulate any further or additional information obtained from the Applicant, in respect of the remitted application for permission under the 2016 Act, to interested parties and to the public, the Board took into account irrelevant considerations and misconstrued the extent of the statutory powers it had under the 2016 Act. The Applicant further relied on the acceptance by the Board (at para. 73 of its written submissions) that the fact that the Board did not exercise a power to request further information from the Applicant in the present case, did not mean that the Board was not open to requesting further information in *"an appropriate, exceptional case"* and contended that this was such a case.

220. In terms of the discretionary nature of the power of the Board to request further information (under s. 177U and s. 177V of the 2000 Act), the Applicant sought to distinguish the present case from *Kildare County Council v. An Bord Pleanála* [2006] IEHC 173 ("*Kildare*"), where the High Court (McMenamin J.) had rejected a claim that the Board was

obliged to request further information under s. 51(4) of the Roads Act, 1993. The Applicant sought to distinguish that case on various grounds including that, in the present case, the Board did not address its mind to the specific statutory provisions which conferred the power upon it to seek further information; that in deciding not to seek further information, the Board did so on a legally erroneous basis; and that the Applicant in *Kildare* was aware in advance of the oral hearing in that case of all of the issues which would be considered at the oral hearing, unlike the present case in which, it was contended, the Applicant was not so aware. The Applicant submitted that, by reason of the very exceptional circumstances of this case, the Board ought to have specifically considered exercising its powers under ss. 177U and 177V and ought to have exercised those powers.

221. In addressing the first of the practical constraints relied upon by the Board, namely, the statutory deadline for the Board to make a decision on the remitted application under s. 9(9) of the 2016 Act, the Applicant noted that the Board had not actually considered the remitted application until 10th September, 2018 (having deferred consideration of the application at meetings on 6th and 7th September, 2018), where the time period provided for in s. 9(9) was to expire on 11th September, 2018, having regard to the terms of the order made on 31st July, 2018. The Applicant relied on the fact that, notwithstanding the expiry of the 16 week period (24 weeks where an oral hearing is held, having regard to Article 303 of the 2017 Regulations, which was not the case here), the Board was nonetheless required to proceed to make its decision, notwithstanding the expiry of that time period (under s. 9(13)(a)), although it would have had to pay a financially penalty to the Applicant under section 9(13)(b). Which the Applicant suggested in its oral submissions to the Court that it might be open to the Board to request the Applicant to waive any financial penalty that might otherwise arise, that point was not pursued with any great enthusiasm. In my view, any attempt by the Board to secure a waiver by the Applicant would have given rise to serious

perception issues and potentially issues of objective bias in terms of the decision which the Board ultimately had to make on the remitted application. The essential point made by the Applicant was that, notwithstanding the expiry of the time period, the Board was nonetheless required to make its decision following the expiry of the time period (albeit subject to the financial penalty obligation) and that the Board's reliance on the statutory deadline as one of the reasons why it did not seek further information from the Applicant was unlawful and based on irrelevant considerations.

222. As regards the second of the two practical restraints relied on by the Board, namely, the alleged absence of a statutory power for the Board to circulate any further information obtained from the Applicant to interested parties and to the public, the Applicant contended that the Board was wrong in its view of the statutory powers possessed by it. The Applicant argued that the Board did have the power to circulate any further information received from the Applicant to others under s. 131 of the 2000 Act, having regard to the amendments made to s. 125 of the 2000 Act by s. 17 of the 2016 Act. The Applicant contended that by virtue of the amendments made to s. 125 of the 2000 Act by s. 17 of the 2016 Act, the scope of s. 131 of the 2000 Act was extended so as to provide that the power contained in that latter provision (to seek submissions or observations from persons) applied in the case of an application for permission for a SHD under s. 4 of the 2016 Act. The Applicant, therefore, contended that it was open to the Board, in the event that it sought and obtained further information from the Applicant in relation to the remitted application, to circulate that further information to other parties under s. 131 of the 2000 Act and that the Board's view to the contrary was wrong.

223. Finally, the Applicant contended that the Board had power under Regulation 302(6)(b) of the 2017 Regulations to request any person, authority or body to make a submission or observation or to elaborate upon a submission or observation made in relation

to an application under the 2016 Act. It argued that it would be open to the court to give an expansive interpretation to that provision such that, if the Board felt it was necessary in order to comply with fair procedures it could circulate any further information obtained from the Applicant to others in accordance with that provision. While the Applicant argued that such an interpretation was open on the basis of the double construction rule and referred in that regard to *East Donegal Cooperative Society Limited v. Attorney General* [1970] IR 317 ("*East Donegal Cooperative Society*"), *Dellway Investments v. NAMA* [2011] 4 IR 1 ("*Dellway*") and *North Wall Property Holding Co Limited v. Dublin Docklands Development Authority* [2008] IEHC 305 ("*North Wall*"), it is fair to say that the Applicant did not pursue this argument in reliance on Regulation 302 (6)(b)with any great vigour.

224. For these reasons, the Applicant contended that the Board erred in failing properly to consider whether to exercise its powers under ss. 177U(3) and 177V(2) and in failing to exercise those powers to request further information from the Applicant. As a consequence, the Applicant submitted that the impugned decision should be quashed and that the remitted application should be remitted again to the Board, so as to allow the Board to consider the issue in accordance with law.

The Board's Case on the Further Information Issue

225. In response, the Board accepted that while the powers to request further or additional information, contained in ss. 177U and 177V of the 2000 Act, were capable of being exercised in the case for an application for permission for a SHD under the 2016 Act, the Board had a discretion as to whether to exercise those powers and had no legal obligation to do so where it was of the view that it was not appropriate to do so. The Board stressed the discretionary nature of the powers contained in those two provisions. The Board relied on the judgment of MacMenamin J. in the High Court in *Kildare* and disagreed with the Applicant's attempts to distinguish *Kildare* from the present case. The Board contended that just as the

Applicant in *Kildare* was aware of the issues which would arise for consideration at the oral hearing, so too was the Applicant here aware of the issues which would arise in the context of the Board's consideration of the its remitted application for permission for the SHD on the St. Paul's site. In that regard, the Board relied on the statutory scheme provided for in the 2016 Act, which it contended provided for a streamlined and expedited procedure in which all matters were intended to be dealt with at an early stage of the procedure or to be *"frontloaded"*. It argued, therefore, that there was no real distinction between the facts in *Kildare* and the present case and that the Court's conclusions as to the discretionary nature of the power to request further information under s. 51 of the Roads Act could be applied by analogy to the exercise by the Board of its discretion not to seek further or additional information from the Applicant in respect of its remitted application.

226. The Board further relied on the judgment of the High Court (Irvine J.) in *Cicol v. An Bord Pleanála* [2008] IEHC 146 ("*Cicol*") to emphasise the discretionary nature of the powers contained in ss. 177U and 177V of the 2000 Act. The statutory provision at issue in *Cicol* was s. 37(2)(a) of the 2000 Act which provided that the Board *"may"*, in determining an appeal, decide to grant permission, even if the proposed development amounted to a material contravention of the relevant development plan. The Board noted that Irvine J. held that the use of the word *"may"* was not consistent with there being an obligation on the Board to proceed to consider whether to grant permission for the development where it considered that it materially contravened the relevant development plan. The Board also noted that Irvine J. held that the Applicant's submission in that case was at odds with the *"tenor"* of the 2000 Act, where the Oireachtas had sought to circumscribe in many ways the development of lands where such development would be in contravention of the relevant development plan. The Board argued that *Kildare* and *Cicol* supported its contention that it was not obliged to exercise the discretionary power contained in ss. 177U and 177V to

request further or additional information from the Applicant (and noted that in *Cicol*, the Court found there was no obligation on the Board even to consider whether to exercise the statutory power). The Board also argued that *Cicol* supported its argument that it was necessary to assess the exercise of a discretionary power in the context of the relevant legislation as a whole and that that had a particular relevance in the context of a request for further information in respect of an application under the 2016 Act, which would lead to significant delay and would, it argued, be inconsistent with the entire scheme of the 2016 Act.

227. The Board maintained that it did consider whether to request further information from the Applicant in respect of the remitted application and that it obtained legal advice on that issue, but accepted that it did not expressly consider, and the advice did not expressly refer to, the particular powers under ss. 177U and 177V of the 2000 Act. However, the Board argued that, once it had considered whether to exercise the power to seek further information, it was not necessary that it should have done so by reference to the specific terms of those sections and that there was nothing in those sections which had a material bearing on whether the power should be exercised in the particular circumstances of this case. It noted that there was nothing in those sections dealing with the provision of any further information which might be obtained from the Applicant to others or with the requesting of comments and observations from others on that further information. The Board argued, therefore, that it did not matter that it had not considered the terms of the two sections at issue and that the reasons which led to it deciding not to seek further information remained valid. Those reasons were, as noted earlier, (a) the statutory deadline for the Board to make a decision on the remitted application under s. 9(9) of the 2016 Act and (b) the Board's view that it did not have the power to circulate any further information obtained from the Applicant to other parties or to the public in the case of an application for permission for a SHD under the 2016 Act.

228. The Board submitted that in considering the basis on which the Board concluded not to seek further information, it was necessary to examine the context of the 2016 Act and the streamlined and expedited procedure provided for under that legislation, as well as the particular obligations on the Board as the relevant competent authority for the purposes of Article 6(3) of the Habitats Directive and ss. 177U and 177V of the 2000 Act. In that context, the Board placed some reliance on a document referred to in the long title to the 2016 Act entitled *"Rebuilding Ireland –Action Plan for Housing and Homelessness"* (the "Action Plan") which stated that *"requests for further information or the holding of oral hearings will only be considered in exceptional circumstances"*, in the case of applications for permission under the 2016 Act. The Board relied on the Action Plan and the scheme, context and provisions of the 2016 Act to highlight the requirement on an applicant to frontload the preparation of its application for permission for a SHD under that Act. It noted that there was no power under the 2016 Act to seek further information from an applicant (and that was accepted by the Applicant) and that the possibility of oral hearings was severely restricted in respect of such applications (s. 134 of the 2000 Act as amended by s. 18 of the 2016 Act).

229. With respect to the Board's reliance on the statutory time limit for deciding the remitted application, the Board referred to the provisions of ss. 9(9) and 9(13) of the 2000 Act. It pointed to the fact that under s. 9(9), the Board was required to make its decision (*"shall make its decision"*) on an application under s. 4 of the 2016 Act within the time period referred to in the section (normally 16 weeks unless there is an oral hearing) and that, in accordance with the order of 31st July, 2018, the time limit for the Board to make its decision on the remitted application expired on 11th September, 2018. The Board contended that while s. 9(13) imposed an obligation on the Board to proceed to make its decision, even if the statutory time limit had expired, nonetheless the obligation contained in s. 9(9) was a mandatory obligation on the Board. It argued that compliance with a statutorily mandated

time limit was not an irrelevant consideration for the Board to take into account. Further, it argued that it was also a relevant factor for the Board to consider that, if the decision was not made on or before 11th September, 2018, the Board would be liable to pay a financial penalty to the Applicant. It further argued that as a matter of principle, the Board could not seek to reach agreement with the Applicant to waive the payment of the financial penalty provided for in s. 9(13) for two reasons. First, the obligation is stated to be a mandatory one in s. 9(13)(b) (the Board *"shall pay"* the appropriate sum to the Applicant for the permission). Second, an agreement by an applicant to waive payment by the Board of the financial penalty could potentially give rise to a perception of bias on the part of the Board.

230. The Board contended that, although it had been in error when the original decision was made and although that was no fault of the Applicant or of the notice parties, nonetheless the Board had to continue to apply the statutory provisions in considering the remitted application in an even-handed way and that the statutory time limit was a real and practical constraint on the exercise of a power to request further information from the Applicant.

231. As regards the Board's reliance, as one of the practical reasons why it decided not to seek further information from the Applicant, on the absence of a power to circulate any further information which might have been obtained from the Applicant on foot of such request, the Board made a number of points. It argued that it would have been subject to an obligation under the Habitats Directive and under Article 6(1)(b) of the Aarhus Convention to ensure public participation in the AA carried out by the Board. It relied in that regard on the judgment of the CJEU in *Case C-243/15, Lesoochranarske Zoskupenie VLK ("Brown Bears II")* [ECLI: EU: C: 2016: 838] (judgment delivered on 8th November, 2016). This point was made primarily in the context of the shortage of time available to involve the public in terms of any further information which might have been obtained from the Applicant if a request for such were made. The main point advanced by the Board in respect of this issue was that

the Board did not have the statutory power to circulate further information to interested parties or to the public where the application was for permission for a SHD under s. 4 of the 2016 Act. The Board contended that there was no power under s. 131 of the 2000 Act to circulate such further information and that the amendment to s. 125 of the 2000 Act made by s. 17 of the 2016 Act did not confer such a power on the Board in the case of an application made under s. 4 of the 2016 Act. In support of its position, the Board carefully analysed the relevant provisions of Part VI, Chapter III of the 2000 Act and of the 2016 Act. It disputed the Applicant's case that the effect of the amendment made by s. 17 of the 2016 Act to s. 125 of the 2000 Act was to extend the scope of s. 131 of the 2000 Act to include applications for permission under s. 4 of the 2016 Act, such that the Board would have permission to circulate and request submissions or observations on any further information which might be received by it from an applicant for such permission. The Board disputed the Applicant's characterisation of its interpretation of these provisions as a *"reading down"* of the provisions of s. 17 of the 2016 Act and argued that its interpretation was correct.

232. The Board submitted, therefore, that there was no statutory basis for inviting further submissions from other parties or from the public in respect of further information provided and that it was not open to the Board to supplement the statutory procedures in reliance upon *Dellway* and *North Wall*. The Board further submitted that Regulation 302(6)(b) of the 2017 Regulations, where there was no power to circulate any submissions, observations or elaborations received on foot of any request made under that provision, had to be construed as permitting only requests for minor and nonmaterial clarifications.

233. In summary, therefore, the Board contended that it had a statutory discretion as to whether to exercise the power to request further information from the Applicant under ss. 177U and 177V of the 2000 Act; that it did not have to expressly consider the provisions of those sections before deciding not to seek further information; that when it decided not to

exercise the power to seek further information because of practical constraints, it was a reasonable and lawful decision for the Board to have made; that the statutory time limit was a real practical constraint and a mandatory obligation on the Board; that the Board did not have the statutory power to circulate any further information which may have been requested from the Applicant to other parties; and that, even if it did have that power, it would not have been practical for it to have done so, having regard to the statutory time limit for making a decision on the remitted application.

Clonres's Case on the Further Information Issue

234. Clonres, in its written submissions and in oral submissions made by its counsel at the hearing, strongly supported the position adopted by the Board on this issue. It stressed the discretionary nature of the Board's powers to request further information under ss. 177U(3) and 177V(2) of the 2000 Act and argued that neither section provided any support for the proposition that the Board was obliged to consider using the powers provided for in those sections or to use those powers, although it noted that the Board had clarified that it had considered seeking further information in this case, but had decided not to do so.

235. Clonres further agreed with the Board's submissions that in deciding not to exercise its discretion to seek further information, the Board was entitled to form the view that it did not have the power to circulate further information requested by the Board from the Applicant to other parties under the 2016 Act or under Part VI, Chapter III of the 2000 Act (as amended by the 2016 Act).

236. Clonres further noted that the Board was a creature of statute and was not permitted to supplement its statutory powers as suggested by the Applicant. In that regard, Clonres relied on *White v. Dublin City Council* [2004] 1 IR 574 ("*White*") and *McMahon v. An Bord Pleanála* [2010] IEHC 432 ("*McMahon*"). It too relied on the judgment of MacMenamin J. in *Kildare* in support of the discretionary nature of the power to seek further information and the

entitlement of the Board not to request further information from the Applicant on the facts of this case.

Discussion and Conclusions on the Further Information Issue

237. I have concluded that the Applicant is not entitled to succeed on the further information issue for the reasons set out below.

(a) Powers under ss. 177U and 177V of 2000 Act

238. It is common case between the parties that the Board did have the power to request further or additional information from the Applicant under s. 177U(3), in respect of the stage 1 screening for AA carried out by the Board, and under s. 177V(2), in respect of the stage 2 AA carried out by it, in considering the Applicant's remitted application for permission in respect of the SHD on the St. Paul's site.

239. Although ss. 177U(3) and 177V(2) are framed slightly differently, each can be read as conferring a discretionary power on the Board to request further, supplemental or additional information. Section 177U(3) provides that, in carrying out its screening obligation, the Board *"may request such information from the applicant as it may consider necessary to enable it to carry out that screening…"*. Section 177V(2) provides that, in carrying out an AA in respect of a proposed development, the Board is required to take into account, amongst other things, *"any supplemental information"* furnished in respect of a Natura Impact Report or NIS and *"if appropriate, any additional information sought… and furnished by the applicant in relation to a Natura Impact Statement"* (s. 177V(2)(b) and (c)). While framed somewhat differently to s. 177U(3), I agree that s. 177V(2) does also confer a discretionary power on the Board to request supplemental information or additional information from an applicant in relation to an NIS. These are discretionary and not mandatory powers. It is accepted by the Board, and I agree, that those powers can be exercised by the Board in respect of an application for permission for a SHD under s. 4 of the 2016 Act. That is so,

notwithstanding that it is again common case that the 2016 Act does not itself confer a statutory power on the Board to request further information from an application for permission for a SHD under s.4 of that Act.

240. Notwithstanding the somewhat unsatisfactory nature of the evidence before the court and the Board's pleadings on the issue which, in my view, did not comply with the provisions of O. 84, r. 22(5) RSC as the points made in correspondence were not pleaded or put on affidavit, about which no issue was taken by the Applicant or by Clonres, it is clear from the exchange of correspondence between the parties prior to the hearing and, in particular, from the Board's solicitors' letters of 21st January, 2019 and 11th February, 2019 that the Board did consider whether to seek further information from the Applicant in respect of the remitted application and obtained legal advice on that issue. However, the Board did not specifically consider ss. 177U or 177V in that context. Nor did the legal advice obtained by the Board.

241. While the Applicant argued that the failure specifically to consider those two provisions in itself entitled it to succeed on this issue, I do not agree. I accept that if either section contained provisions which referred to, or concerned itself with, either of the issues relied upon by the Board in deciding not to seek further information from the Applicant, then the Applicant might well be entitled to succeed on this issue. However, there is nothing in ss. 177U(3) or 177V(2) which has a bearing on either of the factors or constraints considered by the Board in deciding not to seek further information from the Applicant. I conclude, therefore, that the Board was correct in its contention that the fact that it did not specifically consider either or both of these statutory provisions did not invalidate its decision not to seek further information from the Applicant or render that decision legally infirm. That is not to say, however, that in other cases, perhaps in most other cases, a failure by a statutory body to consider a particular statutory provision and its terms before deciding not to exercise a power contained in that provision would not cast doubt on the validity of the decision. I am deciding

that in this case, it does not as neither provision refers to or deals with either of the factors considered by the Board in deciding not to seek further information from the Applicant.

242. I am satisfied on the evidence that the Board did consider whether to seek further information from the Applicant and decided not to do so, albeit that that decision was not taken by reference to the terms of ss. 177U(3) and 177V(2) of the 2000 Act. That was not, however, fatal to the validity of the Board's decision in this case.

(b) Reasons for not Exercising the Powers

243. I now turn to the two considerations which led to the Board deciding not to seek further information from the Applicant in respect of the remitted application. The first was the statutory time period within which the Board was required to make its decision on the remitted application by reason of a combination of s. 9(9) of the 2016 Act and the terms of the order made on 31st July, 2018. By virtue of that order, the time period provided for in s. 9(9) was to expire on 11th September, 2018. While the Applicant's remitted application did not come before the Board until 6th September, 2018 when it was deferred to the following day on which it was again deferred to 10th September, 2018, the Board has explained that in light of an observation I made at para. 51 of the remittal judgment, the Board decided that the remitted application should be determined by different Board members to those who made the original decision. Therefore, a differently constituted Board determined the remitted application. It ultimately made a decision on the remitted application on 10th September, 2018.

(i) The First Reason: Statutory Time Period

244. According to the Board's solicitors' letters of 21st January, 2019 and 11th February, 2019, one element of the *"key issue"* for the Board in deciding not to request further information from the Applicant was the limited time available to the Board to make a decision on the remitted application. I do not accept the Applicant's contention that this was

not a relevant consideration for the Board. I do not believe that the Board can be criticised for treating as relevant the fact that s. 9(9) of the 2016 Act, in combination with the order of 31st July, 2018, imposed a mandatory obligation on the Board to make a decision on the remitted application by 11th September, 2018. Section 9(9) provides that the Board *"shall make its decision"* in respect of an application under s. 4 of the 2016 Act by the relevant date, in this case, 11th September, 2018. The fact that s. 9(13)(a) entitles the Board to make a decision on an application for permission for a SHD under the 2016 Act, notwithstanding that the time period provided for in s. 9(9) has expired, does not, in my view, detract from the mandatory nature of the obligation contained in the latter section. Nor, in my view, does it render the Board's consideration as relevant to a decision not to seek further information, the fact that the mandatory time period was going to expire in a matter of days from the Board's first consideration of the remitted application. That was, in my view, a relevant factor for the Board to consider.

245. While the Applicant did raise the possibility of the Board agreeing with an applicant for permission under the 2016 Act where the time period under s. 9(9) has expired, for such applicant to waive its entitlement to the financial penalties provided for in s. 9(13)(b), I believe considerable difficulties might well be caused by any such waiver by an applicant. It would immediately create the real, or the potential, risk of a claim of objective bias being made against the Board. In light of the extensive history of litigation in relation to the Applicant's proposed development on the St. Paul's site, it is far from a remote possibility that such a case would be made against the Board by one or more disappointed parties. While I express no concluded view as to whether such a claim of objective bias would necessarily succeed, there would, in my view, be a real risk of such a claim being made successfully. Further, s. 9(13)(b) imposes a mandatory obligation on the Board to pay the financial penalty to the Applicant for permission in the circumstances provided for in that section. Section

9(13)(b) states that the Board *"shall pay the appropriate sum to the Applicant"*. Any agreement by the Board to secure a waiver of that mandatory obligation would, at the very least, potentially give rise to legal difficulties for the Board and for any decision it might make following such an agreement.

246. In those circumstances, I do not believe that the Applicant's criticisms of the Board for taking into account the statutory time period for deciding the remitted application is well founded.

(ii) The Second Reason: No Statutory Power to Circulate Further Information

247. As regards the second factor considered by the Board in deciding not to seek further information from the Applicant, namely, the Board's view that it did not have the power to circulate any further information obtained to interested parties or to the public for their submissions or observations on that information, I have, with some difficulty it has to be said, concluded that the Board was probably correct in its view. However, as I will explain, the issue of statutory interpretation necessary to resolve this question is not an easy one and the manner by which the Oireachtas sought to amend provisions in Part VI, Chapter III of the 2000 Act by the 2016 Act is far from a model of clarity. On the contrary, it is extremely confusing and gives rise to real difficulties in interpreting the extent of the amendments sought to be made to the scope of Chapter III of the 2000 Act by the 2016 Act.

248. I propose first, to set out the relevant statutory provisions and then to set them in their proper context before explaining why, on balance, I have concluded that the Board was correct in its view that it did not have the power to circulate any further information which might have been obtained from the Applicant to other parties or to the public under s. 131 of the 2000 Act (as amended) or otherwise.

249. Section 131 of the 2000 Act provides as follows:-

"Where the Board is of opinion that, in the particular circumstances of an appeal or referral, it is appropriate in the interests of justice to request—

(a) any party to the appeal or referral,

(b) any person who has made submissions or observations to the Board in relation to the appeal or referral, or

(c) any other person or body,

to make submissions or observations in relation to any matter which has arisen in relation to the appeal or referral, the Board may, in its discretion, notwithstanding [sections referred to], *serve on any such person a notice under this section—*

(i) requesting that person, within a period specified in the notice (not being less than 2 weeks or more than 4 weeks beginning on the date of service of the notice) to submit to the Board submissions or observations in relation to the matter in question, and

(ii) stating that, if submissions or observations are not received before the expiration of the period specified in the notice, the Board will, after the expiration of that period and without further notice to the person, pursuant to section 133, determine the appeal or referral."

250. It can be seen, therefore, that s. 131 expressly applies to a situation where the Board is dealing with an *"appeal"* or a *"referral"* and confers the power on the Board to request submissions or observations in the circumstances referred to in the section in the course of either of those two procedures.

251. Section 2(1) of the 2000 Act explains that *"appeal"* means an appeal to the Board. The same section explains that a *"referral"* means a referral to the Board under certain provisions of the 2000 Act, including section 5.

252. Section 131 is contained in Part VI, Chapter III of the 2000 Act which is headed *"Appeal Procedures, etc."*. Section 125 provides (without taking into account the changes effected by the 2016 Act) that Chapter III applies:-

> *"(a) to appeals and referrals to the Board,*
>
> *(b) to the extent provided, to applications made to the Board under section 37E or section 37L and any other matter with which the Board may be concerned, but shall not apply to appeals under section 182(4)(b)."*

253. Section 37E concerns applications to the Board for permission for a strategic infrastructure development. Section 37L concerns applications by owners or operators of certain quarries to apply for permission to further develop those quarries under that section. Neither section is relevant for present purposes.

254. Section 17 of the 2016 Act provides that s. 125 of the 2000 Act *"has effect during the specified period as if"* certain provisions were substituted for para. (b) of section 125. The *"specified period"* is defined in s. 3 of the 2016 Act as meaning:-

> *"(a) the period from the commencement of this provision until 31 December 2019, and*
>
> *(b) any additional period as may be provided for by the Minister by order under section 4 (2);"*

255. The following was substituted for para. (b) of s. 125 of the 2000 Act for the *"specified period"*:-

> *"(b) (i) to the extent provided, to applications made to the Board under section 37E or section 37L,*
>
> *(ii) except where otherwise provided for by the* [2016 Act], *to applications made to the Board under section 4 of that Act, and*

(iii) to any other matter with which the Board may be concerned,"

(emphasis added)

256. Put simply, the Applicant submitted that the effect of s. 17 of the 2016 Act is that Chapter III of the 2000 Act applies, during the *"specified period"*, to applications made to the Board under s. 4 of the 2016 Act, *"except where otherwise provided for"* by the 2016 Act. The Applicant, therefore, contended that since s. 131 of the 2000 Act is contained in Chapter III, the power of the Board to request submissions or observations under that section has been extended to apply where the Board is considering an application for permission for a SHD under s. 4 of the 2016 Act, as there is nothing in the 2016 Act which provides otherwise. The Board strongly disagreed with that submission. It contended that the changes sought to be made to Chapter III of the 2000 Act by the 2016 Act, including those provided for in s. 17, had to be considered not only by reference to the express terms of the relevant provisions in the 2016 Act and in Chapter III of the 2000 Act, but also by reference to the context and objectives of the 2016 Act itself.

257. There is no doubt that the 2016 Act was intended to introduce a streamlined procedure for dealing with applications for permission for SHDs. That is clear from the long title to the 2016 Act which refers to the Action Plan and from the structure and provisions of the legislation. There is also no doubt that the 2016 Act frontloads the preparation which must be done by an applicant for permission for a SHD who is required to embark on consultations with the relevant planning authority or authorities and with the Board prior to making an application for permission under s. 4 of the 2016 Act. Section 6 provides for the provision by the Board of an opinion on the basis of the documents provided by the applicant for permission for the SHD as to whether the documents constitute a reasonable basis for an application for such permission or require further consideration and amendment. It is open to an applicant for permission to make a request to the Board under s. 7 for a further opinion on

what information will be required to be contained in the NIS (or EIA). Under s. 8(3)(a), the Board may decide to refuse to deal with an application for permission for a SHD where it considers that the NIS is inadequate or complete, although, under s 9(5), if it does not exercise its function under that latter provision to refuse to deal with an application, it is not prevented from refusing to grant permission for a proposed SHD by reference to the inadequacy or incompleteness of the NIS. Further, the Board is required to make its decision on an application for permission for a SHD within 16 weeks, if there is no oral hearing, and within 24 weeks, if there is an oral hearing, and the circumstances in which an oral hearing are held are circumscribed by s. 134 of the 2000 Act (as amended by s. 18 of the 2016 Act). As noted earlier, s. 9(9) does impose a mandatory obligation on the Board to make its decision within whichever of those periods applies although, having regard to s. 9(13), the Board must make its decision even if the relevant time period has expired and will be subject to financial penalties in those circumstances.

258. I accept, on the basis of these provisions and the overall context of the 2016 Act, that it is intended to be a fast track, streamlined process in which much of the work is frontloaded and in which it is expected that an applicant will ensure that its documentation is as complete as possible at an early stage in the process. That is also supported by the Action Plan. Appendix 3 of the Action Plan refers to the *"fast-track planning approval procedure for largescale residential developments through direct applications to An Bord Pleanála"*, namely, the procedure provided for under the 2016 Act. It then states:-

> *"To maximise the efficiency of the process and quality of preparations for applications made by housing providers, requests for further information or the holding of oral meetings will only be considered in exceptional circumstances."*

259. While I must bear in mind the overall context and objective of the 2016 Act in deciding the net point of statutory interpretation which arises in respect of s. 17 of the 2016

Act insofar as it affects s. 125 of the 2000 Act, and while the Action Plan, and the summary provided in Appendix 3, is useful in terms of assessing the overall purpose of the 2016 Act, I cannot interpret the statutory provisions at issue by reference to the Plan as that would, in my view, be contrary to what the Supreme Court held in *Crilly v. T&J Farrington Limited* [2001] 3 IR 251 ("*Crilly*"). Further, while the 2016 Act does provide a fast-track, streamlined process, that does not mean that further information may not be sought by the Board if it considers it necessary to obtain such information in order properly to carry out its functions under the Act. The time for doing so is necessarily very limited and was particularly limited in the present case.

260. While there is nothing at all clear about s. 17 of the 2016 Act and the manner in which it seeks to applications under s. 4 of the 2016 Act under s. 125 of the 2000 Act during the *"specified period"*, on balance, I prefer the submissions made by the Board in respect of the proper interpretation and application of those provisions for a number of reasons.

261. I agree with the Board that Part VI, Chapter III of the 2000 Act, prior to any change made by the 2016 Act, applied to a range of different procedures, such as appeals and referrals to the Board, and applications under ss. 37E and 37L to the extent provided, in various differing respects. Some of the provisions in Chapter III apply to both appeals and referrals. They include sections 126, 127, 128, 129, 130, 131, 132, 133, 137, 138 and 145. Some of the provisions in Chapter III apply only to appeals and others apply only to referrals. For example, s. 136 applies only to referrals. Section 139 applies only to appeals. Section 142(1) deals separately with appeals and referrals. Some of the provisions in Chapter III apply to applications (including applications under s. 37E), as well as to appeals and referrals. They include sections 134, 135, 140 and 144. Other provisions in Chapter III apply to all types of procedure without differentiating between the particular procedures covered. Those provisions include sections 134A, 141(1) and (2), 143 and 146.

262. Bearing in mind that the different procedures which fall within Chapter III are dealt with in various different ways in that chapter, and bearing in mind that s. 131 of the 2000 Act refers only to appeals and referrals and not to any of the other procedures falling under Chapter III, can it be said that s. 17 of the 2016 Act, which seeks to amend s. 125 of the 2000 Act during the *"specified period"*, has the effect of including applications under s. 4 of the 2016 Act within the scope of s. 131 of the 2000 Act? On balance, I do not believe that it can. Although a literal meaning of the amended version of s. 125(b)(ii) which s. 17 of the 2016 Act seeks to introduce into the 2000 Act might suggest that Chapter III applies to applications under s. 4 of the 2016 Act and that such applications fall within the scope of all of the sections contained in that Chapter, I do not believe that s. 17 of the 2016 and s. 125 of the 2000 Act can be read that way in isolation. Regard must be had to the other provisions in Chapter III. The general words of s. 17 of the 2016 Act must, in my view, be read subject to the specific words contained in the other sections in Chapter III. To my mind, that is the only way coherently to interpret the amendments sought to be introduced by s. 17 of the 2016 Act. I do not agree with the Applicant that this amounts to a "*reading down*" of the provisions of s. 17 of the 2016 Act. It is interpreting that provision so as coherently to apply it to the specific provisions of Chapter III. The consequence of interpreting s. 17 of the 2016 Act in this way is that those provisions of Chapter III which do not specifically relate to a particular form or forms of procedure (such as appeals, referrals or applications under ss. 37E or 37L) are amended by s. 17, such that applications under s. 4 of the 2016 Act are now included in those provisions during the *"specified period"*. However, since s. 131 of the 2000 Act is expressly concerned only with appeals and referrals and not with other procedures, in my view, it has not been affected by the amendment to s. 125 of the 2000 Act made by s. 17 of the 2016 Act.

263. My conclusion that s. 17 does not simply include applications under s. 4 of the 2016 Act into all of the sections in Chapter III of the 2000 Act, as suggested by the Applicant, is supported by the fact that the Oireachtas considered it necessary in the 2016 Act expressly to amend certain provisions of the 2000 Act to include applications under s. 4 of the 2016 Act in those sections. If such applications were included within Chapter III simply by virtue of the amendment to s. 125 of the 2000 Act by s. 17 of the 2016 Act, it would not have been necessary for the Oireachtas to have expressly amended other sections in Chapter III to include applications under s. 4 of the 2016 Act. Section 18 of the 2016 Act is an example of a section which does expressly include applications under s. 4 of the 2016 Act in a section in Chapter III of the 2000 Act. Section 18 seeks to amend during the *"specified period"*, s. 134 of the 2000 Act in relation to oral hearings so as expressly to bring, within s. 134, applications under s. 4 of the 2016 Act and to adapt s. 134 in respect of such applications. While it might be argued that some of the amending provisions in s. 18 of the 2016 Act might fall within the phrase *"except where otherwise provided for by"* the 2016 Act (in s. 125 of the 2000 Act (as applied by s. 17 of the 2016 Act)), such as the amendment to s. 134(1)(b) made by s. 18(a) of the 2016 Act, others cannot be explained in that way, including the amendment to s. 134(1)(a) made by s. 18(a) of the 2016 Act and the amendments made to subsections of s. 134 of the 2000 Act by paras. (b) to (h) of s. 18 of the 2016 Act. None of these would have been required if applications under s. 4 of the 2016 Act were automatically included within the sections of Chapter III of the 2000 Act.

264. While the interrelationship between the 2016 Act and Chapter III of the 2000 Act is complex and not easy to unravel, and while the sections could undoubtedly have been drafted much more clearly, I have concluded that the Board did not have the power under s. 131 of the 2000 Act to circulate and obtain submissions and observations from others on any further information which might have been obtained from the Applicant in respect of its remitted

application under s. 4 of the 2016 Act. Insofar as the Applicant contended that the Board did have the power under s. 131 of the 2000 Act to seek submissions or observations from others on any further information which might have been sought from the Applicant, I do not agree.

265. As regards the point made by the Board that any further information which might have been obtained from the Applicant in respect of the remitted application would have had to have been circulated to the public in order to ensure effective public participation under Article 6(3) of the Habitats Directive and Article 6(1)(b) of the Aarhus Convention, and that in light of the strict time limits contained in the 2000 Act and the tight timeframe within which the Board is required to make a decision on an application for permission for a SHD under that Act, there was no scope for requesting further information or material in relation to the NIS submitted by the Applicant, I do not believe that it is necessary for me to express a concluded view on that point. The Board may very well be correct that, in light of Article 6(3) of the Habitats Directive and Article 6(1)(b) of the Aarhus Convention, as interpreted by the CJEU in *Brown Bears II* and in other cases, the Board would have to make available to the public any such further information obtained in order to ensure effective public participation in the process. However, that would not in itself prevent the Board from exercising the power to obtain further information from an applicant for permission for a SHD if the Board felt it was appropriate to seek such information. The Board accepts that it has the power to seek further information under ss. 177U and 177V in the case of an application for permission for an SHD although, it says, that such will only be exercised in exceptional circumstances. The Action Plan also recognises that requests for further information may be made in exceptional circumstances in the case of SHD applications. The fact that public participation is necessary does not, therefore, in itself mean that further information cannot ever be sought, but it may support the Board's view that the power to seek such further information will only be exercised in very exceptional circumstances. I

should, however, also note that there is no evidence before the court (whether in the affidavits or, indeed, in the further correspondence which preceded the hearing), that the Board considered the question of public participation under the Habitats Directive or the Aarhus Convention in forming the view that it should not seek further information from the Applicant.

266. As regards Regulation 302(6)(b) of the 2017 Regulations, it does not seem to me that that power advances the position greatly. Regulation 302 contains provisions relating to submissions or observations in relation to an application for permission for a SHD. Under Regulation 302(6)(b):-

> *"The Board may, at any time before making its decision, request any person, authority or body to make a submission or observations or elaborate upon a submission or observations in relation to an application."*

267. It should first be noted that this power is also a discretionary power (*"may… request"*). Second, while the Board may make a request a request for, or for elaborations upon, a submission or observations in relation to an application for permission for a SHD, the regulation does not make provision for the circulation of any such submission or observations or elaborations received. Section 131 of the 2000 Act (taking into account the amendments made by the 2016 Act) does not confer that power. Nor, in my view, can the power be implied by means of an expansive interpretation of Regulation 302(6)(b), as contended for by the Applicant. I agree with the submissions advanced by the Board and by Clonres, based on cases such as *White, McMahon, Christian v. Dublin City Council* [2012] 2 IR 506 ("*Christian*") and *Element Power Ireland v. An Bord Pleanála* [2017] IEHC 550 ("*Element Power*"), that the Board is a *"creature of statute"* and is required to act within the four walls of the statutory regime which applies to it. I also note and agree the views expressed by Charleton J. in the High Court in *Wexele v. An Bord Pleanála* [2010] IEHC 21("*Wexele*")

that it would not be appropriate for the Court to reformulate the statutory procedures, insofar as they apply to the Board. To that extent, therefore, it seems to me that the judgments in *Dellway* and in *North Wall* are not of any assistance to the Applicant. In fairness, this point was not very strenuously pursued by the Applicant. I tend to agree with the Board that in so far as Regulation 302(6)(b) confers a discretionary power on the Board to request a submission or observation or an elaboration on them, it ought to be construed as applying only to requests dealing with minor, non-material clarifications, which would not require to be circulated to others or to the public to ensure effective public participation. The Board is probably correct in that regard.

Conclusions on Further Information Issue

268. In conclusion, it seems to me that, like the statutory provisions in *Kildare* and in *Cicol*, the Board's powers to request further information from an applicant under ss. 177U(3) and 177V(2) are discretionary powers and the exercise or non-exercise of those powers, when challenged, must be considered by reference to the particular statutory regime and by reference to the particular circumstances of the case. While the circumstances of this case are undoubtedly very unusual (albeit not quite unprecedented), that does not mean that the Board was obliged to exercise the discretionary power to seek further information from the Applicant as it has contended. I am satisfied that, notwithstanding the manner in which the information was put before the court (without objection from the Applicant or from Clonres) in the form of correspondence and not in its statement of opposition or in its affidavits, the Board did in fact consider whether to seek further information from the Applicant in respect of the remitted application. It accepted that it had the power to do so under ss. 177U and 177V of the 2000 Act. While it did not consider whether to exercise that power by reference to those provisions, it did generally consider whether to seek further information from the Applicant. In my view, in the particular circumstances and having regard to the terms of the

two sections at issue, I do not believe that the Board's failure expressly to consider the sections means that its decision not to seek further information was unlawful. I am satisfied that as a matter of fact the Board did consider seeking further information and decided, for the reasons set out in the correspondence preceding the hearing, not to do so by reason of the limited time available to make the decision and the absence of a statutory process for further public consultation. As regards the first of those considerations, I am satisfied that the Board was entitled to take into account the statutory time limit for making the decision and that it did not act unlawfully in doing so. I am further satisfied that the Board was correct in its view that it did not have the power to circulate any further information it may have obtained to interested parties and to the public and that the Applicant's contention that such power existed in s. 131 of the 2000 Act (when read with the amendments to that Act made by the 2016 Act) is not correct. While the issue is difficult and complex, ultimately, I conclude that the Board was correct in its view of the extent of its statutory powers to circulate any further information that might have been obtained from the Applicant. Further, in my view, the Board could not be said to have acted unreasonably or irrationally in the *O'Keeffe* sense or unfairly in reaching that view. I am satisfied, therefore, that the Board's decision not to seek further information is not unlawful on any of the several grounds asserted by the Applicant and that it was not obliged, in the circumstances, to exercise the power to seek further information from the Applicant under ss. 177U and 177V of the 2000 Act. Accordingly, I find against the Applicant on the further information issue.

The Mitigation Issue

269. The Applicant alleged in its statement of grounds and in the affidavit of Simon Clear, sworn on 26th October, 2018, that the Board made an error of fact and of law in the second reason provided in the impugned decision for refusing to grant permission for the proposed development on AA grounds. It will be recalled that in that reason, the Board decided that

there was a *"lack of adequate qualitative analysis"* and a *"lack of certainty"* that the geese which had been using the St. Paul's site as an *ex-situ* feeding site, *"would successfully relocate to other potential inland feeding sites in the wider area, as proposed as mitigation for the development of the subject site"* in the NIS. The Applicant's complaint centred on the description by the Board of the availability of other potential inland feeding sites for the geese as being *"mitigation"* which was proposed by the Applicant in the NIS. It was argued that the Applicant had not proposed the availability of alternative *ex-situ* feeding sites as "*mitigation*" or as a "*mitigation measure*" in the NIS and that the Board's use of the term "*mitigation*" in that reason indicated that the Board considered the availability of alternative *ex-situ* feeding sites as a "*mitigation measure*" put forward by the Applicant when that was not the case.

270. The Applicant asserted that the NIS had assessed the proposed development in the context of the conservation objectives' attributes of *"population trend"* and *"distribution"* and their specific targets for each SCI of the relevant European sites and in the context of the conservation objectives' attributes and their specific targets for each Annex I habitat and Annex II species for the relevant European sites. The Applicant pointed out that that appraisal, which was documented in the NIS, involved a detailed assessment of the known network of inland feeding sites used by the geese, the level of usage of those sites, whether the geese were opportunistic feeders or loyal to a particular site and whether there were additional potential sites that appeared not to be utilised at the time. The results of that appraisal were set out in s. 13.1 of the NIS which concluded that, having considered the potential for adverse effects on the integrity of the site to arise as a consequence of the proposed development negatively impacting on those two conservation objectives' attributes, there would be no impact on the population trend of the geese at any of the relevant sites.

271. The Applicant contended that there was no question of "*mitigation*" and no "*mitigation measures*" were proposed in the NIS in respect of the geese. It asserted that, in finding otherwise, the Board made an error of fact without any evidential basis and that, in doing so, the Board also erred in law. It contended that such an error could provide a basis for setting aside the impugned decision and relied in that context on the judgment of the Court of Appeal in *N.M. (DRC) v. Minister for Justice* [2016] IECA 217 ("*N.M*"). Essentially, therefore, the Applicant contended that the Board misunderstood the basis of the NIS and the information and conclusions contained in it.

The Board and Clonres's Case on the Mitigation Issue

272. The Board disputed all of this. The Board maintained that it had not used the term "*mitigation*" in any technical or scientific sense in the impugned decision and that it was not referring to any "*mitigation measures*" in its decision. It maintained that in using the word "*mitigation*" in the second reason for its decision, the Board was simply noting that the NIS was suggesting that the availability of alternative *ex-situ* feeding sites for the geese would mitigate the loss of the *ex-situ* feeding site on the St. Paul's site and that the Board was not satisfied that it could be certain to the requisite scientific standard that that was so. The Board was referring to the point made in the NIS that the availability of the potential alternative sites *"should ensure that there be adequate capacity in the potential network to absorb the loss of St. Paul's"*, in combination with the potential loss of a number of other inland feeding habitat sites (paras. 12.15 and 13.2 of the NIS). It noted that the thrust of the conclusions of the NIS was that alternative sites would absorb the geese displaced from the St. Paul's site and that the availability of those other sites would make up for the loss of the geese's most important *ex-situ* feeding site. It was contended that the use of the word "*mitigation*" was intended to convey that argument. The Board contended that there was no error of fact or law

on its part, still less any material error which would warrant the quashing of the Board's order.

273. Clonres agreed with the submissions advanced by the Board on that issue and added further submissions of its own in support of the Board's approach.

274. The Applicant, the Board and Clonres all referred to, and relied on, the judgment of the CJEU in *Case C-323/17 People Over Wind v. Coillte Teoranta* [ECLI: EU: C: 2018: 244] (judgment delivered on 12th April, 2018) ("*People Over Wind*").

Discussions and Conclusions on the Mitigation Issue

275. I have concluded that the Applicant is not entitled to succeed on the mitigation issue for reasons which I will now explain. First of all, I accept that in using the word "*mitigation*" in the second reason for its decision, the Board was using the term to describe the case made in the NIS that the loss of the St. Paul's site as an important *ex-situ* feeding site for the geese would be made up for, ameliorated or mitigated by the availability of other potential *ex-situ* feeding sites in the area. That was the case made in the NIS and, it seems to me, that it is clear that that is what the Board was attempting to describe in the second reason of the impugned decision. I agree with the Applicant that the word "*mitigation*" probably crept in to the Board analysis on the basis that the Chief Executive of the Council used it on various occasions in his report (where the terms "*mitigation*", "*mitigated*" and "*mitigation measures*" were used in the context of the availability of alternative inland feeding sites) and the inspector reproduced those parts of the Council's report in her report (at p. 20).

276. Second, the term "*mitigation*" is not a term of art or a technical or statutory term. It is not used in the Habitats Directive or in Part XAB of the 2000 Act. In those circumstances, it is necessary to interpret the phrase in the second reason of the impugned decision which contains that term. In doing so, I have the benefit of the Board's own explanation for the use of that term. However, in interpreting the second reason in the impugned decision which

contains the term "*mitigation*", I must apply the principle described by McCarthy J. in the Supreme Court in *Re XJS Investments Limited* [1986] IR 750 ("*XJS*"). McCarthy J. stated the planning documents (which term includes decisions of the Board) are to be construed *"in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning"* (per McCarthy J. at 756). That principle has been applied by the High Court in numerous subsequent decisions which were referred to recently by me in my judgment in *Kelly/ALDI* (at para. 164). In my view, a reasonably intelligent person, without legal training and having no particular expertise in planning, would understand the relevant reason of the Board which contained the term "*mitigation*" as referring to the reliance by the applicant in the NIS on the availability of other potential *ex-situ* feeding sites in the area, as a means of making up for the loss of the St. Paul's site. I do not believe that such a person would understand from reading the second reason that the Board was using the term "*mitigation*" in any technical or formal sense.

277. Third, insofar as the Applicant contended that the use of the word "*mitigation*" suggested that the Board understood the NIS to put forward "*mitigation measures*", I reject that contention. The impugned decision does not make reference to any "*mitigation measures*". The CJEU in *People Over Wind* considered what were described by the High Court (Barrett J.) in the reference to the CJEU as *"mitigation measures"*. The CJEU noted that Article 6 of the Habitats Directive contains no reference to any concept of *"mitigation measures"*. However, the Court noted that the measures which the referring Court was describing *"should be understood as denoting measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned"* (para. 26). As the Court noted at para. 27 of its judgment, the issue was whether it was possible at the screening stage *"to take account of the measures intended to avoid or reduce the project's harmful effects on*

that site". That is not the point made by the Applicant here. There is no question of any "*mitigation measures*" being considered at the screening stage in terms of the geese in a manner which was found to be impermissible by the CJEU in *People Over Wind*. While it may well be the case, as contended for by Clonres, that in order to constitute *"mitigation measures"*, as explained by the CJEU, the measure must be one which is built into the design of the particular project or development it is unnecessary to express a concluded view on that point, as in order to constitute a "*mitigation measure*", there must first of all be a "*measure*". It seems to me that this must involve some action or proactive step to be taken by or on behalf of the developer and not merely a reference to or reliance on an existing state of affairs which requires no proactive step on the part of the developer. The reliance by the Applicant on the availability of alternative *ex-situ* feeding sites for the geese is a reference to a state of affairs and does not, in my view, constitute any step or action or "*measure*" proposed or adopted by or on behalf of the Applicant. Nor did the Board understand it as such.

278. In my view, therefore, the Board did not make any error of fact or law in the second reason contained in the impugned decision, insofar as it referred to the availability of other potential inland feeding sites proposed as mitigation for the development of the St. Paul's site in the NIS. Accordingly, I find against the Applicant on the mitigation issue.

Summary of Conclusions

279. In summary, for the reasons set out in this judgment, I have concluded that the Applicant must succeed on one of the grounds of challenge which it has made to the impugned decision of the Board, namely, on the ground that the reasons given by the Board for refusing permission and for disagreeing with the inspector's recommendation to grant permission were inadequate in various respects. I have concluded that the reasons provided by the Board did not comply with the requirements as to reasoning set out by the Supreme Court in *Connelly*. It seems to me that on the basis of that finding, I should grant an order of

certiorari quashing the impugned decision to refuse planning permission and granting certain of the declaratory relief sought by the Applicant.

280. However, I have concluded that the Applicant must fail on the other two grounds of challenge advanced by it.

281. The first of those two other grounds was that the Board acted unlawfully in failing to seek further information from the Applicant in respect of its application for permission which had been remitted to the Board on foot of the order by the High Court on 31st July, 2018. I have found against the Applicant on that ground.

282. The second of the two other grounds relied on by the Applicant was that the Board made an error of fact and of law in the second reason contained in the impugned decision, in referring to the proposition advanced in the NIS that the geese would successfully relocate to other potential inland feeding sites in place of the existing *ex-situ* feeding site at the St. Paul's site as "*mitigation*". I have also found against the Applicant on that ground. I do not accept that the Board erred in fact or in law as alleged by the Applicant.

283. I suggest that the parties liaise as to the terms of the order which should be made to give effect to this judgment. Rather than directing an exchange of further submissions at this stage, I would propose listing the matter for mention on a date in August or September. If it is not possible to agree the terms of the order at that stage, if necessary, I will give further directions.