Judgment

Title: Ratheniska Timahoe and Spink (RTS) Substation Action Group & anor -v- An Bord Pleanála

Neutral Citation: [2015] IEHC 18

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Judgment by: Haughton Robert J.

Status: Approved

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THE HIGH COURT

JUDICIAL REVIEW

COMMERCIAL

[2014 No. 340 J.R.]

BETWEEN

RATHENISKA TIMAHOE AND SPINK (RTS) SUBSTATION ACTION GROUP AND ENVIRONMENTAL ACTION ALLIANCE IRELAND

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

EIRGRID PLC

NOTICE PARTY

JUDGMENT of Mr. Justice Haughton delivered on 14th day of January, 2015

1. The applicants in this judicial review seek an order of *certiorari* quashing the decision of the respondent dated 23rd April, 2014, whereby An Bord Pleanála ("the Board") purported to make a determination pursuant to s. 182A(1) of the Planning and Development Act 2000, as amended

(PDA, 2000), granting approval for a development comprising electricity transmission infrastructure and associated works comprising the Laois-Kilkenny Reinforcement Project ("the Development").

2. The first named applicant is a group of people local to the area in which the proposed infrastructural and associated works are intended to be carried out and who, as individuals or as a group, raised objections to the application for approval or made observations/submissions to the Board.

3. The second named applicant is an unincorporated body of whom David Malone, an environmental consultant, is a member. The second named applicant through Mr. Malone also objected to approval for the Development and made submissions/observations. The principal affidavits grounding the application were sworn by Mr. Malone.

4. Although the notice party initially put the applicants on proof of their *locus standi*, this was not pursued at hearing and their *locus standi* was therefore accepted.

5. The notice party, EirGrid Plc ("EirGrid") was joined in these proceedings as it was the party applying to the Board for approval of the Development.

Background

6. EirGrid is the statutorily designated electricity transmission system operator and holds the only license granted by the Commission for Energy Regulation to operate the Irish electricity transmission system. In October, 2008, EirGrid published "A Strategy for the Development of Ireland's Electricity Grid for a Sustainable and Competitive Future", known as "Grid 25". This was a high level strategy outlining how EirGrid intended to undertake the electricity transmission grid in the short, medium and long term to support a long term sustainable and reliable electricity supply. The "Grid 25 Implementation Programme 2011-2016" was a practical strategic overview of how the early stages of Grid 25 would be implemented. It was subjected to Strategic Environmental Assessment (SEA) under the SEA Directive 2001/42/EC The SEA Directive was transposed into Irish law via EC (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (S.I. 435 of 2004) and the Planning and Development (Strategic Environmental Assessment) Regulations 2004 (S.I. 436 of 2004) both of which Regulations became operational on 21st July, 2004. These Regulations were amended by S.I. 200 and 201 of 2011. . This involved a systematic process of identifying and evaluating the likely significant environmental affects of Grid 25 and avoidance of those adverse effects which could not be sustainably accommodated.

7. At p. 119 of the SEA there is specific reference to "Laois/Kilkenny Reinforcement" with the following description:-

> "New 400/110kV transmission station in Co. Laois. The station will be looped into the existing Dunstown-Moneypoint 400kV line and Carlow-Portlaoise 100kV line. A new 110 kV circuit from the new station to Kilkenny using the existing Ballyragget-Kilkenny 38kV line which is built to 110kV standards. A new 110/38kV station at Ballyragget to cater for loss of the Kilkenny-Ballyragget 38kV line."

8. The following additional comments in relation to this reinforcement project appear on the same page:-

> "Alternative for the new 400/110kV transmission station in Co. Laois should first examine locations to the east of Portlaoise and to the north of the south Laois plateau – away from most of the county's ecological and landscape sensitivities. Looping the station into the existing Dunstown-Moneypoint 400kV and Carlow-Portlaoise 110kV lines is likely to involve crossing the River Barrow and River Nore cSAC; looping will need to take into account this designation and planning authorities should be consulted in order to facilitate the identification of crossing points in Development Plans as appropriate. Linking the station to the existing Ballyragget-Kilkenny line in order to link the station to Kilkenny is likely to involve crossing the Nore/Barrow catchment limit and would therefore need to consider, in particular, visual impacts and their mitigation."

9. Upon completion, the SEA was circulated to various environmental authorities such as the EPA and certain government ministries and was published in a newspaper notice which indicated that a copy of the SEA Statement and Implementation Programme were available for inspection. Both the draft Implementation Programme and the SEA Environmental Report went on public display at the end of March, 2011and the public was entitled to take part in the consultation process.

10. It was in this context and subsequent to the SEA, and pursuant to statutory function, that EirGrid applied to the Board on 25th January, 2013 for the approval of the Development.

11. Prior to making the application and pursuant to relevant statutory provisions concerning strategic infrastructure development, the Board convened four pre-application consultations with representatives of EirGrid on 5th August, 2009, 13th July, 2012, 3rd August, 2012 and 15th October, 2012. By a decision made on 21st November, 2012, the Board decided that the Development was a "strategic infrastructure development" (PL11.VC0035). While this preliminary decision of the Board also determined that an Environmental Impact Statement (EIS) was unnecessary, subsequent to the submission of the application for approval to the Board, by letter dated 29th April, 2013, the Board requested further information from EirGrid, namely, the submission of an EIS.

12. The EIS, running to over 800 pages plus two folders of Appendices was duly submitted to and received by the Board on 16th August, 2013. This led to a further round of public notices in September, 2013 over six weeks prior to the planning hearing. An oral hearing was subsequently convened by the Board relating to the proposed Development and was held on 4th, 5th, 6th, 7th, 14th and 15th November, 2013, before Senior Planning Inspector Andrew C. Boyle, whose report is dated 31st January, 2014. The Inspector's Report runs to 114 pages and it is apparent from it that submissions and observations were received from numerous parties including the first named applicant and Mr. Malone.

13. As part of the process, EirGrid also carried out Screening Reports to enable the Board to determine whether an "appropriate assessment" (AA) was required in the context of possible adverse impacts of the Development on conservation interests protected under the Natura 2000 Networking Programme ("Natura 2000"). In fact, EirGird accepted in the Screening Reports submitted with the application that there was potential for adverse affects on the River Barrow and River Nore candidate Special Area of Conservation (cSAC). Accordingly, as required by law, a Natura Impact Statement (NIS) was prepared which was, in fact, submitted with the application for approval.

14. At the screening stage, EirGrid also considered the River Nore Special Protection Area (SPA) (an area of special protection concerned with Kingfishers and breeding sites). The report concluded that this would not be impacted upon either directly or indirectly by the proposed Development and that therefore no AA of that aspect was required to be carried out by the Board before granting approval. The Screening Reports and the NIS relating to the River Barrow and River Nore cSAC were materials before the Inspector and considered at the planning hearings.

15. The Board "Direction" in the matter dated 14th April, 2014, indicates that meetings of the Strategic Infrastructure Division of the Board were held on 26th February, 2014, 5th, 12th and 25th March, 2014 and 3rd April, 2014. The Direction was unanimously to approve the Development. The actual approval decision of the Board, impugned in these proceedings, is dated 23rd April, 2014.

Grounds of Challenge

16. By order of Peart J. made on 23rd June, 2014, pursuant to *ex parte* application, leave was granted to the applicants to apply for *certiorari* of the decision of the Board dated 23rd April, 2014, on the grounds set forth at para. (e) in the statement of grounds. Paragraph (e) in the statement of grounds runs to some 28 paragraphs. The essential grounds appear in paras. 1-5 inclusive:-

> "1. The statutory notifications of the application for approval were deficient as they did not properly or completely identify or describe the proposed development contrary to national and European law. In particular, the said notifications were inadequate to properly inform the public concerned of the proposed development contrary to the Public Participation Directive 2003/35/EC.

2. The respondent failed to carry out, and record, proper environmental impact assessment contrary to national and European law. In particular, the respondent failed to properly assess the cumulative impacts of the development and the implications of the development for human health.

3. The respondent failed to give any or any adequate reasons and considerations for its determinations and, in particular, for not following the recommendations of its inspector.

4. The respondent failed to carry out a proper appropriate assessment contrary to national and European law and, in particular, contrary to Article 6 of the Habitats Directive 92/43/EEC.

5. The respondent failed to award the applicants the costs of their participation in the approval process contrary to natural and constitutional justice and the public participation provisions of the Aarhus Convention and the Public Participation Directive."

17. The ensuring paras. 6-28 of the Statement of Grounds at para. (e) appear under the heading "Factual Background" and broadly set out the factual basis upon which grounds 1-5 are based, and elaborate on same.

18. At hearing and from perusal of the papers and in particular the Inspector's Report, it became apparent that within these grounds there were two themes particularly exercising the applicants. The first was a concern about the risk or perceived enhanced risk of childhood leukaemia from exposure to the electro magnetic fields (EMFs) of 110 kilovolt (kV) transmission wires. The second related to the fear that the Development would have built-in capacity which would accomodate the development of wind farms in the vicinity in due course. The court accepts that these were real and genuine concerns of the applicants.

Grounds of Challenge for which Leave was not Granted

19. In their legal submissions, both written and oral, the applicants sought to broaden their challenge on a number of grounds which had not been raised previously and were not the subject of the grant of leave. These included:-

- That it was not lawful for the Board to require an EIS by way of request for "further information", pursuant to s. 182A(5) of the PDA, 2000.

- That a complaint had been submitted to the Board and at oral hearing that the public were not allowed early and effective public participation contrary to Article 6 of the Aarhus Convention.

- That the Non Technical Summary in the EIS failed to contain certain information required under para. 7 of Annex IV of the Environmental Impact Assessment (EIA) Directive 2011/92/EU.

- That the Board failed on request to furnish a copy of its original negative screening determination that an EIS was not required.

- That there were no consultations after it was established an EIS was mandatory and required.

- That the respondent in carrying out the EIA should have had regard to the Environmental Report for the Grid 25 Implementation Programme 2011-2016, the AA Report for the SEA for Grid 25, the Laois-Kilkenny reinforcement project and the Inspector's Report.

- That the proposed Development, a 'lower tier' project, started before the SEA Grid 25 Implementation Programme, a 'higher tier' project.

- Failure to set time frames for public participation procedures within the decision making process.

- That the respondent wrongly delegated its EIA function to its Inspector by relying overly on the Inspector's Report.

- A discrete issue, raised for the first time late in the day by the applicant's counsel in his reply submission, to the effect that there had not been proper screening under the Habitat's Directive at stage one in respect of a "petrifying springs with tufa formation (Cratoneurion)" situated just outside the confines of the proposed new substation at Coolnabacky. Consequently, the Inspector had come to an incorrect conclusion in reporting that a screening for an AA was not required.

20. Both the respondent and EirGrid argued that the applicants should not be permitted to pursue these additional arguments because leave had not been granted and the complaints/arguments were raised very late in the day. Furthermore, they were not dealt with properly on affidavit and the respondent and EirGrid had not had an opportunity to consider filing further affidavits in dealing with such matters and hence were not in a position to deal with same. They also pointed to the fact that this matter had been admitted to the Commercial List on the application of EirGrid, without opposition from the applicants and that this made it all the more important that applicants should adhere to procedures and time limits and facilitate the disposal of the case during the period listed for hearing by the court.

21. For the most part these additional grounds could be described as technical in nature and not supported by any evidence that the applicants or any of them had been adversely affected or that they were genuinely concerned by the complaint made. Their counsel indicated at the outset that no application would be made for any amendment of the Statement of Grounds and none was in fact made.

22. The court indicated at the hearing that it was not disposed to allow the applicants to broaden the grounds of challenge beyond those permitted by the Order granting leave. In this respect, the court accepted the respondent and EirGrid's arguments and for the further reasons just given confirms its decision.

23. The applicants also sought to challenge the absence of reasons for the Board's "nil" costs award and they sought to bring this argument within Ground 5. In so doing, they relied on recent case law extending the obligation of decision makers to give reasons, even in instances where, as here, the decision maker has an absolute discretion – see *Mallak v. Minister for Justice* [2012] 3 I.R. 297 (Supreme Court). However, the challenge in Ground 5 is to the failure of the Board to award costs and does not mention reasons. Moreover, there was no suggestion that after the decision of the Board was published any reasons for the "nil" costs award were sought by any of the applicants prior to the issue of these proceedings. The respondent and EirGrid accordingly had not dealt with this issue on affidavit or in their written submissions and argued that they would be prejudiced if the applicants were permitted to pursue this ground. These submissions are accepted by the court and it is the view of the court that it is not appropriate to consider or determine this issue in the present case.

The Statutory Framework

24. The statutory framework for the Board's approval of a project of this nature is governed in domestic law by S. 182A, B, D and E of Part X of the PDA, 2000, Inserted by s. 4 of the Planning and Development (Strategic Infrastructure) Act 2006 and as amended by the European Communities (Public Participation) Regulations 2010 (S.I. No. 352 of 2010), Reg, 10(e); and as substituted in part by the Environment (Miscellaneous Provisions) Act, 2011, section 39, S.I. No. 374 of 2011. It was not contended by the applicants that there was any failure to properly transpose the EU Directives into Irish law, although some arguments were based around EU Directives and the Aarhus Convention.

25. Section 182A relates exclusively to the approval of projects relating to electricity transmission lines and is relevant to a number of issues arising in these proceedings and so far as is relevant provides:-

> "(1) Where a person (hereinafter referred to in this section as the "undertaker") intends to carry out development comprising or for the purposes of electricity transmission (hereafter referred to in this section and section 182B as "proposed development"), the undertaker shall prepare, or caused to be prepared, an application for approval of the development under section 182B and shall apply to the Board for such approval accordingly.

(2) In the case of development referred to in subsection (1) which belongs to a class of development identified for the purposes of section 176, the undertaker shall prepare, or cause to be prepared, an environmental impact statement or Natura impact statement or both of those statements, as the case may be, in respect of the development.

(3) The proposed development shall not be carried out unless the Board has approved it with or without modifications.

(4) Before an undertaker makes an application under subsection (1) for approval, it shall –

(a) publish in one or more newspapers circulating in the area or areas in which it is proposed to carry out the development a notice indicating the nature and location of the proposed development, and –

(i) stating that –

(I) it proposes to seek the approval of the Board for the proposed development,

(II) in the case of an application referred to in subsection (1)(a), an environmental impact statement or Natura impact statement or both of those statements, as the case may be, has been prepared in respect of the proposed development, and

(III) where relevant, the proposed development is likely to have significant effects on the environment of a Member State of the European Communities or other party to the Transboundary Convention,

(ii) specifying the times and places at which, and to the period (not being less than 6 weeks) during which, a copy of the application and any environmental impact statement or Natura impact statement or both of those statements, as the case may be, may be inspected free of charge or purchased on payment of a specified fee (which fee shall not exceed the reasonable cost of making such copy),

(iii) inviting the making, during such period, of submissions and observations to the Board relating to -

(I) the implications of the proposed development for proper planning and sustainable development in the area or areas concerned, and

(II) the likely effects on the environment or adverse affects on the integrity of a European site, as the case may be, of the proposed development,

if carried out, and

(iv) specifying the types of decision the Board may make, under section 182B, in relation to the application,

(v) stating that a person may question the validity of a decision of the Board by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and

(vi) stating where practical information on the review mechanism can be found.

(b) send a copy of the application and any environmental impact statement or Natura impact statement or both of those statements, as the case may be, to the local authority or each local authority in whose functional area the proposed development would be situate and to the prescribed authorities together with a notice stating that submissions or observations may, during the period referred to in paragraph (a)(ii), be made in writing to the Board in relation to –

(i) the implications of the proposed development for proper planning and sustainable development in the area or areas concerned, and

(ii) the likely effects on the environment or adverse affects on the integrity of a European site, as the case may be, of the proposed development, if carried out, and

(c) where the proposed development is likely to have significant effects on the environment of a Member State of the European Communities or a state which is a party to the Transboundary Convention, send a prescribed number of copies of the application and the environmental impact statement to the prescribed authority of the relevant state or states together with a notice stating that submissions or observations may, during the period referred to in paragraph (a)(ii), be made in writing to the Board.

(5) The Board may –

(a) if it considers it necessary to do so, require an undertaker that has applied for approval for a proposed development to furnish to the Board such information in relation to –

(i) the effects on the environment or adverse affects on the integrity of a European site, as the case may be, of the proposed development, or

(ii) the consequences for proper planning and sustainable development in the area or areas in which it is proposed to situate the said development of such development, as the Board may specify, or

(b) ….

(6) ….

(7) The Board shall –

(a) where it considers that any further information received pursuant to a requirement made under subsection (5)(a) contains significant additional data relating to –

(i) the likely effects on the environment or adverse affects on the integrity of a European site, as the case may be, of the proposed development, and

(ii) the likely consequences for proper planning and sustainable development in the area or areas in which it is proposed to situate the said development of such development,

or

(b) where the undertaker has made the alterations to the terms of the proposed development specified in a notification given to it under subsection (5)(b), require the undertaker to do the things referred to in subsection (8).

(8) The things which an undertaker shall be required to do as aforesaid are –

(a) to publish in one or more newspapers circulating in the area or areas in which the proposed development would be situate a notice stating that, as appropriate –

(i) further information in relation to the proposed development has been furnished to the Board, or

(ii) the undertaker has, pursuant to an invitation of the Board, made alterations to the terms of the proposed development (and the nature of those alterations shall be indicated) and, if it be the case, that information in relation to the terms of the development as so altered or a revised environmental impact statement or revised Natura impact statement or both of those statements, as the case may be, in respect of the development has been furnished to the Board, indicating the times at which, the period (which shall not be less than 3 weeks) during which the place, or places, where a copy of the information or the revised environmental impact statement or revised Natura impact statement or both of those statements, as the case may be, referred to in subparagraph (i) or (ii) may be inspected free of charge or purchased on payment of a specified fee (which fee shall not exceed the reasonable cost of making such copy) and that submissions or observations in relation to that information or statement may be made to the Board before the expiration of the indicated period, and

(b) to send to each prescribed authority to which a notice was given pursuant to subsection (4)(b) or (c) –

(i) a notice of the furnishing to the Board of, as appropriate, the further information referred to in paragraph (a)(i) or the information or statement referred to in (a)(ii), and

(ii) a copy of that further information, information or statement, and to indicate to the authority that submissions or observations in relation to that further information, information or statement may be made to the Board before the expiration of a period (which shall be not less than 3 weeks) beginning on the day on which the notice is sent to the prescribed authority by the undertaker.

(9) In this section 'transmission', in relation to electricity, shall be construed in accordance with section 2(1) of the Electricity Regulation Act 1999, but, for the purposes of this section, the foregoing expression, in relation to electricity, shall also be construed as meaning the transport of electricity by means of –

(a) a high voltage line where the voltage would be 110 kilovolts or more, or

(b) an interconnector, whether ownership of the interconnector will be vested in the undertaker or not."

Section 182B(1) provides that before making a decision in respect of a proposed development the subject of an application under s. 182A, the Board "shall consider":-

"(a) the environmental impact statement or Natura impact statement or both of those statements as the case may be submitted pursuant to section 182A(1) or (5), any submissions or observations made in accordance with section 182A(4) or (8) and any other information furnished in accordance with section 182A(5) relating to –

(i) the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the proposed development of such development, and

(ii) the likely effects on the environment or adverse affects on the integrity of a European site as the case may be of the proposed development,

and

(b) the report and any recommendation of a person conducting any oral hearing relating to the proposed development."

26. Under s. 182B(5), the Board is empowered to approve the proposed development or approve it with modifications, or approve part only, or refuse approval and it "may attach to an approval under paragraph (a), (b) or (c) such conditions as it considers appropriate".

27. Section 182B(5A) and (5B) are also relevant:-

"(5A) A decision of the Board under subsection (5) shall state –

(a) the main reasons and considerations on which the decision is based,

(b) where conditions are attached under subsection (5) or (6) the main reasons for attaching them,

(c) the sum and direct the payment of the sum to be paid to the Board towards the costs incurred by the Board of –

(i) giving a written opinion in compliance with a request under section 182E(3) (inserted by section 4 of the Act of 2006),

(ii) conducting consultations under section 182E, and

(iii) determining the application made under section 182A (inserted by section 4 of the Act of 2006) under this section,

and, in such amount as the Board considers to be reasonable, state the sum to be paid and direct the payment of the sum to any planning authority that incurred costs during the course of consideration of that application and to any other person as a contribution to the costs incurred by that person during the course of consideration of that application (each of which the sums the Board may, by virtue of this subsection, require to be paid).

(5B) A reference to costs in subsection (5A)(c) shall be construed as a reference to such costs as the Board in its absolute discretion considers to be reasonable costs, but does not include a reference to so much of the costs there referred to as have been recovered by the Board by way of a fee charged under section 144."

28. The Board is obliged to have regard to certain matters. Section 182B(10) thus provides:-

"(10) In considering under subsection (1) information furnished relating to the likely consequences for proper planning and sustainable development of a proposed development in the area in which it is proposed to situate such development, the Board shall have regard to –

(a) the provisions of the development plan for the area,

(b) the provisions of any special amenity area order relating to the area,

(c) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c), that fact,

(d) if the proposed development would have an effect on a European site or an area prescribed for the purposes of section 10(2)(c), that fact,

(e) the matters referred to in section 143, and

(f) the provisions of this Act and regulations under this Act where relevant."

29. It should be noted that under s. 143 of the PDA, 2000 the Board in carrying out its functions is obliged to have regard to the policies and objectives for the time being of the government, state authorities, the Minister and planning authorities where their functions may have a bearing on proper planning and sustainable development of cities, towns or other areas whether urban or rural. The Board must also have regard to the national interest and the effect of the project on issues of strategic, economic or social importance in the State, as well as on the National Spatial Strategy and any regional planning guidelines for the time being in force.

30. Under s. 182E, there are certain prescribed procedures that must be followed before approval is sought under s. 182B. Section 182E(1) obliges the prospective applicant (EirGrid in this instance), before making the application, to "enter into consultations with the Board in relation to the proposed development". In these consultations the Board can give advice to the prospective applicant regarding the proposed application both in relation to procedures and what considerations relating to proper planning and sustainable development or the environment as may, in the opinion of the Board, have a bearing on its decision. Under s. 182E(3) the prospective applicant may request the Board to undertake a "scoping" exercise, i.e. "give to him or her an opinion in writing…on what information will be required to be contained in an environmental impact statement in relation to the proposed development".

31. These consultations are preliminary meetings between EirGrid and the Board that precede any application or advertisement and although the Board is obliged to keep a written record of the consultations (s. 182E(6)), they are not open to the public. The Board, however, is free to obtain information from any person that it considers may be relevant for the purposes of any such consultations. The objective would seem to be to ensure that the application for approval is well scoped and properly prepared in addition to minimising the risk of false starts.

32. As stated above at para. 10, subsequent to the submission of the application (25th January, 2013), by letter dated 29th April, 2013, the Board requested further information from EirGrid, namely, the submission of an EIS, which was duly submitted to and received by the Board on 16th August, 2013.

33. The provisions of Part X of the PDA, 2000 concern the EIA and applied to the instant case once it became one in which an EIS was required. Section 171A(1) defines "environmental impact assessment" for the purposes of Part X, as an:-

> "assessment, which includes an examination, analysis and evaluation, carried out by…the Board…in accordance with this Part and regulations made thereunder, that shall indentify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:-
>
> (a) human beings, flora and fauna,
>
> (b) soil, water, air, climate and the landscape,
>
> (c) material assets and the cultural heritage, and
>
> (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c)."

34. Section 172(1H) of the PDA, 2000 is a provision of some significance in the context of the impugned decision in this case. It provides:- "In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers."

35. This would clearly include the Board's Inspector's Report. In this case- as in most infrastructural development applications- there was an oral hearing directed by the Board which resulted in an Inspector's Report.

36. It is important to note that in Ground 2, the applicants are critical not of the EIS, but rather of the failure to carry out and record "a proper environmental impact assessment". Thus, the permitted challenge is aimed at the Board's assessment rather than the content or substance of the EIS presented by EirGrid in response to the request for further information and as presented to the Inspector and supported in evidence at the oral hearing.

37. While the Board has an obligation in law to examine, analyse and evaluate the direct and indirect effects of the proposed development in relation to the areas outlined above at para. 28 in carrying out its EIA, it is left with a residual discretion to approve a development notwithstanding that there may be some adverse environmental impacts if it is allowed to proceed. As will be seen, this is in contrast to the Board's AA in respect of the adverse effects of matters conserved under the Habitats Directive. The Board is obliged under the AA procedure to withhold approval where the integrity of a European site is likely to be adversely affected or where such integrity cannot be protected by modifications or attached conditions. This residual discretion of the Board in carrying out its EIA is subject only to a test of irrationality, a subject that will be discussed later in this judgment.

Appropriate Assessment

38. An "appropriate assessment" under s. 177V(1) is defined to "include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not a…proposed development would adversely affect the integrity of a European site". A "European site" is defined under s. 177R to include, *inter alia*, "candidate special area[s] of conservation" and "special protection area[s]". Prior to undertaking an AA, a screening for AA is required under s. 177U(1) on the proposed development "to assess, in view of best scientific knowledge, if that… proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site". Subsections 177U(4) and (5) are then relevant:-

"(4) The competent authority shall determine that an appropriate assessment of a …proposed development…is required if it cannot be excluded, on the basis of objective information, that the…proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.

(5) The competent authority shall determine that an appropriate assessment of a…proposed development…is not required if it can be excluded, on the basis of objective information, that the… proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site."

39. Thus, it can be seen that where a European site is concerned, the screening exercise must be carried out and if it is determined that it cannot be excluded that the proposed development may have a significant effect on a European site, then an AA is required and a request for an NIS may be made under s. 177U(6)(b) unless an NIS has already been provided with the application. It is only in circumstances where there is no likelihood of a significant effect on the site on the basis of objective information that an AA will not be required.

40. In the instant case, Screening Reports were required because of the proximity/involvement of (1) the River Barrow and River Nore cSAC and (2) the River Nore SPA. These were carried out prior to the application for consent for development. In relation to the cSAC it was determined that a significant effect on a European site could not be excluded and accordingly, an AA was required and a NIS was subsequently prepared prior to the application being made. In the case of the River Nore SPA, it was determined that the project would not have a significant effect on a European site and an AA and NIS were not required.

41. In undertaking an AA, s. 177V(2) obliges the Board to take into account the NIS, any supplemental information furnished in relation to that statement, including information sought or obtained from the applicant or any competent authority or any advice obtained by the Board. The Board must also consider any written observations or submissions relating to the application for consent for the proposed development and

any other relevant information. Under s. 177V(3) the Board can "give consent for [the] proposed development only after having determined that the…proposed development shall not adversely affect the integrity of a European site". It may, however, under subs. (4) grant the consent with modifications or attached conditions "where the authority is satisfied to do so having determined that the proposed development would not adversely affect the integrity of the European site if it is carried out in accordance with the consent and the modifications or conditions attaching thereto".

42. Importantly, under subs. (5) the competent authority (the Board in this instance) is obliged to give "reasons for the determination".

43. There has been considerable European case law in relation to the nature of an AA, and this was carefully considered by Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] I.E.H.C. 400. At para. 40 it is stated:-

> "…the appropriate assessment to be lawfully conducted in summary:
>
> (i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.
>
> (ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.
>
> (iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects.
>
> Hence in my judgment the full appropriate assessment required by s.177V(1) must include all of the above elements and not just the determination expressly referred to in the sub-section."

44. In summary, therefore, prior to taking the approval decision in this instance, the Board had to:-

> (1) comply with the procedural and substantive requirements of ss. 182A, B and E;
>
> (2) consider what might be termed normal or general planning requirements under the PDA, 2000;
>
> (3) carry out an EIA as required under the EIA Directive as implemented by Part X of the PDA, 2000; and
>
> (4) carry out an AA as required by Article 6(3) of the Habitats Directive as implemented by Part XAB of the PDA, 2000, in accordance with the principles set out in *Kelly*.

Ground 1 – Statutory Notification of the Application for Approval Deficient

45. Pursuant to s. 182A the application was advertised by EirGrid in the "Leinster Express", the "Irish Independent" and the "Kilkenny People" on 22nd, 23rd and 25th,January, 2013, respectively. These gave a detailed description of the works broken down into eight elements; subparagraph (i) concerned the construction of a new substation at Coolnabacky with switch gear transformer connections, fencing, buildings and ancillary works. Element (v) was a new 110kV overhead line between proposed substations at Ballyragget and Coolnabacky with 26km of

overhead line on 143 double wood polesets up to 22 metres in height and 17 lattice steel angle masts up to a maximum height of 25 metres and much shorter length of underground cable. Although the number of wood polesets in this description was inaccurate, no point was taken about this by the applicants. The applicants' complaints related to element (vi) which read as follows:-

> "(vi) An uprate to the existing Ballyragget - Kilkenny 110kV overhead line consisting of the replacement of all the structures along the existing line with similar structures along the same alignment except for the first 670m out of Ballyragget substation and the first 275m out of Kilkenny substation which are required to be realigned as well as uprated. The development comprises approx. 21.9 km of overhead line and 2 no. short lengths of cable at Ballyragget and Kilkenny substations. The overhead line will consist of 90 no. double wood polesets up to a maximum height of approx. 22m and 14 no. lattice steel angle masts up to a maximum height of approx. 25m supporting three electrical conductors. Approx. 215m of underground cable connects the proposed Ballyragget 110kV building to a proposed line/cable interface mast and approx. 50m of underground cable connects the lines/cable interface mast to the electrical equipment in Kilkenny substation…."

46. The applicants' complaint is that the existing Ballyragget-Kilkenny 110kV line does not in fact exist. .They complained that the notification did not disclose what was in fact proposed in the Development, which would be an increase in the operational voltage from 38kV to 110kV. Accordingly, they asserted that the Notice failed to properly describe the proposal and failed to inform the public concerned including the applicants of the full nature and extent of the proposal.

47. In fact, this issue was not raised by the applicants at or prior to the oral hearing but was raised by the Inspector, Mr. Andrew Boyle, in his report to the Board dated 31st January, 2014, in which he stated as follows:-

> "There is a further inaccuracy in the public notices which has not been raised to date. Unit (vi) is stated to consist of an upgrade to the existing Ballyragget to Kilkenny 110kV overhead line. There is, in fact, no existing 110kV line between Ballyragget and Kilkenny. The existing overhead line between these locations is operating at 38kV, but has been built to 110kV standard. It has all the appearance of 110kV overhead line. Although, unlike the overstatement of the number of pole sets in unit (v), this error understates the nature of the proposed development, nevertheless, in general, I take the same view as has been taken in the case of the claimed typographical error in relation to the number of pole sets. There is a difficulty insofar as the overstatement of the existing voltage could be taken to imply that there would be no alteration in the magnetic and electric fields arising from this altered power line. However, this is not the case, as can be seen at figures A6 and A11 in appendix 5.1 of the Environmental Impact Statement.
>
> The closest residence to this power line is shown to be at a distance of 16 metres, i.e. that adjacent to pole set BK96 as shown on Drawing PE687-D261-017-038-001. Although the two figures in Appendix 5.1 are to a fairly small scale (approximately 1:450 and 1:300, vertical, respectively), I estimate that the magnetic field at this location would rise from about 0.3μT [(microtesla)] to 1.8μT and that the electric field at this house would rise from about 0.15kV/m to 0.3kV/m. The implication of the increased magnetic field levels is that there could be an increased risk of childhood leukaemia in this house and others in close proximity to this upgraded power line. "

48. The Inspector in his report concluded as follows:-

> "Overall, I consider that the proposed development should be regarded as acceptable. However, having regard to the precautionary principle, I have concerns in relation to the upgrading of the existing power line between Kilkenny and Ballyragget. It appears that several houses in the vicinity of this power line would be subject to magnetic field exposure at a level which could give rise to an increased risk of childhood leukaemia. Rather than recommending refusal on this basis, I consider that it would be preferable to seek clarification on this matter with the applicant by way of further information."

49. The Inspector then included in his report a recommendation that EirGrid be written to, pursuant to s. 182A(5)(a) of the PDA, 2000, requesting comment on two matters - the first, which shall be addressed later, concerned EMF exposure and possible realignment of the line - and the second stated:-

> "The Board is also concerned that this "unit" of the proposed development may not have been adequately advertised in the public notices insofar as it is described as "an uprate to the existing Ballyragget – Kilkenny 110kV overhead line" whereas, in fact, this line, although claimed to be constructed to 110kV standard, is operating at 38kV. Accordingly, the public may be unaware of the full implications of this "unit" of the proposed development. You are requested to comment on this matter, also."

50. The Board addressed these issues in two separate paragraphs in its approval decision in the following terms:-

> "In deciding not to accept the Inspector's recommendation to seek further information from the applicant in relation to the electricity line between Ballyragget and Kilkenny, the Board examined the planning history of the existing electricity line, which was permitted as a 110-kilovolt line and constructed accordingly. Although in operation at 38 kilovolts, the Board considered that the proposal to uprate this line in accordance with its permitted voltage was reasonable."

51. And, one page further on, the Board stated:-

> "Finally, the Board noted the Inspector's second concern in relation to the accuracy of the description of the proposed "uprate to the existing Ballyragget-Kilkenny 110 kV overhead line". The Board considered that the description as set out in the public notices is satisfactory. The Board noted that this section of existing line is already permitted at 110 kilovolts and was constructed accordingly, and notwithstanding the current operational voltage, the Board is satisfied that the public would not have been misinformed in any material way as to the principal nature and extent of the proposed development, and that the rights of the public to participate in the planning, environmental impact assessment and appropriate assessment processes have not been infringed."

52. It is clear that the planning history did accompany the application for approval in the form of a Planning Report, from which it appeared at p. 61 that:-

> "The existing Ballyragget-Kilkenny line was permitted in 1988 (Reg. Ref. KCC P.702/88). Planning permission was granted in 1998 (Reg. Ref. KCC P.98/10) to realign and upgrade 670m of the existing Ballyragget-Kilkenny 110 kV line from 38 kV to 110 kV . Planning permission was also granted in 1998 to erect a 110 kV substation at Ballyragget (Reg. Ref. KCC P.98/390). In addition, the existing substation in Athy was developed in 2011"

53. Mr. Des Cox, Town Planner, asserted in an affidavit sworn on behalf of EirGrid that it was quite clear on the face of the existing planning permissions that they related to a 110kV line and that the 1998 application stated that it was for a permission to realign a section of the existing Ballyragget-Kilkenny 38kV line "and to upgrade this section to 110kV Line standard". Mr. Cox also asserted that "the existing line has the visual appearance of a standard 110kV circuit, comprising a horizontal formation of three overhead conductors (wires), supported on a series of double wood pole structures, *lattice steel angle towers sited at locations* where the existing alignment changes direction". Mr. Cox expressed his view as a town planner that the ordinary meaning of the permissions granted in respect of the Kilkenny-Ballyragget line "is clearly understood to include the construction of the electricity transmission to 110kV standard and operation at that standard" (see Supplemental Affidavit of Des Cox, at para. 4).

54. The respondent and EirGrid argued that the public notices did in fact indicate the "nature and location" (the term used by s. 182A(4) of the PDA, 2000) of the proposed development, in that the Kilkenny 110kV line did/does exist, albeit that *operationally* it is only taking 38kV. They pointed out that in all other respects, e.g. the inclusion of references to all relevant townlands, the project had been correctly identified.

55. The respondent and EirGrid also relied, by analogy, on the case law relating to requirements in notices advertising applications for planning permission to local planning authorities and they referred to *Monaghan UDC v. Alf-a-Bet Promotions Ltd.* [1980] I.L.R.M. 64 in which the Supreme Court held that no member of the public could have been expected to glean from the general words "alterations and improvements" that planning permission was sought for the conversion of what had been a drapery store into a betting office and amusement arcade. In that case Henchy J. stated:-

> "any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with".

Griffin J. stated in the same case:-

> "The purpose of the Acts, therefore, is to ensure proper planning and development, not in the interests of the developer, but in the interests of the common good. The primary purpose of Articles 14 and 15 in relation to the notice in newspapers is to ensure that adequate notice is given to members of the public who, may be interested in the environment or who may be affected by the proposed development, that permission is sought in respect of that development, so as to enable them to make such representations or objections as they may consider proper."

56. In *Springview Management Limited v. Cavan Developments Limited [*2000] 1 I.L.R.M. 437, O'Higgins J. considered the judgment of Griffin J. in Alf-a-Bet and concluded that a failure to clearly describe the houses, the subject of the application, as being terraced houses was not fatal. O'Higgins J. held that the public notice had, as was required, "alerted any vigilant or interested party to what was being contemplated". He stated that if the applicant's members wanted to have further information as to precisely what was envisaged in relation to the material development, they could have inspected the plans submitted with the application.

57. EirGrid also submitted that there was no express requirement in s. 182A(4)(a) to set out the "extent" of the Development and it is argued that the public notices in fact correctly set out the "nature" and "location" of the Development and that they were not misleading.

58. The supporting argument is also made by the respondent and EirGrid that, notwithstanding the suggested deficiency in the public notices, a large number of parties were alerted by them to what was being contemplated in the application for approval and that the applicants were not in fact deceived. It is also argued that on foot of the public notices and other means of communications with the public concerned, many persons, including the applicants, made their submissions and observations in writing to the Board and appeared or were represented at the oral hearing convened by the Board on the application.

Decision

59. The court is satisfied that the wording of element (vi) in the public notices was sufficient to comply with the requirements of publication of the "nature and location" of the Development as required by s. 182A(4) of the PDA, 2000. The court is satisfied that there was, in fact, an "existing Ballyragget-Kilkenny 110kV overhead line". This is clear from the historical development of the line as laid out in s. 6.2 of the Planning Report submitted by EirGrid. The court accepts the uncontested expert evidence of Mr. Des Cox, Town Planner, that the existing planning permission extended not only to the existing 100kV line but also to its operation at that standard.

Moreover, in accordance with planning regulation, the "nature and extent" of these preceding developments will have been advertised prior to the grant of the two planning permissions. As such, at those times members of the public had an opportunity to participate in the process and to raise objections or make submissions based on anticipated use of the overhead lines for the transmission of 110kV.

I also accept the evidence of Mr. Cox that the appearance of the existing line was that of a 110kV circuit.

60. The court is further of the view that the use of the word "uprate" was a reasonable description of the intended Development described at element (vi) when read as a whole. Interested parties and members of the public could have been left in no doubt as to the specification to which the overhead lines would be operated. The advertisement also led them to further and more detailed documents and information. As a result, they were able to consider and make submissions and observations in relation to the lines and poles and to the EMFs that would be associated with the operation of these lines at 110kV.

61. Even if there was some deviation from the strict requirements of advertisement (which the court does not accept), in the view of the court, and adopting the test enunciated by Henchy J. in the *Alf-a-bet* case, the deviation was "…so trivial, or so technical or so peripheral, or otherwise so insubstantial that…the prescribed obligation has been substantially, and therefore adequately, complied with".

62. In addition, the court accepts the supporting argument of EirGrid that a large number of parties were in fact alerted by the public notices as to what was being contemplated. On foot of those notices and other means of communication with the public concerned, many persons including the applicants made their submissions and observations in writing to the Board and appeared or were represented at the oral hearing convened by the Board on the application and none of them complained about this suggested deficiency in the advertisement. In this regard, the court accepts that the application for approval was on display at the offices of the Board, the offices of Laois County Council and the offices of Kilkenny County Council. The court also accepts that the application was also published on a dedicated website and information brochures were made available at events such as the National Ploughing Championships. In fact, in this instance there was a second series of public notifications arising from the necessity to carry out an EIS. This publication took place on 10th and 11th September, 2013 and over six weeks in advance of the oral hearing which commenced 4th November, 2013. As EirGrid point out, from the materials that were available for inspection, including the EIS, it would have been abundantly clear that the Development contemplated the use of the 110kV lines for transmission of 110kV. This series of further advertisements in September, 2013 then led into the oral hearing, in the course of which concerns arising from EMFs based on 110kV were extensively explored in the context of relevant and up to date scientific information, analysis and recommendation. There can be no doubt but that persons participating in the oral hearing ought to have been aware that the existing line, although built to a 110kV, was actually operating at 38kV and that the Development would mean that it would operate at 110kV. Mr. Barniville SC on behalf of EirGrid was in a position to point to at least eight references in the written documentation comprising the application, including the EIS, in which this was made explicitly clear. It was also explicit in the SEA that the circuit from the new station to Kilkenny would use the existing Ballyragget-Kilkenny 38kV line which is built to 110kV standards. The SEA was published in a newspaper notice and went on public display in March 2011.

63. Mr. Barniville SC also argued that there was a distinction to be drawn between the requirement of s. 182A(4) for advertisement of the "nature and location" of the proposed development and the words "nature and extent" used in respect of non-infrastructural planning applications to local planning authorities. He argued that there was no obligation on EirGrid to publish the extent as opposed to the location of the proposed development.

64. It is notable that the scheme of the PDA, 2000 seems to require publication to specify the "nature and location" in relation to proposed Strategic Infrastructural Developments (see s. 37E(3)), for certain state developments requiring EIAs (s. 181A(3)), and for strategic gas infrastructure and developments (s. 182C(4a)- as well as the proposed development of electricity transmission lines under s. 182A. In general, what would seem to be common to these projects is their scale and complexity and the concomitant extent of environmental and Habitats Directive investigations and reports that are required. It is easy to understand how unduly burdensome it would be for undertakers to have to advertise in notices the full extent of such major projects – this would simply take up too much print, be indigestible to the reader and excessively costly. Indeed, the level of detail could defeat the purpose of publication. The main objective in advertising the "nature and location" would seem to be to alert the public to the general nature and geographical location of the infrastructure proposed and to direct them to locations, including physical locations and a website, where the full application and detailed supporting material can be scrutinised. Thus, while the advertisement must provide summaries in relation to the "nature", of the development they are not required by statute to state "the

extent" of the development beyond identifying its location. I am satisfied that the advertisement on both occasions complied with the statutory requirements and that none of the Applicants were in fact deceived by the description.

65. It follows that the court agrees with the view expressed by the Board in the impugned decision that it was entitled to consider that "the description as set out in the public notices is satisfactory" and to proceed, contrary to the recommendation of the Inspector in so far as he suggested that further information/comment be sought from EirGrid.

Ground 2 – Failure to Carry Out and Record a Proper Environmental Impact Assessment and, in Particular, Failure to Properly Assess the Cumulative Impacts of the Development and the Implications of the Development for Human Health.

66. Before assessing the applicants' particular complaints in relation to the impugned decision on the issues of (1) human health and (2) the accumulative impacts of the Development, it is appropriate to state the central principles that the court applies in addressing the remaining grounds of judicial review.

67. Firstly, the Board's decisions enjoy a presumption of validity until the contrary is shown. As McGuinness J. stated in *Lancefort Ltd. v. An Bord Pleanála* (unreported, High Court, 12th March, 1998):-

> "The onus of proof in establishing that An Bord Pleanála did not consider the question of environmental impact assessment…and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant."

This principle has been followed in many cases and most recently by O'Neill J. in *Harrington v. An Bord Pleanála & Ors* (unreported, 9th May, 2014).

68. As to the standard of review applicable to the Board's decision, in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 Finlay C.J. stated:-

> "It is clear from these quotations that the circumstances under which the court can interfere on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene.
>
> The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.
>
> These considerations, described by counsel on behalf of the appellants as the height of the fence against judicial intervention by way of review on the grounds of irrationality of decision, are of particular importance in relation to questions of the decisions of planning authorities.
>
> Under the provision of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of a planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor it is expected to, nor can it, exercise discretion with regard to planning matters.
>
> I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the

> applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

69. One of the cases from which Finlay CJ quoted with approval was *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 in which Henchy J. set out the grounds of unreasonableness or irrationality in different terms:-

> "1. It is fundamentally at variance with reason and common sense.
>
> 2. It is indefensible for being in the teeth of plain reason and common sense.
>
> 3. Because the court is satisfied that the decision-maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.'"

70. More recently in *Weston v. An Bord Pleanála* [2010] I.E.H.C. 255, Charleton J. held:-

> "The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. Furthermore, where, as a colourable device, a reason is chosen for refusing permission which does not give rise to an entitlement to compensation under the legislation, the burden of proving that a decision choosing such an incorrect reason for that improper purpose rests on the applicant. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal on a non-compensatory ground is sufficient to support the lawfulness of a decision."

71. The deference that a court should give to the decisions of different administrative bodies, depending on their nature and the extent of their expertise, was considered by Clarke J. in *Ashford Castle Ltd. v. SIPTU* [2007] 4 I.R. 70. In the course of this judgment he stated:-

> "At the other end of the spectrum, expert bodies may be required to bring to bear upon a situation a great deal of their own expertise in relation to matters which involve the exercise of an expert judgment. Bodies charged with, for example, roles in the planning process are required to exercise a judgement as to what might be the proper planning and development of an area. Obviously in coming to such a view the relevant bodies are required to have regard to the matters which the law specifies (such as…a development plan). However a great deal of the expertise of the body will be concerned with exercising a planning judgment independent of questions of disputed fact. In such cases the underlying facts are normally not in dispute. Questions of expert opinion (such as the likely effect of a proposed development) may well be in dispute and may be resolved, in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence. However above and beyond the resolution of any such issue of expert fact, the authority concerned will also have to bring to bear its own expertise on what is the proper planning and development of an area."

72. With specific reference to challenges to decisions of the Board where an EIA had to be carried out, in *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59 at p. 73 McMahon J. held that:-

> "It is recognised in cases such as this that the court in reviewing the Board's decision will not interfere with the *bona fide* exercise of its discretion in these matters. It is not the court's function to second guess the respondent and substitute its own decision for that of the Board. The legislature, in its wisdom, vested the power to make such a decision in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions

> in this specialised area than the court, which has to rely on expert evidence to inform it in these cases. The courts will only interfere in such decisions where they appear so irrational that no reasonable authority or decision maker in this position would have made such a determination. Although the attitude has been criticised as being over deferential, this judicial restraint is now well established in our jurisprudence. Whether it will have to be reassessed in future because of more recent European Union directives in this area remains to be seen. Such a reassessment does not arise in this case, however."

73. The applicants' counsel, Mr. Fogarty SC, did suggest in argument that the test for unreasonableness in *O'Keeffe* was too extreme. He relied on Article 11 of the EIA Directive (2011/92/EU) sub article 1 which states:-

> "1. Member states shall ensure that, in accordance with the relevant national legal system, members of the public concerned-
>
> (a) having a sufficient interest, or alternatively;
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omisisons subject to the public participation provisions of this Directive."

Section 50(2) of the PDA, 2000 specifically provides that a person shall not question the validity *inter alia* of a decision of the Board otherwise than by way of an application for judicial review under Order 84 of the RSC 1986. Clearly the court can quash a decision for procedural irregularity. The court can also intervene where it is shown that the Board has failed to have regard to matters to which it aught to have regard or has had regard to irrelevant matters or where the decision is otherwise unlawful. Furthermore, the court can quash a decision where it is irrational in the sense of failing the *O'Keeffe* test of unreasonableness.

74. Mr. Fogarty SC relied on an extract from the Opinion of Advocate General Jacobs in *SIAC Construction v. Mayo County Council* C-19/00. This case dealt with a review of a public procurement contract. At para. 53, Advocate General Jacobs stated:-

> "It is again for the national court to determine whether the criterion was applied objectively. That issue is related, but not identical, to the question of unreasonableness, which was addressed in some detail by the High Court by considering whether the award decision 'plainly and unambiguously flew in the face of fundamental reason and common sense'. The test for objectivity should be, I consider, rather less extreme."

Mr. Fogarty SC relied on the subsequent decision of the Supreme Court in *SIAC Construction v. Mayo County Council* [2002] 3 I.R. 148 where at p. 176 Fennelly J. noted that the O'Keeffe principles are inapplicable in the field of public procurement:-

> "Therefore, I am satisfied that the courts, while recognising that awarding authorities have a wide margin of discretion, must recognise that this cannot be unlimited. The courts must exercise their function of judicial review so as to make the principles of the public procurement directives effective. In the case of clearly established error, they must exercise their powers. The application of these principles may not, in practice, lead to any real difference in result between the judicial review of purely national decisions and of those which require the application of community law principles."

75. Reliance on this case law is misconceived as a different regulatory framework applies to public procurement and the review of public procurement decisions. Directive 89/665/EC ("the Remedies Directive") applies to a review of such decisions and was transposed into domestic law by the EC (Review Procedures for the Award of Public Supply and Public Works Contracts) Regulations 1992. Again in the *SIAC case* Fennelly J. at p. 174 stated:-

> "Thus, it seems to be well established by a significant line of case law of the Court of First Instance that a community institution, when in a comparable situation to the awarding authority of a member state, enjoys "a wide discretion" as to the criteria by which it will judge tenders and, moreover, its decisions will be annulled only if a"manifest error" can be demonstrated."

Thus, the test of "clearly established error" or "manifest error" applies to reviews of public procurement decisions.

76. It is the view of this court that the more limited test for substantive review on grounds of irrationality set by the *O'Keeffe* case, and reiterated in the case law derived from that case, is both well established and remains appropriate, and continues to bind the High Court at least in its review of decisions of the Board, including EIAs forming part of such decisions.

Human Health
As has been seen under s. 171A(1) of the PDA, 2000, an EIA means an assessment which identifies, describes and assesses in an appropriate manner the direct and indirect effects of a proposed development on *inter alia* human beings.

77. The applicants claim that the Board failed properly to assess the increased risk of childhood leukaemia from the EMF levels likely to result from the proximity of the 110kV lines to certain houses – 1 house being within 16 metres of a transmission line and four houses being within 45 metres of such lines. They relied in particular on the Inspector's treatment in his report of the EMF Report which was presented as part of the EIA and comprised some 51 pages and included various graphs plotting the magnetic or electrical fields. At p. 79 of his report, the Inspector stated:

> "Despite the averred adherence to the precautionary principle, it appears that the proposed upgraded power line from Ballyragget to Kilkenny could have an adverse impact on those living closest to it in terms of magnetic field radiation. The text at page 7 of the EMF report and its table A-2 shows that the calculated magnetic field value at 50 metres from the centre of this upgraded power line would be 0.2μT. Figure A-6 shows the calculated magnetic field profile of the existing and upgraded power line from Ballyragget to Kilkenny. This is at a small scale, but I estimate that the magnetic field would fall off from 10.6μT below the centreline of the power line to the level of 0.3μT at a distance of about 45 metres. These levels are for average loading, but I note that table A1 shows that the average load would be 67 MVA, whereas the peak load would be 223 MVA. (The latter figure might be for a few hours or days per annum). The present existing levels are 4 MVA and 18 MVA, respectively. Assuming that a distance of 45 metres from the centreline is correct for a magnetic field value of 0.3μT, it appears that there would be four houses within this distance of the upgraded power line from Ballyragget to Kilkenny. One of these houses would be as close as 16 metres. Having regard to the precautionary principle, I do not believe that the Board can be satisfied that he proposed upgraded power line from Ballyragget to Kilkenny would not possibly have an adverse impact on the health and safety of persons occupying these houses".

78. At the end of his report, the Inspector stated that rather than refusing the application, he believed that it would be preferable to seek clarification as to the effects of the increased EMF exposure.

79. The Inspector then proceeded to recommend that the applicant be written to *inter alia* in the following terms:-

> "Having regard to the documentation lodged with the application and the Environmental Impact Statement lodged as further information, and, in particular, the information contained in Appendix 5.1 of the Environmental Impact Statement, and having regard to the precautionary principle, the Board is concerned that a number of residences adjacent to the route of the upgraded overhead power line between Kilkenny and Ballyragget would be exposed to an average magnetic field greater than 3mG. You are requested to comment on this matter and, in the event that any remedial measures are proposed, including the realignment of the power line, to provide details of these measures commensurate with the level of detail and scale of drawings in the application to date."

80. The Board declined to follow this particular recommendation of the Inspector, although adopting his report in other respects. The relevant parts of the Board's decision are as follows:-

> "The Board is satisfied that the information available on file is adequate to allow an environmental impact assessment…to be completed."
>
> "In this regard, the Board also noted the Inspector's specific concerns in relation to the magnetic field rising from the proposed development; however, the Board had regard to the exposure guideline set by the International Commission on Non-Ionizing Radiation Protection (ICNIRP), and which, in 1998, identified a magnetic field reference level for the general public of 100μT (microtesla). This reference level applies to all exposure situations, including long-term exposure. It is noted that the ICNIRP carried out a review of these guidelines in 2010, and increased the reference level for the general public to 200μT.
>
> The Board is satisfied that the predicted magnetic fields arising from the proposed development at certain houses would be significantly lower, by orders of magnitude, than established ICNIRP reference levels, which are considered to provide an acceptable level of protection for the general public."

81. In forming this view, the Board also had regard to a number of publically available scientific and government reports concerning EMFs outlined on p. 8 of its decision. The Board then went on to state that:-

> "Therefore, and notwithstanding the proposed increase in voltage of this line, the Board is satisfied that the resulting magnetic field exposure at houses would be far below that of established guidelines, and did not accept the Inspector's recommendation in relation to public health.
>
> Taking all of the above into account, including the planning history of the existing line and the ICNIRP guidance in particular, the Board did not consider that any re-alignment of the existing power line would be necessary or appropriate."

82. In declining to accept the Inspector's recommendation to seek further information the Board also stated as follows:-

> "In deciding not to accept the Inspector's recommendation to seek further information from the applicant in relation to the electricity line between Ballyragget and Kilkenny, the Board examined the planning history of the existing electricity line, which was permitted as a 110-kilovolt line and constructed accordingly. Although in operation at 38 kilovolts,, the Board considered that the proposal to uprate this line in accordance with its permitted voltage was reasonable."

83. The applicants assert that the Board failed to "record" the EIA. The applicants also aver that the Board failed to "engage" with the Inspector's assessment and disregarded his concerns which were based on broader factors. They asserted that the Board failed to give any or any proper reasons for its decision to depart from the Inspector's recommendation (that the Board seek further information). They asserted that this aspect of the decision was entirely unreasonable having regard to the potential health consequences and risks.

84. The respondent and EirGrid argued that there was no evidence that the Board had failed to carry out or record a proper EIA; that there was ample evidence on which the Board could come to the conclusions and assessment that it did come to. They contended that in the light of the evidence and particularly international research which was considered by the Board, its conclusion could not be impugned for irrationality. They argued that ample reason had been given by the Board for rejecting the Inspector's recommendation that further information be sought, in particular pointing to its conclusion at para.77 above that the predicted EMFs arising from the proposed development would be significantly lower by orders of magnitude than established ICNIRP reference level which are considered to provide acceptable protection for the general public. They pointed to the reference level of 200μT under the ICNIRP guidelines of 2010 in comparison with the anticipated levels of 0.2μT 50 metres from the centre of the power line and 10.6μT below the centre line of the power line anticipated in the Inspector's Report.

Decision

85. The court is satisfied firstly that the Board did undertake a comprehensive EIA in relation to this aspect of the Development and that this is recorded in the body of the decision where the Board stated that it was satisfied that the information available on file was adequate to allow an EIA to be completed. It is also apparent from a reading of the decision as a whole that the Board considered and assessed the EIS, the Inspector's Report (where an assessment of the EIS and this issue was carried out by the Board's nominated officer) and other relevant documentation. The Board also expressly confirms that in forming its view it had regard to listed and publicly available documents of a scientific or guidance nature relevant to this issue. Secondly, the Board clearly had before it relevant evidence from which it could take a decision in relation to this aspect of the Development. Thirdly, it is clear that the mere fact that the Development will or might have some adverse affect, or will lead to increased EMF levels, does not of itself mean that the Board is obligated to decline approval or even to follow the Inspectors advice and recommendation to obtain further information. The Board has a discretion in reaching its decisions provided it decides on the basis of relevant material. Fourthly, no case has been made out that this decision flies in the face of fundamental reason or common sense. On the contrary, it was guided by up to date scientific evidence on the possible effects on humans of EMFs, and by up to date Government policy documentation. Moreover, the anticipated increase in EMFs is still far below that which would give rise to scientific concern for human health. For instance, from reading the EMF Report, it emerges that a washing machine is likely to produce a greater EMF than that created by a 110kV line in respect of a house lying within 16 metres. EIS Appendix 5.1, EMF Report, p. 4. This scientific evidence was not contested- indeed no scientific evidence was adduced by the Applicants either at the oral hearing or before this court. The court is satisfied that the applicants have failed to discharge the onus of proof in relation to this aspect of Ground 2.

Failure to Assess the Cumulative Impacts of the Development

86. The applicants assert that in carrying out the EIA the respondent failed to properly assess the cumulative impact of the Development. In elaborating this ground in para. 20 of the Grounds, it is stated that:-

> "The applicants herein raised significant concerns in relation to the capacity of the proposed development and in particular the fact that the development provided for significant spare capacity to be utilised into the future. This use to which this future capacity was to be put is nowhere identified in the planning documentation or the EIS. It is clear however, that the development is part of an overall strategy that has not been subject to either a strategic environmental assessment or an environmental impact assessment. This is contrary to European Law and the public participation directive."

87. The real concern here appears to be the applicants' fears that the project will enable to establishment of new wind farms in the region. In their written and oral submissions the applicants sought to expand this ground to include an assertion that the Board breached its obligations under s. 172(1D) of the PDA, 2000 which obliges the Board to "consider whether an environmental impact statement submitted under this section identifies and describes adequately the direct and indirect effects on the environment of the proposed development...".

88. In elaborating this argument, the applicants complain that nowhere does the EIS deal with the effect the project will have on the ability to accommodate more wind farms in the region and that the Inspector refused expressly to deal with the issue of wind farms notwithstanding submissions received. The applicants cite a passage at p. 112 of the Inspector's Report which states:-

> "…at the time of the oral hearing, there were two live planning applications for wind farms in the vicinity, namely a development of eighteen 85 metre high wind turbines to the east of Ballyroan Village and the southwest of Timahoe Village at Cullenagh Mountain (Laois County Council Reg. Ref. 13/268) and a development of 8 wind turbines up to 100 metres in height to the east and northeast of the village of Ballinakill (Laois County Council Reg. Ref. 13/262). The former has now been refused by the planning authority and is currently on appeal (PL.242626), while the latter has been withdrawn. However, these are not permitted developments and, even if ultimately granted planning permission, they would still be dependant on receiving a connection authorisation from the Commission for Energy Regulation. There is very considerable uncertainty over these wind farms, or,

> indeed, any other wind farms which have not even reached the planning application stage. It is unreasonable to expect that they would be factored in to considerations of the present project."

89. The submission is made that the Inspector's approach was wrong in so far as he chose not to consider potential developments which were not yet permitted. In their written submission it was further submitted that the Inspector failed to have regard to additional electrical infrastructures or quarries explicitly mentioned in the Grid 25 Implementation Programme 2011-2016 SEA.

90. The respondent and EirGrid in their submissions relied on s. 172(1H) and pointed to the fact that the Board stated in its decision that it had regard to the EIS and other documentation listed on file when carrying out the EIA. They pointed to a discreet chapter in both the EIS and Environmental Report originally submitted with the application dealing with interactions or inter-relationships between environmental factors, i.e. the cumulative impacts. They further argued that the cumulative impacts were addressed in the Inspector's Report. In so far as the applicants assert that the Inspector's treatment is inadequate, the respondent submitted that there cannot be a requirement for the Board to assess interactions between the proposed development and other inchoate developments which may or may not occur in a manner and timescale that is as yet completely indeterminate. In this regard, reliance was placed on the decision of *Sloane v. An Bord Pleanála* [2003] 2 I.L.R.M. 61. EirGrid also submitted that it is inherent in sustainable electricity transmission development that an element of additional or spare network capacity is incorporated and points to the fact that the EIS and other documentation submitted with the application referred expressly to additional or spare network capacity.

Decision

91. Firstly, the submission that the Development is part of an overall strategy that was not subjected to SEA is incorrect. As noted in para. 6 of this judgement, Grid 25 was subjected to SEA.

92. Secondly, it is the case that there is no explicit statement in the impugned decision that the Board has considered the cumulative direct or indirect effects on the environment of the proposed development. However, the court is of the view that the decision falls to be considered in its entirety and if on a fair reading it includes an evaluation of the cumulative environmental effects which it is required by law to consider including those impacts and matters canvassed in the EIS, the Inspector's Report and other documentation before it, then the Board complies with its statutory obligation to carry out an EIA.

In this regard, the Board is not required to set out at length in its decision all of the materials that it considered, together with an examination and analysis of all of those materials. Specifically, s. 172(1H) of the PDA, 2000 permits the Board to have regard to and adopt reports such as that prepared by the Inspector. Also significant is that under s. 182B(5A) of the PDA, 2000, the Board is only obliged to state the *main* reasons and considerations for its decision and for attaching conditions to its decision.

93. Reading the impugned decision as a whole and having regard to the Inspector's Report and contents of the EIS, the court is of the view that the Board did consider and evaluate the environmental impact of the Development including cumulative environmental effects.

94. With regard to wind farms for which planning permission had yet to be obtained, the court considers the *Sloane* decision helpful. *Sloane* involved a challenge to a decision to approve a road construction scheme from Balriggan in Kilcurry, Co. Louth to Ballymascanlon, Co. Louth, a 3km stretch of road also known as the Dundalk Western By-Pass Northern Link Road. Its effect was to further develop the exiting Rosslare-Larne Motorway Scheme from Balriggan to link with the existing national road from Dundalk to Newry at Ballymascanlon Roundabout.

The argument was advanced by the applicant in that case that cumulative assessment required that the proposed road be considered cumulatively with *inter alia* another proposed road – i.e. the road which would ultimately be developed northwards after the disputed section was built, Kearns J. (as he then was) stated:-

> "It was submitted that the respondent had no obligation to consider matters which must be the subject of a separate application for approval of a separate scheme as part of its obligation to consider all matters relating to a scheme submitted to it for approval. Roads by their nature are necessarily inter-related. The illogical consequence of following the applicants' argument would be that no decision could be made on the 3km stretch of road without at the same time considering the entire of Euro route EO1 from Larne to Rosslare".

95. In that case Kearns J. refused leave to seek judicial review. The decision in *Sloane* appears to make eminent sense. Cumulative assessment surely requires that the development be assessed in the light of existing and permitted development in the relevant area. It cannot involve deliberation on possible future development which may be at the concept, design or the early planning stage and which may not yet have been authorised. There may be exceptional cases in which development which has not yet been permitted must be considered but as a general rule this would not seem necessary as it would enter on the realms of speculation. A case where it could arise, which is identified in the written submission of the respondent, is where a project could be artificially sliced into several smaller projects so as to avoid thresholds for EIA purposes or in order to avoid possible objections based on cumulative effects. However, this is clearly not a proposed development where any such artificial slicing has taken place and no such argument was put by the Applicants.

96. The court accepts the respondent's submission that the Board was not required to consider possible wind farms for which planning permission had yet to be obtained. What the applicants assert in this instant case is that completely separate and inchoate matters, namely hypothetical developments of wind farms which at the time of the Board's decision were not permitted or approved, should be assessed cumulatively with an electricity transmission system, solely on the basis that same will either draw from it or feed into it. The applicants' assertion is unsustainable and the court finds that the applicants' complaint that there was no proper EIA in respect of potential wind farms in the region is not well grounded.

97. The court therefore finds that the Board did in fact undertake an EIA, that this encompassed consideration of the relevant cumulative effects, both direct and indirect, of the proposed development and that its approval decision in this regard is unimpeachable.

Ground 3 – Failure by the Respondent to Give Adequate Reasons and Considerations for its Determinations and in Particular for not Following the Recommendations of its Inspector.

98. This ground has already been considered in the context of the applicants' claims that no proper EIA was carried out and that, in particular, the respondent failed to assess the cumulative impacts of the development or the implications of the development for human health. It is the view of the court that the respondent did give adequate reasons and considerations for these determinations. Furthermore, for the reasons just given, the court considers that the Board gave clear reasons for not following the recommendations of the Inspector in relation to seeking further comment both in relation to EMF exposure/possible realignment of the transmission lines and the accuracy of the description of the proposed development in the advertisements. As to the adequacy of these reasons, as the court has already indicated it considers that:-

> (a) there was ample evidence before the Board from which it could make its determinations and decide not to follow the recommendations of the Inspector; and
>
> (b) its reasons for not following the recommendations of the Inspector are clearly and sufficiently explained in the Board's approval decision.

Ground 4 – No Proper Appropriate Assessment under Article 6 of the Habitats Directive 92/43/EEC

99. The applicants claim that the Board failed to carry out a proper AA of impacts of the proposed development on neighbouring European sites. In the elaboration of their grounds at paras. 21-27 of the Statement of Grounds they make three claims:-

(1) Firstly, that the Inspector in his report largely recites the NIS verbatim in dealing with the potentially significant impacts on the conservation interests of the River Barrow and River Nore cSAC, contrary to Article 6 of the Habitats Directive which requires a full assessment.

(2) Secondly, the applicants assert that the Board conducted no AA of its own in relation to this site or indeed the River Nore SPA.

(3) Thirdly, the applicants contend that the Inspector's Report indicated likely significant indirect effects from the proposed development in respect of the River Nore SPA and that accordingly a full AA was required, whereas in fact the Board did not in fact carry out an AA in respect of this SPA.

100. Before addressing each of these contentions it will be recalled that s. 177U of the PDA, 2000, the relevant parts of which set out above, requires screening for AA of the application to assess a proposed development in view of best scientific knowledge, for any likely significant effects it may have on a European site. This must be done as a first stage before consent can be given. Persuant s. 177U(4), an AA must then be carried out where it cannot be excluded that the development will have a significant effect on a European site. An AA is not required where same can be excluded, pursuant to s. 177U(5).

101. Two "stage one" Screening Reports were carried out by EirGrid and presented with their application to the Board for approval. The first is exhibit DC14 and dated January, 2012. It concluded that there were four Natura 2000 sites identified as occurring within 5 kilometres of the proposed development and determined:-

"that 3 of these sites (River Nore SPA, Lisbigney Bog SAC and Ballyprior Grassland SAC) will not be impacted upon either directly or indirectly as a result of the proposed development and therefore are excluded from appropriate assessment.

Based on the precautionary approach adopted during the assessment it has been shown that the proposed development has the potential to adversely impact:

• the River Barrow and River Nore SAC during the construction phase Hence a stage 2 appropriate assessment will be carried out to further examine the risk proposed by the proposed project on the conservation interest of this Natura 2000 site."

102. The second "Appropriate Assessment Screening Statement" is dated November 2012 and contained in Appendix 1 of the NIS. The executive summary in this second Screening Statement reached the same conclusion that three of the European sites including the River Nore SPA would not be impacted either directly or indirectly as a result of the proposed development and that a NIS for stage two AA was required only in relation to the River Barrow and River Nore cSAC.

103. EirGrid then commissioned a NIS in relation to the River Barrow and Nore cSAC. In the executive summary it concluded:-

"The potential impacts were identified during the screening stage relate to possible deterioration in water quality within the cSAC due to sediment run-off from construction sites, and a risk posed by other harmful substances (such as fuel and cement).

Potential significant adverse impacts on the cSAC that have been identified relate [to] the works associated with the following elements of the project:

- Coolnabacky substation site – construction phase
- Ballyragget substation site – construction phase

- Transmission structure (Poleset and Angle Mast) locations in close proximity to watercourses which feed into the River Barrow and River Nore cSAC – construction phase

- Conifer plantations that require felling along the new Ballyragget to Coolnabacky 110 kV line route – construction phase

A series of detailed mitigation measures have been developed to address the potential impacts that have been identified. Proposals are also made with regards monitoring the effectiveness of these measures.

The correct implementation of all mitigation measures detailed in this report will ensure that the conservation objectives for the cSAC will not be compromised by the proposed development, nor by any cumulative effects and no significant impact is anticipated on any of the species and habitats for which the site is designated.

In conclusion, through the process of Appropriate Assessment, it is the considered view of the author that the proposed development will have no adverse impact on the integrity of the designated site as a whole or on any other designated site."

104. The actual NIS is a lengthy document running to some 150 pages and includes detailed consideration of potential impacts including cumulative impacts and appropriate mitigation measures. It also includes appendices dealing *inter alia* with the Nore Fresh Water Pearl Mussel and Ecological Mitigation Measures at specified sensitive locations. Both the Screening Reports and the NIS were submitted with the application for approval, so as to enable the Board to carry out an AA.

105. It is also apparent from the Inspector's Report at pp. 19-45 that Natura 2000 considerations featured in submissions from a number of State bodies and interested parties to the Board and to the Inspector. These included, *inter alia*, the requirement of measures to counter the possibility of oil or fuel spillages, discharges of silt laden waters or washings into the watercourse and effective controls on the removal of waste, particularly hazardous waste; ensuring that there be no adverse impact on the integrity of the Fresh Water Pearl Mussel site; timing the instream construction so that salmonid spawning would not be affected; that the Board should satisfy itself that there is sufficient information in the NIS to show that there would be no adverse impact on the integrity of the site; and the necessity of the mitigation measures outlined in the reports to counter adverse effects caused by the Development.

106. The Inspector's Report records various other observations/submissions (including those of the applicants), most of which were concerned with visual impact or touched on natural habitats but did not contest the content of the NIS or contribute any new or additional scientific information. The Inspector records at p. 41 submissions from "the RTS" Group, the first named applicant. These submissions consisted of 169 letters from local residents and organisations opposing the proposed development and covered a wide range of issues. The Inspector records that :-

"There is concern in relation to the pollution of groundwater from the siting of the proposed substation at Coolnabacky over an aquifer serving approximately 4,000 households and seven schools over a 2,000 square kilometre area through at least eight group water schemes. There is a lack of engineering drawings, e.g. for the foundations for the substation with implications for the underlying aquifer. The water table is just 2 metres from the surface. There is concern also in relation to private wells".

On p. 42 the Inspector records that their objections included concerns that the Development would affect wildlife including pheasants, buzzards, owls and hawks. Apart from this there do not appear to have been any observations or objections from the first named applicant in relation to the Natura 2000 habitats and particularly the River Barrow and River Nore cSAC.

The Inspector records that he carried out a site inspection on 30th September, 2013 and 24th October, 2013. He confirms that he conducted oral hearings on 4th -7th and 14th-15th November, 2013. At p..45 of his report he asserts that there are a number of issues arising from

contemplation of the NIS and the EIS

107. Then, at p. 58 of his report under the heading "Appropriate Assessment" he devotes some 10 pages of his report to his own assessment under Article 6(3) of the Habitats Directive (92/43/EEC). In outlining the relevant four European sites at pp. 58-59 of his report, the Inspector addresses the River Nore SPA in the following terms:-

> "The River Nore SPA is noted to be 0.6 kilometres west of the Coolnabacky to Ballyragget 110KV line at Moatpark. Its conservation objective is to maintain or restore the favourable conservation condition of a nationally significant breeding population of kingfishers. It is noted that the proposed development would avoid traversing the SPA. No direct impacts on the conservation interest of the kingfisher population are foreseen during the construction phase. While indirect impacts could result from any major deterioration in water quality and subsequent effects on the birds' food source, considering the nearest works would be about 0.6 kilometres upstream and that no instream works are proposed, the potential impact was considered extremely unlikely. The use of best practice construction management techniques would prevent any deterioration of water quality within the SPA and therefore it was concluded that no significant adverse impacts were foreseen. Based on the flight behaviour and habitat preferences of kingfishers and the location of the Coolnabacky–Ballyraggett line in relation to the SPA, it was considered that the proposed overhead line would not pose any significant collision risk during the operational phase."

108. The Inspector in his report dealt at length with the River Barrow and River Nore cSAC, setting out a table from the Screening Report detailing the Habitats Species within the cSAC qualifying for conservation and then dealing with the potential for direct or indirect habitat or species disturbance – in particular during the construction phase. The Inspector draws both from the Screening Reports and the NIS. The possibility of sedimentation is dealt with at p. 64, and on that page the Inspector also commences a section in which he considers the cumulative impacts of the project on the Natura 2000 site. The Inspector then considers the proposed mitigation measures, such as drainage and run off controls, settlement ponds, emergency response plans in the event of pollution, water monitoring, protection from the risk of non-sediment related pollution, risks from conifer felling, etc. At p. 69 the Inspector concluded:-

> "The Natura Impact Statement, in relation to residual impacts, states that these would be reduced from being possible, albeit unlikely significant, to becoming extremely unlikely short-term imperceptible negative impacts. No long-term impacts are foreseen.
>
> Overall, it may be said that the mitigation measures recommended in the Natura Impact Statement are all tried and tested and amount to good practice during both the construction phase and operational phase of the project which, for the most part, does not directly impinge on the candidate Special Area of Conservation. In conclusion, I consider it reasonable, on the basis of the information available, that the proposed development, individually and in combination with other plans or projects, would not adversely affect the integrity of European site no. 002162 - the River Barrow and River Nore candidate Special Area of Conservation, in view of the site's conservation objective."

109. It should be noted that the applicants do not appear to have made any detailed or focused submissions or observations in relation to the NIS or the AA that the Board was required to carry out and they do not appear to have adduced any scientific evidence in relation to the Natura sites, either in written form or at the oral hearings. This particular complaint is therefore technical and lacking in any real substance.

110. At pp. 5-6 of the impugned decision the Board lists out at (a)-(m) the matters to which it has had regard in coming to its decision and these included:-

> "(k) the documentation submitted with the application, as amended by the significant further information submitted on 16th day of August 2013 in response to a request by An Bord Pleanála, including the environmental impact statement, appropriate assessment screening statement and the Natura impact statement, as further amended by the documentation submitted at the oral hearing.

(l) the range of medication measures set out in the documentation, and

(m) the submissions on file, and the report of the Inspector who held the oral hearing"

111. The Board proceeded to state that :-

"The Board is satisfied that the information available on file is adequate to allow an environmental impact assessment *and appropriate assessment to be completed*." [emphasis added]

112. The Board then stated:-

"Having regard to the nature, scale and location of the proposed development, the appropriate assessment screening statement and associated documentation, the submissions on file, including those from relevant prescribed bodies, and the Inspector's assessment, which is noted, the Board completed a screening exercise for appropriate assessment of the impacts of the proposed development on the River Nore Special Protection Area (site code 004233), Lisbigney Bog candidate Special Area of Conservation (site code 000869) and Ballyprior Grassland candidate Special Area of Conservation (site code 002256). The Board concluded that the proposed development, in itself or in combination with other plans or projects, would not be likely to have a significant effect on these European sites.

Having regard to the nature, scale and location of the proposed development, the Natura impact statement and associated documentation, the submissions on file, including those from relevant prescribed bodies, and the Inspector's assessment, which is noted, the Board completed an appropriate assessment of the potential impacts of the proposed development on the River Barrow and River Nore Special Area of Conservation (Site Code 002162). The Board concluded that, subject to the implementation of the identified mitigation measures, the proposed development, in itself or in combination with other plans or projects, would not adversely affect the integrity of the River Barrow and the River Nore Special Area of Conservation, in view of the conservation objectives for this site."

113. A number of the conditions in the Board's approval decision are relevant to this subject. Condition 1 required the development to be carried out and completed in accordance with the plans and particulars lodged with the application and documentation submitted at the oral hearing. Condition 2 imposed two obligations:-

"(a) The mitigation measures identified in the environmental impact statement, Natura impact statement, and associated documentation on file, shall be implemented in full, except as may be required to comply with the following conditions.

(b) The construction of the proposed development shall be supervised by suitably qualified and experienced environmental personnel, to ensure that all environmental mitigation and monitoring measures are implemented in full."

114. Condition 3 required consultation with the National Parks and Wildlife Service prior to commencement of the Development, with agreement in writing to be obtained in relation to installation details for bird flight diverters, details of pre-construction surveys for badgers, otters and bats, etc.

115. Condition 4 required that works in the vicinity of the rivers and streams comply with "Requirements for the Protection of Fisheries Habitat during Construction and Development Works at River Sites" issued by the Easter Regional Fisheries Board.

116. In the written and oral submission on behalf of the applicants, Mr. Fogarty SC relied in particular on the judgment of Finlay Geoghegan J. in *Kelly* and the passage already quoted above in which the minimum requirements of an AA are identified,

117. It is against this backdrop that Mr. Fogarty SC argued that the AA purportedly carried out by the Board was defective as to the first two criteria outlined in *Kelly*. Firstly, in respect of a verbatim approach to the Inspector's Report and in failing to conduct an assessment of its own (as opposed to "delegating it" to the Inspector). Secondly, in producing a decision which is "uninformative and perfunctory and fails to give any proper reasons or considerations for the determination" (para. 24 of the Statement of Grounds).

118. The respondent's counsel Ms. Butler SC, while being careful not to disagree with the principles enunciated by Finlay Geoghegan J. in *Kelly*, nonetheless pointed out that they should be seen in the context of the particular facts of that case which concerned a challenge to planning permissions for wind turbine developments in Co. Roscommon. There were two phases to the work and in respect of neither case does it appear that a formal screening for AA pursuant to s. 177U was carried out. More importantly, two different Inspectors were appointed by the Board, to report on phases one and two of the development, respectively, and in both cases the Inspectors recommended that permission should not be granted for the wind farms. Thus, while Finlay Geoghegan J. held that the Board did not conduct an AA in relation to phase two, the court further decided in respect of its phase two decision that the Board had failed to give reasons. The decision must therefore be read in the context of the Board purporting to take a decision conflicting with its Inspectors' recommendations and the scientific evidence that they had considered.

119. Ms. Butler SC referred to the decision of Hedigan J. in *Sweetman v. An Bord Pleanála* [2010] I.E.H.C. 53. This case concerned AA in the context of the proposed New Ross bypass road. After referring to the relevant threshold required for habitat protection, the court held:-

> "It lies with the national authorities to determine in the light of the conclusions of the assessment of the implications of the project whether this threshold has been met. This they may do only after having made sure there will be no adverse effect on the site. They should do this by reference to the assessment and a high degree of certainty is required. However the decision remains one for the Board as the competent authority. As has been repeatedly stated in a wide range of cases over the years, this Court should intervene in the decisions of administrative tribunals such as the Board only where it is satisfied that the decision was unlawful. Even where the Court was satisfied the tribunal was wrong it cannot intervene. The test is one of the legality of the decision and not its correctness."

120. In the instant case, the respondent and EirGrid argued that appropriate screening had been undertaken, that the Board clearly did undertake AA, that it was entitled to do so after having regard to the NIS, Inspector's Report and other relevant documentation and information. It was also argued that the brevity of its AA decision was not of any relevance.

121. The court notes that at para. 50 of her decision in *Kelly*, Finlay Geoghegan J. stated:-

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

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122. In the view of the court it is clear on the face of the impugned decision firstly that the Board had regard to all of the documentation, the application, the submissions and observations, the Inspector's Report, the Screening Reports as well as the NIS and all the other information and matters to which it was obliged to have had regard in carrying out an AA.

123. Secondly, it is clear on the face of the decision (at p. 6) that the Board itself was satisfied that the information available on file was adequate and allowed it to complete an AA.

124. Thirdly, it is quite clear on the face of the impugned decision that the Board did in fact carry out an AA in respect of the River Barrow and River Nore cSAC – the only European site in respect of which it was required to carry out an AA following the screening at stage one. The decision states at p. 6 "…the Board completed an appropriate assessment…". The Board concluded that subject to the implementation of the identified mitigation measures, the proposed development would not adversely affect the integrity of the River Barrow and River Nore cSAC, in view of the conservation objectives for the site. This conclusion was the Board's AA decision.

125. In approaching the matter in this fashion, the Board complied with its obligation under s. 182B(1) to consider the NIS and other statements including the EIS, all submissions and observations in addition to the Inspector's Report. The Board further complied with its primary obligation under s. 177V not to approve the development unless "satisfied to do so having determined that the proposed development would not adversely affect the integrity of the European site if it is carried out in accordance with the consent and the modifications or conditions attaching thereto".

126. In s. 177V(5) the Board was obliged in law to give reasons for it's determination. Under s. 182B(5A)(a) the Board was also obliged to state "the main reasons and considerations on which the decision is based". In the opinion of the court the Board did this in so far as the AA is concerned in the wording used on p. 6 of its decision. Different considerations may arise where the Board is disagreeing with its Inspector (as in the *Kelly* case) or perhaps disagreeing with the content of a NIS or even where there is a dispute in relation to scientific evidence presented to the Board or given at an oral hearing. In such instances there may well be a need for the Board to give more detailed reasons for its decision in choosing to accept one side of the scientific argument over the other. Not only was there no scientific dispute in relation to the likely adverse affects on the River Barrow and River Nore cSAC or the necessary mitigation measures but the applicants did not present any scientific evidence, or indeed any particular evidence, that would require comment from the Board in its AA.

127. The court takes the view that in a case such as this, where the Board on due consideration accepts the relevant findings made and conclusions reached by its Inspector, the production and recitation of that report satisfies the obligations of the Board to give reasons for it's determination. In other words, where the Board, having considered all appropriate documents and matters, accepts the scientific knowledge and findings in relation to the European site, accepts the Inspector's examination and analysis and that the proposed development will not adversely affect the integrity of the European site, it is not necessary for the Board to set out yet again at length in its decision the same examination and analysis. Such an exercise would be both pointless and unnecessary. The mere fact that the resulting decision might be perceived to be "uninformative and perfunctory" clearly does not of itself amount to any ground for review.

Decision- River Nore SPA

128. In the Statement of Grounds at para. 26 the applicants made the further assertion that because the Inspector's Report identified that "indirect impacts could arise from the proposed development" to the River Nore SPA, a full AA in relation to that European site was also required and they asserted that it was not permissible in the context of a screening for AA to determine that significant effects could be mitigated out by mitigation measures. No written submissions were made in support of these contentions, and hence the reply submissions did not deal with this issue.

129. As has been seen, s. 177U(5) empowers the competent authority (the Board) to determine that an AA is not required if it can be excluded, based on objective information, that the proposed development will have a significant effect on a European site. The two screening assessments quoted above and carried out on behalf of EirGrid, and which were submitted with the application, both excluded, on the basis of objective scientific information, any significant direct or indirect effect on the River Nore SPA arising from the proposed development. This was endorsed by the Inspector's Report wherein he concluded there would be no direct impacts on the conservation interest of the Kingfisher population during the construction phase and that indirect impacts from deterioration of water quality and subsequent effect on the birds' food source were "considered extremely unlikely" given that the nearest works would be 0.6 km upstream from the kingfisher breeding sites and that no in-stream works were proposed.

130. In the view of the court, arising from the two Screening Reports, it was reasonable for the Inspector and the Board, in the context of assessing any likely "significant effect", to assume that best practice construction management techniques would be adopted to prevent any deterioration of water quality within or upstream of the River Nore SPA. This was not an irrelevant or irrational assumption. It should also be noted that Conditions 1, 2, 3 and 4 of the decision were framed to ensure that the Development was carried out properly and in a manner that protected the environment including the water quality in the River Nore, albeit as part of the River Barrow and River Nore cSAC, and the grounds for these Conditions supported this assumption.

131. The Board was entitled to conclude, as it did, that the proposed development, by itself or in combination with other plans or projects, would not be likely to have any significant effect on the River Nore SPA. Accordingly, there was no necessity in law for an AA of the effects of the proposed development on the River Nore SPA.

Ground 5 – Costs

132. In the Statement of Grounds the applicants asserted that the Board had wrongfully failed to award them their costs of participation in the process. It was asserted that their observations informed the Board's deliberations and that their participation came at great expense to themselves. Their written submissions before this court pursued a different argument, namely that the Board, in exercising its discretion not to award them any costs failed to give them any reasons. As previously indicated the court was not prepared to allow the applicants to pursue this latter submission in respect of which leave had not been granted.

133. The respondent and EirGrid argued that under s. 182B(5A) the Board enjoyed a jurisdiction to direct the payment of such costs as the Board "in its absolute discretion considers to be reasonable costs". They argued that the Board was entitled, in the exercise of its absolute discretion, to award a nil costs. They argued that any contention that the applicants were "entitled" to their costs of participation in the application process was fundamentally misconceived. They pointed out that no such entitlement arose under the Aarhus Convention or Directive 2011/92/EU.

134. The respondent and EirGrid also placed reliance on the decision in *Hands Across the Corrib Ltd. v. An Bord Pleanála* [2009] I.E.H.C.. 600 where the court considered a comparable provision in s. 219 of the PDA, 2000:-

> "A further argument was raised in relation to the entitlement of the applicant to be paid costs in respect of the oral hearing. This argument arises against the background of an application by Mr. Podger, a representative on behalf of the applicant, purportedly made pursuant to s. 145 of the Planning and Development Act 2000, for an order from the Board that Galway County Council pay its costs and expenses. In fact, s. 145 of the Planning and Development Act 2000 does not appear to have any application. However, a later section, s. 219(1) (b) is of relevance. It provides that where an oral hearing is held (in relation to a proposed road development) the Board, may in its absolute discretion direct the payment of such sum as it considers reasonable by a local authority concerned in the oral hearing to any person appearing at the hearing as a contribution towards the costs. It appears therefore that the Board had and indeed still has an absolute discretion to make an order for costs against the local authorities and in favour of the applicant company. However, it must be noted that it is a matter for the absolute discretion of the Board and it is for the applicant to persuade the Board to exercise that discretion in its favour. The applicant has no automatic entitlement to have its costs paid in whole or in part".

135. The wording used in s. 219 is somewhat different to that used in s. 182B(5A). Section 219 is headed "Power to Direct Payment of Certain Costs", and specifically empowers the Board such that it "may at its absolute discretion direct the payment of such sum as it considers reasonable by a local authority…(b) to any person appearing at the oral hearing". In contrast, s. 182B(5A) does not contain a specific empowering provision but instead states:-

> "A decision of the Board under subsection (5) shall state –

> (a) [reasons]
>
> (b)[conditions]
>
> (c) …in such amount as the Board considers to be reasonable, state the sum to paid and direct the payment of the sum…to any other person as a contribution to the costs incurred by that person during the course of consideration of that application (each of which sums the Board may, by virtue of this subsection, require to be paid."

This rather unusual wording does not use the word "may" to express the conferral on the Board of a power. However, the intendment of the subsection seems clear from the use of the phrase "and direct the payment of the sum", followed by the words in parentheses at the end of the subsection "each of which sums the Board may, by virtue of this subsection, require to be paid". However, both s. 219(1) and s. 182B(5A) are buttressed by the immediately succeeding subsections which are much closer in wording. Section 219(2) states:-

> "A reference to costs in subsection (1) shall be construed and have effects as a reference to such costs as the Board in its absolute discretion considers to be reasonable costs."

Section 182B(5B) states that:-

> "A reference to costs in subsection (5A)(c) shall be construed as a reference to such costs as the Board in its absolute discretion considers to be reasonable costs, but does not include a reference to so much of the costs there referred to as have been recovered by the Board by way of a fee charged under section 144."

136. This much therefore can be said – that in both instances the Board has an "absolute discretion" as to what it considers are the "reasonable costs" which it directs are to be paid. This absolute discretion contrasts with the discretion vested in the courts to order costs where the general rule is that the costs follow the event (see Order 99 rule 1(3) and (4)), and where in default of agreement and on foot of court direction the costs fall to be determined on taxation. The absolute discretion vested in the Board both under s. 219 and s. 182B of its nature must include the power to award nil costs, and the applicants in this case did not seek to argue otherwise. The court accepts the submissions of the respondent and EirGrid, based on the decision in the *Hands Across the Corrib* case, that there is no automatic entitlement to costs for persons appearing before an oral hearing in a planning matter. Accordingly this ground also must fail.

Conclusion

137. The court finds that the applicants have not succeeded in respect of any of the Grounds in respect of which leave was granted. Accordingly, the court orders that these proceedings be dismissed.

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