

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 117

[Record No. 2019/566 JR]

**IN THE MATTER OF AN APPLICATION PURSUANT TO
SECTION 50, 50A AND 50B OF THE
PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)
AND IN THE MATTER OF AN APPLICATION BETWEEN**

RAYMOND O'SULLIVAN

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

**IRISH AMATEUR ROWING UNION CLG (TRADING AS ROWING IRELAND) AND
WICKLOW COUNTY COUNCIL**

NOTICE PARTIES

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 4th day of March, 2022

1. Issues

- 1.1. By order of 31 July 2019 the applicant secured leave to maintain the within judicial review proceedings seeking to quash the decision of An Bord Pleanála (ABP) of 12 June 2019 whereby ABP granted planning permission to the first named notice party to develop a high performance training centre in accordance with plans and particulars lodged with Wicklow County Council, on land situate at Burgage, Moyle, Blessington, Co. Wicklow. The site is on the north facing shore of Poulaphouca Reservoir known as Blessington Lake, which is a European designated Special Protection Area (SPA) site for the purposes of Council Directive 92/43/EU (the Habitats Directive). (The qualifying interests being the greylag goose and the lesser black-backed gull).
- 1.2. Although the within statement of grounds refers to a variety of grounds upon which the relief is sought the ultimate submissions on behalf of the applicant set forth six effective grounds, however, during the course of oral submissions to the Court the applicant indicated that the issue *vis-à-vis* a stage one screening assessment was not being pursued and accordingly the following five issues fall to be determined:
 - (1) The information available to ABP was incapable of grounding a lawful Appropriate Assessment (AA) for the purposes of the Habitats Directive;
 - (2) ABP erred in its decision in accepting that an absence of adverse effects to the conservation objectives of the SPA site is established if the proposed development will not have worse effects than the existing uses of the relevant site at the date of the application for planning permission;
 - (3) The decision failed to identify, analyse and evaluate the indirect effects and cumulative effects of the proposed development with the existing uses and approved future uses of the site;
 - (4) The conditions attached to the relevant planning permission were inappropriate and unsustainable;

- (5) ABP failed to undertake an Environmental Impact Assessment (EIA)/ preliminary examination.

2. Background

- 2.1. The Poulaphouca Reservoir was created in or about 1944 and extends to approximately 20 square kilometres. In 1995 the area was designated as an SPA under the Birds Directive (Council Directive 2009/147/EC) and therefore is an SPA site for the purposes of the Habitats Directive.
- 2.2. In 2010 the SPA status of the Poulaphouca Reservoir was placed on a statutory footing under Statutory Instrument no. 73 of 2010 which provides under Regulation 4 thereof that the Minister's licence is required for any activity mentioned in Schedule 4 (including at point 6, sports activity liable to cause significant disturbance to those birds listed in Schedule 3 of these Regulations or damage to their habitats (Schedule 3 makes reference to the greylag goose and the lesser black backed gull)) unless permission has been afforded by a public authority, which is defined in Regulation 2 as the local authority or body established by statute.
- 2.3. The conservation objectives in respect of this site were identified in a document from the Department of Culture, Heritage and the Gaeltacht (the Department) of 21 February 2018 as maintaining and restoring the favourable conservation status of habitats and species of community interest.
- 2.4. It appears that rowing has taken place on the reservoir for approximately forty years with the existing boathouse built in the early 1970s (see para. 3 of Management of Racing (rowing) Boats document of May 2018) and it appears that the reservoir is now the primary location of senior Dublin rowers with Olympic aspirations. In order to facilitate these rowers there may be many more boats required at training (see para. 3 of document aforesaid).
- 2.5. The relevant application for planning permission was submitted to Wicklow County Council on 6 October 2017 and was accompanied by an Natura Impact Statement (NIS) and Ecological Impact Statement (EcIA) both of April 2017. On 23 November 2017 the County Council required further information, and as a consequence on 5 July 2018 the applicant notice party submitted a revised NIS (rNIS) and revised EcIA (rEcIA) respectfully dated May 2018 and June 2018.
- 2.6. Following an assessment by the local authority a recommendation was made on 2 August 2018 to refuse permission on the basis of a proposed effluent holding tank and the impact of disposal on the SPA. Further unprompted information was furnished to the local authority by the notice party applicant on 16 August 2018, with Irish Water indicating on 23 August 2018 that it had no objection to the development subject to a number of matters relevant to the effluent holding tank.
- 2.7. A further local authority assessment was conducted on 24 August 2018, following which on 27 August 2018 the local authority granted planning permission subject to conditions.

- 2.8. The within applicant appealed that decision to ABP on 20 September 2018 with a response from the notice party in October 2018, which was circulated to the applicant on 31 October 2018. The applicant made further submissions on 19 November 2018. The Department was also invited to make a further submission by way of letter dated 14 December 2018 but did not do so.
- 2.9. ABP's Inspector conducted two site inspections on 5 December 2018 and 19 February 2019 and concluded with a recommendation to grant planning permission subject to conditions.
- 2.10. The relevant ABP direction issued on 4 June 2019 with an ABP grant of planning permission on 12 June 2019. Insofar as the within issues are concerned ABP followed the Inspector's report/recommendations.

3. Notice party documents

- 3.1. The following documents, furnished on behalf of the notice party, were among the documents available to ABP at the time of the impugned decision:

A. Rowing Schedules (showing current and proposed rowing schedules)

- (a) Currently rowing starts at 7.30am at weekends during the winter months in respect of four of seven clubs. There is a note to the effect that rowing never takes place after dark or during adverse weather conditions.
- (b) The weekend rowing proposed will start at 7.30am in respect of five of eight clubs with the remaining three at 8.00am or 9.00am.
- (c) Midweek rowing starts and is proposed to start at 5.00pm until 8.00pm.

B. Management of racing boats

- (a) This document was generated on 9 May 2018 and at paras. 2 and 3 sets out the following:
- (i) It identifies that the major reason for the proposed development is to provide storage space for the racing craft. Because of congestion on the River Liffey the more experienced crews currently transport their boats to Blessington by jeep and trailer for weekend training. The new facility will have racks to store the boats.
- (ii) Rowing has grown over the last twelve years and with recent Olympic success, will grow more in the future (para. 2).
- (iii) Over the last five years the numbers of people rowing have increased mainly among the junior ranks in the Dublin rowing clubs (para. 3).
- (iv) The lake at Blessington is now the primary facility for the majority of the more senior Dublin racing crews with Olympic aspirations (para.3).
- (v) Training methods have changed with the emphasis on smaller boats, and to facilitate these rowers there may be more boats required at training (para. 3).

- (vi) Statistics show that there is approximately a 75% fall off among rowers when they graduate from the junior ranks (para. 3).
- (vii) The facility proposed is for senior rowers with ambitions to progress to high performance and Olympic level (para. 3).
- (viii) The annual growth among adult rowers is small. An average of crews training in Blessington over the past five years is set out with a note that overall numbers are "fairly static" (para. 3).

C. Natura Impact Statement

- (a) This document was revised in May 2018. A walking survey was conducted on 17 February 2017. The report indicates that due to the proximity to the Poulaphouca Reservoir and the SPA designation, the investigation proceeded on the basis that there was potential for significant impacts on the site.
- (b) It is noted that greylag geese are on an amber list meaning there are medium conservation concerns for them in Ireland. The geese arrive in Ireland from Iceland in late October each year.
- (c) At para. 4-7-4 of the report it is recorded that the National Parks and Wildlife Service (NWPS) indicated greylag geese were observed roosting near the proposed boathouse location.
- (d) At para. 7.1.1 it is acknowledged that rowing has the potential to cause impacts.
- (e) At para. 7.2 it is stated that several professional rowers use the reservoir each morning, four to five times per week, all year round. Under the proposed development there will be eleven bays for the storage of boats in lieu of three bays currently available in the existing boathouse.
- (f) It is acknowledged that relocation with the proposed facilities may contribute to increased levels of recreational activity. However, it is said that this activity will occur when, inter alia, the greylag geese are not roosting.
- (g) Mitigation measures are set out at para. 8 of the report including design mitigation, construction mitigation, operation mitigation and rowing activities mitigation.
- (h) In respect of rowing activities reference is made to the schedule and maps of proposed routes. In this regard maps of existing routes on the lake are identified and there is a map of the proposed routes on the lake. The difference appears to be a reduced area at the Threecastles site.
- (i) There will be no rowing during the main roosting period which is identified as at night.
- (j) In the conclusion it is stated that the new boathouse location and the mitigation measures will be successful in negating potential impacts on the SPA.

3.2. The Inspector's report

3.2.1. The report is dated 24 May 2019 and runs to 66 pages. For the purposes of the issues raised in the instant matter it appears to me the following provisions are relevant:

3.2.2. Paragraph 5.4 is headed "Environmental Impact Assessment Screening". It is stated that having regard to the nature and scale of the development in a rural location there is no real likelihood of significant effects on the environment arising from the proposed development and the need for an EIA can therefore be excluded at preliminary examination, and a screening determination is not required.

3.2.3. Within the bullet points identified in para. 6.1.1 under the heading "General" it is stated that:

"Most of the existing rowing clubs on the lake will use the proposed facility and there will, therefore be small increase [sic] in the number of boats on the lake. Rowing will naturally be significantly reduced within the Three Castles area and the mid to southern sections of the lake will be used with more frequency. The result of this will be a reduction of rowing near the main Greylag geese roosting areas, which will thus minimise impact on the designated features of the SPA."

3.2.4. At para. 7.1.7 headed "Potential Impacts" it says:

"The proposed development includes 11 bays for storing boats, unlike the current facility that has 3. This will see a slight increase in the number of craft on the lake but this will be at the same time at the current usage which is during times when the relevant birds are not roosting. ...Therefore it is early morning use of the lake by rowers during the winter that is of main concern for designated species of the Poulaphouca Reservoir SPA and other local species. This disturbance may effect may [sic] be classified as one which can be temporary but may have impacts on resting and energy intake...The EcIA concluded that the impact of water based craft on birds is very hard to measure due to the degree of uncertainty with monitoring...In conclusion, I am satisfied that the proposed development, subject to the mitigation measures set out in the ecological impact assessment, would not have a serious detrimental ecological impact."

3.2.5. The AA is set out at para. 7.4.4 (p. 50 of 66). In describing the Poulaphouca Reservoir it is noted that the main roosting area is identified as the Threecastles area to the north and closer to the dam to the south. It is stated:

"During the operational phase the High Performance Training Facility will not provide a new obstacle for the birds as the reservoir has been used by rowers for circa. 40 years. The current proposal refers to the relocation of an existing facility for rowers that already use the lake and would not constitute an increase in activity. Furthermore, the facility would not be in use after dark which is when the Greylag Geese roost over winter." (This is the only reference to relocation. There is no evidence that the existing boathouse will not continue to be used).

- 3.2.6. The Inspector summarises the content of the rNIS and rEcIA furnished by the notice party concerning potential indirect effects on the conservation objectives of the qualifying interest of the Poulaphouca Reservoir and summarises "...the integrity of the site could be indirectly affected by the proposal through disturbance to bird species during roosting." (p. 53).
- 3.2.7. The Inspector notes that there is potential for indirect impacts arising from, *inter alia*, operation of the development from the presence of rowers and activities that may impact on protected species. The potential indirect impacts are not explored further (p.54).
- 3.2.8. Insofar as cumulative and in combination effects are concerned it was said that given the location and mitigation measures in the rNIS it is unlikely that the proposed development and the rowers would contribute significantly to the cumulative effects. It is then stated that subject to the implementation of mitigation measures proposed the author accepts that no significant cumulative effects would arise in respect of qualifying interests (the greylag goose and the lesser black-backed gull). Insofar as mitigation measures for the qualifying interests is concerned, the Inspector notes at p.58 that a management plan for rowing activities incorporating a rowing schedule and rowing routes was furnished to the Inspector.
- 3.2.9. Under the heading "Appropriate Assessment Conclusions" the Inspector was satisfied that the development would not cause changes to the key indicators of conservation value, and there is no potential for any adverse impacts.

3.3. NWPS

- 3.3.1. The within planning application was made on 6 October 2017 to Wicklow County Council. By letter of 8 November 2017 the Department reacted to communications it received from Wicklow County Council in respect of the planning application which sought the Department's observations/recommendations.
- 3.3.2. In respect of nature conservation, the Department recognised that Rowing Ireland had taken on board its comments from a previous planning application. The Department welcomed the proposed reduction in some of the activity at the Threecastles end of the lake, however, it had concerns about the weakness of the proposed mitigation against ongoing disturbance by the rowing activities.
- 3.3.3. It advised that mitigation needs to be clearly stated and measurable especially given the fact that the new boathouse can store four times the number of boats as the present boathouse. The Department noted that the potential level of increase in activity is not quantified and very little cognisance is taken of the wider water fowl and wader populations. The fact of a single day survey in February was also noted.
- 3.3.4. The Department requested further information about the water bird species present close to the proposed development and about the mitigation of disturbance from the rowing activities on the species present in the Wildfowl Sanctuary. It was requested that the

information would include estimates of increased usage at the new location and on the lake.

- 3.3.5. On 24 July 2018 the Department again wrote to Wicklow County Council noting the additional information supplied in the rNIS and ancillary reports, together with revised mitigations regarding the construction, post-construction and operational phase of the proposed development, which were requested to be implemented as conditions attached to any possible granting of planning.
- 3.3.6. On 14 December 2018 the respondent communicated with the Department in connection with the appeal of the instant applicant of the 20 September 2018 requesting the department to make any submissions or observations that it might have in relation to the appeal.
- 3.3.7. No response was received.

4. Cumulative effects

- 4.1. The applicant complains that the Inspector did not consider a grant of planning permission to Wicklow County Council in or about May 2017 whereby under s.179 of the Planning and Development Act 2000 it authorised an extended development of an existing amenity route around the shores of the Poulaphouca Reservoir. It is accepted that this decision was judicially reviewed. Paragraph 62 to 66 of the statement of grounds deals with this particular issue.
- 4.2. At para. 63 it is stated that the greenway is the subject matter of a concluded process. The paragraph does acknowledge that the decision was the subject matter of a judicial review. Paragraph 64 claims that the rNIS failed to consider or investigate the Greenway Project and the respondent relied on that for conclusions.
- 4.3. In the events the Inspector did refer to such possible development, however, it is stated that this possible development would be required to undergo an AA screening but there are no plans in place at present for this route, therefore, it cannot be fully assessed for in-combination effects (p. 55 of 66).
- 4.4. European Commission guidance on the Habitats Directive states that the "in-combination provision" concerns other plans and projects which have been already completed, approved but uncompleted, or actually proposed. Insofar as the meaning of "actually proposed" is concerned this is identified as "for which an application for approval or consent has been introduced."
- 4.5. At para. 23 of the affidavit of Dr. Niamh Burke of 19 June 2020, it is stated that the proposed development of the greenway being the s.179 issue, was considered in both the rNIS and the AA.
- 4.6. There is no supporting document from the applicant whatsoever before the Court in respect of this issue of the matter.

4.7. I am satisfied that given the foregoing the applicant cannot succeed in his claim based upon an alleged failure on the part of the respondent to consider the proposed Greenway Project.

5. No EIA screening

- 5.1. The applicant's argument is to the effect that the within development, because of the subsistence of the boat racks within the proposed boathouse, comprises a marina within the meaning of the Planning and Development Regulations 2001-2020, Schedule 5, Part 2(12)(b).
- 5.2. It is acknowledged that marina is not defined in the regulation. The provision is to the effect that the construction of seawater marinas where the number of berths will exceed 300 and fresh water marinas where the number of berths will exceed 100 would be developments which require an Environmental Impact Assessment Report (EIAR) to be submitted under Regulation 109(1) of the Regulations. In that respect where a development comprises such a development as aforesaid but of a sub-threshold number, ABP is obliged to carry out a preliminary examination of at least the nature, size or location of the development.
- 5.3. It is asserted that such an EIA was not carried out, and if it was carried out at para. 5.4.1 of the Inspector's report, then reference to a rural location without mentioning the fact that Blessington Lake provides the greater Dublin area with drinking water and the fact that the lake is an SPA renders the EIA assessment unlawful.
- 5.4. It is further argued that the fact that ABP may have conducted an assessment contemplated under Regulation 109(2)(a) of the aforesaid regulations demonstrates that the Inspector believed the development to comprise a sub-threshold development within the meaning and application of Regulation 109.
- 5.5. It appears to me that the Inspector's belief that a statutory obligation arises in a given set of circumstances is not sufficient to give rise to a statutory obligation which otherwise does not exist.
- 5.6. To succeed in the argument, the plaintiff suggests that the word "marina" should be given a purposeful meaning and include the instant boathouse.
- 5.7. The respondent relies on *Kavanagh v. ABP & Ors* [2020] IEHC 259 at para. 35 where Mr. Justice O'Moore was dealing with a project which could have a significant effect on the environment, however, would nonetheless not be caught by Article 2 of the EIA Directive unless in those circumstances it also fell within Article 4. The Court stated:

"While it is uncontroversial that the purpose of a legal instrument can and should be taken into account in construing its provisions, here the meaning of Article 4 is so plain that its scope cannot be artificially extended in the manner proposed on behalf of Mr. Kavanagh."

- 5.8. I am satisfied that the concept of a "marina" in its normal understanding and user is that of a dock, basin or harbour providing secure moorings for boats. A construction of a boathouse set back from the lake's edge with no construction on any portion of the lake is not incorporated in the definition of marina. The views expressed by O'Moore J. in *Kavanagh aforesaid* apply equally in this matter.
- 5.9. Furthermore, no relief is sought in the statement of grounds based on this asserted failure.

6. Conditions left over for agreement

- 6.1. The applicant's argument in this regard is to the effect that condition two of the planning permission granted by ABP which requires future agreement in writing with the planning authority, as opposed to ABP, is unlawful since the decision of the CJEU in *Holohan v. An Bord Pleanála*, (Case C-461/17) ECLI:EU:C:2018:883. In relation to condition three the argument is to the effect that the mitigation proposals within the rNIS do not incorporate any mechanism for enforcement.
- 6.2. The above issue has recently been considered by Barr J. in *Donnelly v. An Bord Pleanála* [2021] IEHC 834. Barr J. helpfully referred in his judgment to various relevant case law. In that matter it was argued that the decision was flawed because it left over matters to be agreed between the developer and the planning authority post consent, and this was not permissible where the development could have an adverse effect on an SPA site.
- 6.3. The instant applicant argues that his argument is not as radical as the argument before Barr J. but rather is to the effect that following *Holohan* there has been a tightening up of matters which can be left over for subsequent agreement following the granting of planning permission, and the nature of the matters outlined in Conditions two and three are such that they should not have been left over for agreement with the local authority. The applicant also argues that the agreement should not be between the local authority and the developer but rather ABP and the developer.
- 6.4. It was argued in the case before Barr J. and in the instant matter that because of the level of uncertainty that existed in relation to the matters that had been left over for post consent agreement those conditions attaching to the respondent's direction were invalid and the direction should be struck down. ABP has argued that the CJEU decision in *Holohan* has tightened the circumstances and range of matters which could be left over for post consent agreement but the Supreme Court decision in *Boland v. An Bord Pleanála* [1996] 3 IR 435 has not been displaced. Barr J. was satisfied that ABP's position was correct.
- 6.5. In *Boland*, Hamilton C.J. was satisfied that in leaving over matters to be agreed, ABP was entitled to have regard to:
- (1) the desirability of allowing a developer engaged in such an enterprise a certain limited degree of flexibility having regard to the nature of the enterprise together with;

- (2) the desirability of leaving technical matters of detail be agreed between the developer and the planning authority, in particular where such details are within the responsibility of the planning authority;
 - (3) the impracticability of imposing detailed conditions;
 - (4) the functions and responsibilities of the planning authority;
 - (5) whether the issues affect the subject lands or are off-site problems; and,
 - (6) whether the enforcement of such conditions require monitoring or supervision.
- 6.6. Barr J. noted that statutory recognition to impose such conditions is now contained in s.34(5) of the Planning and Development Act 2000. Barr J. quoted from *People Over Wind v. An Bord Pleanála* [2015] IECA 272 which in turn referred to the Supreme Court decision in *Boland* to the effect that the delegation of technical matters of this kind in principle is acceptable. In *Boland* the left over condition related to the management of ferry traffic and plans for traffic access and egress arrangements. These issues were considered to be essentially technical matters of detail relating to only one aspect of the development, and what was required to be agreed was merely a matter of detail. In *People Over Wind* the Court was satisfied that ABP's statement of principle was crystal clear.
- 6.7. In *Holohan* at para. 47 the CJEU was satisfied that the competent authority is permitted to grant consent which leaves the developer free to determine later, certain parameters relating to the construction phase, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site.
- 6.8. At para. 104 of *Donnelly* Barr J. held that the test had been tightened to the extent that the level of detail to be agreed subsequently must be such as to preserve the guarantee that there will be no adverse effects on the European site, no matter what is subsequently agreed between the developer and the planning authority.
- 6.9. In para. 110 Barr J. referenced *Arklow Holidays Limited v. An Bord Pleanála* [2006] IEHC 15 where Clarke J. noted that it was open to any party to challenge an agreement reached post consent on the basis that it did not conform with the criteria specified in the decision of ABP.
- 6.10. Insofar as the applicant argues that the agreement should not be left over as between the developer and the local authority, each of the cases above were dealing with a set of circumstances where ABP did leave over the conditions to the local authority and no difficulty was encountered in this regard by any of the courts.
- 6.11. It has been made clear in several authorities not least in *Connelly v. An Bord Pleanála* [2018] IESC 31 that a decision of ABP must be read in conjunction with all the material before the Board.

- 6.12. Condition three requires all mitigation measures set out in the notice party's various documents to be implemented in full. However, there is no mention in Condition three to subsequent agreement with the local authority. It appears rather the essence of the applicant's argument in respect of Condition three is to the effect that the proposed mitigation measure is insufficient by reason of the fact that there is no monitoring or record keeping obligation, as is the case in respect of the construction phase.
- 6.13. In Condition two it is provided that prior to the commencement of the development, a detailed environmental management plan for the construction stage would be submitted to the planning authority generally in accordance with the proposal set out in the rNIS and the rEcIA, and other plans, reports, and details submitted by the applicant. It appears to me that the entirety of Condition two is such that ABP's requirement is patently clear and not only will not adversely affect the integrity of the site, but rather is designed to protect such integrity.
- 6.14. In relation to Condition three, it occurs to me that monitoring and recording of the construction phase is a far different proposition to monitoring and recording activity on a twenty square kilometre lake. Further it appears to me that mitigation measures comprise quantitative decisions on the part of ABP which would not amount to an appropriate judicial review matter.
- 6.15. I am satisfied that the ABP statement of principle is clear from a reading of both conditions and therefore the applicant has not identified any breach of the *Holohan* decision aforesaid.

7. Appropriate Assessment

7.1. Relevant jurisprudence

7.1.1. Both parties accept the legal tests laid down by the Supreme Court in *Connelly v. An Bord Pleanála & Ors.* [2018] IESC 31. The Supreme Court referenced the analysis conducted by Ms. Justice Finlay Geoghegan in *Kelly v. An Bord Pleanála* [2014] IEHC 400. Finlay Geoghegan J. distinguished between the obligations on ABP in carrying out an EIA and in carrying out an AA. In respect of an AA it was stated:

"The determination which the Board makes on that issue [would the development adversely affect the integrity of the relevant European site in view of its conservation objectives] in the appropriate assessment determines its jurisdiction to take the planning decision. Unless the appropriate assessment determination is that the proposed development will not adversely affect the integrity of any relevant European site, the Board may not take a decision giving consent for the proposed development unless it does so pursuant to Article 6(4) of the Habitats Directive".

7.1.2. Later in the judgment the Court concluded that the AA must include an examination analysis, evaluation findings, conclusions and a final determination and in so doing 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 light of its conservation objectives. The assessment must contain complete, precise and definitive findings and conclusions without lacuna or gap. The Board must decide that no reasonable scientific doubt remains as to the absence of the identified potential affects.

7.1.3. At para. 13.2 of *Connelly* it is identified that "...before a valid AA can be said to have been conducted, be a precise identification of the potential risks and, importantly, precise scientific findings to allay any fear of those risks coming to pass". These findings and conclusions must sustain the ultimate conclusion. Further, these findings and conclusions "...must be found either in the decision itself or in other materials which clearly must be taken by express reference or by necessary inference to identify the reasons for the ultimate determination..." (para. 13.6).

7.1.4. Article 6 of the Habitats Directive provides:

"2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public".

7.1.5. In *Aitoloakarnanias v. Perivallontos* (Case C-43/10) ECLI:EU:C:2012:560 the CJEU noted at para. 110 that a plan or project likely to have a significant effect on a site may be authorised only to the extent that it will not adversely affect the integrity of that site. The assessment must be organised in such a manner so that the authorities can be certain that the plan will not have adverse effects, where doubt remains as to the absence of such effects the authority must refuse consent (para. 112). The assessment cannot be considered appropriate where information and reliable and updated data concerning the birds in the SPA are lacking (para. 155).

7.1.6. Article 6(3) precludes development consent with plans likely to have a significant effect on the SPA in the absence of information or reliable and updated data concerning the birds in that area (para. 117).

7.1.7. In *Brussels Hoofdstedelijk Gewest v. Vlaamse Gewest* (Case C-275/09)

ECLI:EU:C:2011:154 at para. 37 it was provided:

“If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure.”

7.1.8. In *People Over Wind v. An Bord Pleanála* [2015] IECA 272, para. 16, the Court noted that obligations in Article 2(2) are addressed to the Member States and not to private operators such as a developer. The Court also noted that Advocate General Sharpston in her opinion in *Sweetman v. An Bord Pleanála* (Case C 258/11) ECLI:EU:C:2013:220 at para. 43-45 stated “...paragraphs (2), (3) and (4) of Article 6 serve a ‘different purpose’”, and “Article 6(2) imposes a general requirement on the Member States to maintain the status quo”, with Article 6(3) setting out the procedures to be followed in respect of an assessment of a plan or project. At para. 21 it was noted that it would be quite unrealistic to think that purely private individuals or companies could be expected to have the expertise or resources or even the legal entitlement to assist in restoration objectives. The Court was satisfied that it was sufficient therefore that the applicant for permission demonstrates that the proposed development will pose no threat on the integrity of the SAC.

7.2. Best scientific methods and understanding

7.2.1. As to best scientific evidence it was noted in *People Over Wind* that this phrase is not used in the Directive but rather best scientific knowledge. The objective is to ensure that the assessment is conducted by reference to the best scientific methods and understanding. “Specifically, the objective is to ensure that the integrity of an SAC site is not compromised by the grant of permission which is in turn premised on a scientific analysis which is outdated, flawed or which does not measure up to state of art scientific understanding.” (Para. 25).

7.2.2. The Court indicated that:

“the obligation which is placed on the Board is to have access to the best scientific knowledge which is reasonably available. The objective here is to ensure that the appropriateness of any assessment meets proper contemporary scientific standards.” (para. 50)

7.2.3. The applicant argues that this element of the requisite test to establish the lawfulness of an AA (and thus ability to grant planning permission) is lacking and therefore in breach of the CJEU decision in *Aitoloakarnanias v Perivallontos* (Case C-43/10) ECLI:EU:C:2012:560. This argument is based on references in the rNIS at pp. 15 and 16

thereof identifying two separate surveys in respect of the greylag goose in Ireland, generally for the period 2001 to 2009, and at Threecastles from 2005 to 2013 save for one year. It is argued that these surveys are out of date and therefore insufficient to comprise reliable and updated data concerning the birds in that area.

7.2.4. At para. 3.1 of the rNIS it is stated:

“A desktop review was conducted of available published and unpublished information, together with consultation with National Parks and Wildlife Services (NPWS) local staff and a review of data available on the NPWS <http://www.npws.ie/en/> and National Biodiversity Data Centre (NBDC) <http://maps.biodiversityireland.ie/> web-based databases. Relevant Irish Wetland Bird Survey (I-WeBS) data relating to the Poulaphouca Reservoir was purchased from BirdWatch Ireland.” Consultations took place between 2011 and 2017.

7.2.5. The applicant has not tendered any professional evidence to suggest that the foregoing desktop review and data collation is other than reliable and updated data.

7.2.6. In my view the applicant cannot succeed in this argument which is effectively a complaint as to the survey data available to Dr. Burke, Ecologist. The case law identified does not place an obligation on an applicant for planning permission or the relevant planning authority to generate surveys over protracted periods.

7.3. Investigation of historic user

7.3.1. The applicant argues that as there has been no prior AA in respect of the existing rowing activity on the within SPA site, and that ABP was under an obligation to assess the impact of current and past rowing on the qualified interests in the SPA in order to achieve a valid AA. It is argued that this obligation arises under Article 6(2) of the Habitats Directive.

7.3.2. It is argued that the commencement date or baseline chosen for the AA by ABP's Inspector was that of current status/the date of application, whereas the applicant argues that it should have been at a date earlier than this. When pressed no particular date was identified in circumstances where rowing has taken place on the lake, which was created in 1944, for the preceding 40-year period and evidence was to the effect that the existing boathouse was built in the 1970s.

7.3.3. In accordance with *People Over Wind* aforesaid it is the case that Article 6(2) is directed to Member States and not to individual planning applicants. As per para. 22 of *People Over Wind* it is sufficient that the applicant demonstrates that the proposed development will pose no threat on the integrity of the Special Area of Conservation.

7.3.4. In the alternative the applicant suggests that the within application is part of a multi-stage development contemplated by Case C-43/10 thereby obliging ABP to view past activity, again, to a date unknown.

7.3.5. In *Sweetman v. An Bord Pleanála* [2021] IEHC 16 Hyland J., (whose views in the events are obiter) was dealing with an alleged error in an EIA by reason of a failure to assess the

status from before the existence of fish farms which had not been previously assessed (para. 63). The argument was based on the judgment of the CJEU in Case C-275/09.

7.3.6. As in this matter, in the matter before Hyland J. the "Brussels Airport argument" (Case C-275/09) was neither pleaded nor identified in legal submissions and it would not have been possible to anticipate the argument was going to be made. The Court was satisfied that the applicant was not entitled to introduce the "Brussels Airport argument" but went on to deal with the substance of the matter. The Court was satisfied that the case before it was not a case of project splitting, as the Court was satisfied that the decision on planning for water extraction could not be regarded as a stage in a consent procedure carried out in several stages.

7.3.7. In my view the current application for the construction of a boathouse and ancillary facilities within and outside that structure (e.g. car parking) cannot be considered part of a larger project incorporating past rowing user of the Poulaphouca Reservoir.

7.3.8. I am satisfied that the applicant has not demonstrated any error on the part of ABP in not carrying out an AA in respect of user/activity prior to the date of the instant planning application to Wicklow County Council, in particular having regard to the judgment in *People Over Wind*.

7.4. Adverse impact from rowing on the greylag geese

7.4.1. The applicant's argument in this regard is to the effect:

- (a) ABP erred in considering that the proposed development would not create an increase in rowing activity;
- (b) ABP misdirected itself in reviewing the test as, the absence of adverse effects to the conservation objectives of an SPA site, if the proposed development will not have worse effects than the existing user of the relevant site;
- (c) the locations within the reservoir where greylag geese might be found were not properly assessed in the Inspector's report:
 - (i) at para. 7.4 it is indicated that the current proposal would not result in an increase in activity and the facility would not be used after dark (p.53).
 - (ii) also at para. 7.4 it is stated that there is potential for indirect effects in the operational phase, namely it may decrease the habitat quality (p.54).
 - (iii) concludes that there is no potential for any adverse impacts (p. 58).

7.4.2. In the rNIS it is noted that:

- (a) there would be a slight increase in the number of craft user in the early morning and it may affect resting and energy intake (para. 7.2);
- (b) due to the proximity of the development to the SPA there was potential for significant impacts (para. 4.6.4);

- (c) the NWPS has indicated to the author that geese were observed roosting near the proposed boathouse location (para. 4.7.4);
- (d) rowing has potential to cause impacts (para. 7.1.1);
- (e) several professional rowers use the reservoir each morning, four to five times per week, all year round (para. 7.2);
- (f) there will be eleven bays, in lieu of three, and the relocation with facilities may contribute to increased levels of recreational activity, however, not when the greylag goose is roosting (para. 7.2);
- (g) there is no rowing during the main roosting period (the night time) (para. 8.6.2); and,
- (h) the rNIS concluded with the expression of the view that the new boathouse location and mitigation will be successful in negating potential impacts (para. 10).

7.4.3. In the Management of Racing Boats document of 9 May 2018 it is recorded:

- (a) at para. 2.1 that rowing has grown over the last twelve years and with recent Olympic success will grow more in the future. (The notice party suggests this is a general statement and not specific to the reservoir, however, no doubt, it being general, and not otherwise stated, the comment applies to Blessington as other venues);
- (b) paragraph 2.3 refers to the number of rowers attending regularly (being 180). (The notice party has suggested that the numbers mentioned refers to the total number of members in the user clubs.)
- (c) paragraph 3 deals with the number of people rowing over the last five years and it is suggested these numbers have increased mainly among the junior ranks in Dublin. The lake at Blessington is stated to be the primary facility for the majority of the more senior Dublin racing crews with Olympic aspirations. To facilitate the rowers' aspirations more boats are required at training (smaller boats, same number of rowers). It is noted that there is approximately a 75% fall off among rowers when they graduate from the junior ranks. (The notice party suggests that this means that the increase in junior ranks does not mean an increase in elite or senior ranks. Again, in this regard there is a growth in number of junior ranks and 25% of same survive then numerically there will be a growth in senior ranks and therefore is probative of an increase in senior members).

7.4.4. Documentation from the Department of 21 February 2018 states that the overall aim of the Habitats Directive is to maintain or restore the favourable conservative *status inter alia*, for the Poulaphouca Reservoir, which is achieved when (a) the species is maintaining itself on a long term basis as a viable component of its natural habitats; (b) range of the

species is neither being reduced nor likely to be reduced for the foreseeable future; and,
(c) there is a sufficiently large habitat to maintain its populations on a long-term basis.

7.4.5. In resisting the within application Dr. Burke has sworn an affidavit bearing date 19 June 2020. At para. 8 she identifies the Threecastles area as the main roosting area for greylag geese but says that the proposed development area is not where the geese roost, forage or nest. The period of concern was identified as early mornings in winter. (In the rowing schedule during winter months rowing will commence at 7.30am which will amount to pre-dawn start on some occasions.)

7.4.6. At para. 21 Dr. Burke refers to the allegation made by the plaintiff that there would be a six-fold increase in activity on the lake which is stated to be incorrect, and in this regard refers to para. 16 of the affidavit of Ms. Carpenter to support her proposition. At para. 26 the deponent notes that the greylag geese roost all night long and feed during the day. At para. 28 the deponent states that she has been advised that future rowing may be based further down the lake.

7.4.7. The affidavit of Michele Carpenter is dated 17 June 2020 where at para. 4 she identifies that the facility is required for ongoing development of the sport "particularly for the significant population base in the east of the country".

7.4.8. At para. 5 it is noted that the lake is already in use for rowing for eight Dublin based clubs and other clubs including the recently thriving Three Castles Club for local teenagers and their families. At para. 6 it is stated that the development offers a unique opportunity for Dublin and Leinster based clubs to train safely. At para. 9 it is stated that the Three Castles Club will have an opportunity to grow and develop in addition to facilitating the development of high performance rowing. At para. 10 it is stated that the development is of critical importance to the development of rowing in Ireland.

7.4.9. At para. 16 it is stated that the additional use will solely be for high-performance rowers.

7.4.10. In my view para. 16 cannot be reconciled with the averments in the preceding paragraphs in the affidavit.

7.4.11. The notice party identifies the failure of NPWS to respond with observations to ABP as indicative of satisfaction with the grant of permission, however, the applicant counters this submission by indicating the NPWS did not withdraw, or indicate their prior concerns were satisfactorily addressed.

7.4.12. Clearly neither the affidavit of Ms. Carpenter nor of Dr. Burke were before ABP when making its decision.

7.4.13. Given:

(1) the content of the documents issued by the notice party to ABP, the various references as outlined above suggesting increased human and/or boat activities; and,

- (2) the statement in the Inspector's report at para. 7.4.4 (p.53) to the effect that the current proposal would not result in an increase in activity, and the facility would not be in use after dark coupled with the conclusion (in the circumstances of no engagement with the evidence which was before the Inspector to the effect that increase in personnel and craft was likely) that there was no potential for any adverse impacts,

the finding of the Inspector that there was no potential for any adverse impact is not sustainable and not in accordance with the jurisprudence identified at paras. 49, 50 and 52 hereof. On this basis the decision is flawed.

8. Conclusion

- 8.1. Given the matters referred to in paragraph 7.4.13. above, the applicant is entitled to an order quashing the ABP decision.

9. Costs

- 9.1. If an order for costs is sought, the Court should be provided with submissions identifying the legal basis for such an entitlement. If either party contends for an order regarding costs, written submissions no longer than 2,000 words should be filed in hard copy in the High Court List Room and in soft copy by email to the High Court Submissions Inbox (highcourtsubmissions@courts.ie) within 14 days following electronic delivery of this judgment; the other party being entitled to respond by written submission no longer than 2,000 words within a further period of 14 days thereafter. The Court will thereafter consider same and the matter will be listed for mention on Wednesday, 6 April 2022 at 11am.
- 9.2. Otherwise, in default of any submission seeking costs being filed as above provided and within the time specified, there will be no order as to costs.