

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 834
[Record No. 2018/17 JR]

BETWEEN

**CAROL DONNELLY AND
CAVAN BETTER WASTE MANAGEMENT**

APPLICANTS

**AND
AN BORD PLEANÁLA**

RESPONDENT

**AND
CAVAN COUNTY COUNCIL AND WILTON WASTE RECYCLING**

NOTICE PARTIES

JUDGMENT of Mr. Justice Barr delivered electronically on the 21st day of December, 2021

Introduction.

1. This is an application for relief by way of judicial review in respect of a direction given by the respondent on 9th November, 2017, to grant planning permission to the second named notice party (hereafter referred to as “the developer”), for a waste processing plant in the townlands of Lismagratty and Corranure, located approximately 3km from Cavan Town.
2. The first named applicant lives within 1,000m of the site of the proposed development. The second named applicant is a group, which was formed by the first named applicant after a decision had been made by the first named notice party to grant planning permission for the proposed development. The group was formed with a view to appealing the decision made by the first named notice party to An Bord Pleanála.
3. The applicants seek an order of *certiorari* quashing the respondent’s direction to grant permission for the waste facility, on the following grounds: -
 - (i) That following the decision of the CJEU in *Holohan v. An Bord Pleanála* (Case 461/17) it is not permissible for a planning authority to leave over matters for post-consent agreement between the developer and the planning authority, when the decision to grant planning permission would affect European sites, meaning sites protected under various EU directives, in particular Directive 2011/9/EU (on protection of the environment) and Directive 97/43/EEC (the Habitats Directive);
 - (ii) that in the present case the respondent failed to carry out an appropriate assessment under the Habitats Directive, in particular due to its failure to ensure that there was a comprehensive hydrogeological survey of the streams and channels flowing underground from the development site to various European sites;
 - (iii) that condition 2 in the planning permission granted to the second notice party, was impermissible because it was too vague and therefore the permission is bad on its face;

- (iv) that conditions 3-15, which leave over various matters for post-consent agreement, are impermissibly wide and therefore the planning permission is flawed;
 - (v) that the respondent's decision and direction is bad, because they failed to give reasons for omitting condition 13, as recommended by the inspector in her report;
 - (vi) that the decision by the respondent to leave over matters for post-consent agreement is bad, because the first named notice party would be biased when agreeing such matters, due to the fact that it was to sell the land to the second named notice party for the operation of the waste facility; and
 - (vii) that the inconsistency in the wording between condition 7 in the inspector's report and condition 7 in the Board's direction, means that the permission granted is ambiguous and fatally flawed.
4. The respondent resists the applicant's claim herein. The grounds on which it argued that the final permission was valid and lawful, will be set out later in the judgment, when dealing with the various grounds of challenge put forward by the applicants.

General overview of the development and its proximity to European sites.

5. The proposed development consists of a waste processing and transfer facility. The site on which it is proposed to be developed has a stated area of 2.1 hectares, it is located in the townlands of Lismagratty and Corranure, adjacent to the Cavan/Cootehill Road, approximately 3km from Cavan Town Centre. The site is part of a wider land holding owned by Cavan County Council.
6. The main features of the proposed development, would entail demolition of the existing uninhabited dwelling house and domestic garage; the construction of a steel framed waste processing and transfer building; an external yard; two weighbridges and a weighbridge kiosk; an administration building, incorporating staff welfare facilities; parking and ancillary site development works.
7. It was proposed that the facility would accept various forms of waste up to 50,000 tonnes per annum. The primary focus of the facility would be the processing of mixed wastes to produce solid recovered fuel (SRF) from commercial, industrial and bulky waste sources. The SRF would be used as a fuel source within Ireland's cement industry, as a replacement for fossil fuels. At the oral hearing, the developer stated that the waste which would not be processed into SRF, would be transferred elsewhere for recycling, including some which would be exported, with some residual waste going to landfill, estimated to be no greater than 15%.
8. In the environmental impact statement (EIS) submitted by the developer, it was stated that the waste to be processed at the facility would be made up of the following: mixed municipal waste, which would be collected in the developer's kerbside bin collection vehicles. It was stated that the material would enter the odour abatement area of the facility and would be placed in an allocated waste storage bay as detailed in the drawings accompanying the application. The material would be inspected by an operator for

unregulated quarantine materials, prior to being placed onto a waste trommel. Trommeling of the material would allow for extraction of commodities such as metals, recyclable materials and organic fines. All material with the exception of a small fraction of residual waste, would be diverted from landfill and would undergo further processing.

9. The second main type of waste accepted at the facility would be construction & demolition and commercial & industrial waste. These waste materials would enter the site in skips. The material would be inspected by an operator for unregulated quarantine materials, prior to being processed. Processing would involve removal of SRF suitable materials from the skips, which would account for approximately 40% of the content. The remaining 60% of the material would be forwarded to another treatment facility for further processing.
10. The production of SRF was described in the following way: SRF suitable material includes: soiled cardboard and plastic; fabric and textile; furniture; carpet and floor covering and untreated timber. Once the SRF suitable material has been separated from the skip waste area, it would be placed in a designated SRF storage point, prior to being placed on a conveyor belt. The material would then pass under a large fixed magnet to remove ferrous materials. The output metals from the magnet would fall into a bunker underneath the conveyor belt for further recovery. After metal removal, the material would be fed into a slow speed SRF shredder, which houses a 3m wide rotator with cutters, that shred the material and force it through a fixed screen. The design of the screen does not allow particles sized greater than 35mm to pass through. The shredded material is then passed under another overhead fixed magnet and Eddy current to remove any final remnants of ferrous and non-ferrous metals. The material is then passed along the conveyor to a discharge stockpile, which is loaded into an articulated truck for transportation to the cement plant for energy recovery.
11. It is worth noting at this early stage, as was noted by the inspector in her report, that outside of the planning process, the waste transfer and processing facility would be required to hold a waste facility permit and the facility would not be able to operate without such a permit. Matters around monitoring of such facilities would follow as a function of the local authority under the Waste Management (Facility Permit and Registration) Regulations 2007, as amended.
12. The site of the proposed development is located some 3.5km from two European sites, being the Lough Oughter and associated loughs SAC and the Lough Oughter complex SPA.
13. In relation to the first of these, it was noted that Lough Oughter and its associated loughs occupy much of the townland drumlin belt in north and central Cavan, between upper Lough Erne, Killeshandra and Cavan Town. The site is a maze of waterways, islands, small lakes and peninsulas, including some 90-inter drumlin lakes and 14 basins in the course of the River Erne. The Lough Oughter area contains important examples of two habitats listed in annex one of the Habitats Directive and supports a population of the annex two species, otter. The site as a whole is considered the best inland example of a flooded

drumlin landscape in Ireland. It has many rich and varied biological communities. Nowhere else in the country does such an intimate mixture of land and water occur over a comparable area and many of the species of wetland plants, some considered quite commonplace in Lough Oughter and its associated loughs, are infrequent elsewhere.

14. The Lough Oughter complex SPA is relatively shallow in terms of water depth and is considered to be a naturally eutrophic system. The area is of ornithological importance for its wintering water bird populations. Of particular note, is the internationally important population of whooper swan, that is based in the area. The site also supports nationally important populations of a further two wintering species and, notably, holds the highest breeding concentrations of great crested grebe in the country. Two of the species which occur regularly are listed on annex one of the EU Birds Directive, being the whooper swan and the Greenland white fronted goose.
15. It was accepted by the developer that there are source, pathway and receptor linkages between the development site and the European sites by means of underground streams and channels linking the two sites. This connectivity and the mitigation measures put in place to address any possible contamination of the European sites during both the construction and operation phase of the development site, will be addressed in more detail later in the judgment.

Chronology of relevant dates.

16. The relevant dates in this matter can be set out in the following way: -

March 2016	Planning application submitted by first named notice party. This included a Natura Impact Statement dated February 2016 and an Environmental Impact Statement dated March 2016.
May 2016	The first named applicant states that she made submissions and exhibits these at exhibit CD4; however the submissions exhibited thereat were submitted by a Mr. & Mrs. Fitzsimons in May and December 2016.
11th November, 2016	At the request of the planning authority, further information is furnished by Boylan Engineering on behalf of the developer.
24th January, 2017	Notification of decision to grant planning permission is given by the first named notice party.
20th February, 2017	An appeal is lodged against that decision by the applicants. Further submissions are lodged by both the objectors and the developer.
17th May,	The inspector appointed by the respondent, carries out a site inspection.

2017	
23rd May, 2017	The inspector holds an oral hearing at Cavan Crystal Hotel, Cavan Town. The applicants were represented by Mr. Gabriel Toolan, solicitor.
16th June, 2017	The inspector issues her report, wherein she recommends that permission be granted for the proposed development subject to a number of conditions.
3rd November, 2017	The respondent decided to grant planning permission in accordance with the inspector's recommendation.
9th November, 2017	The order/direction of the respondent is made to grant planning permission to the second notice party for the proposed development, subject to 15 conditions.
11th January, 2018	The applicants sought leave to proceed by way of judicial review to seek the reliefs set out in their statement of grounds; in particular, an order of <i>certiorari</i> quashing the respondent's decision and direction of 9th November, 2017. The application is opened and then adjourned to 29th January, 2018, when the applicants are given leave to proceed by way of judicial review.
2nd - 5th November, 2021	The contested judicial review proceedings are heard before the High Court.

The planning documentation.

17. Given that the applicants' case involves a challenge to the adequacy of the appropriate assessment that was carried out by the respondent, it is necessary to set out in some detail the information that was before the respondent at the time that it made its decision. This involves looking at the EIS, the NIS and the further information that was furnished on behalf of the developer, together with the information gleaned by the inspector from the oral hearing and her conclusions thereon, as contained in her report.
18. The nature of the activities that would be carried out at the waste facility; its proximity to the European sites and their environmental and ecological importance, has already been described and need not be repeated here.
19. Before looking at the relevant documents, it is useful to keep in mind the essence of the challenge made by the applicants in this application. Essentially, they challenge the respondent's decision and direction on two grounds: Firstly, it was submitted that while a hydrological assessment was carried out by Dr. O'Reilly on behalf of the developer, which was incorporated into the EIS; crucially, it did not include a hydrogeological survey of the exact course followed by the underground streams and channels leading from the development site to the European sites. On this basis, it was argued that the appropriate assessment carried out by the respondent, was deficient in a fundamental respect.

20. Secondly, it was submitted that what may be termed the “points of detail” conditions, which left over various matters for post-consent agreement between the developer and the planning authority, are not only impermissible having regard to the judgment of the CJEU in the *Holohan* case, but are also impermissible as being too wide. It is against those core assertions, that the documentation which was submitted on behalf of the developer and the conclusions thereon, which were drawn by the inspector, and which were ultimately adopted by the respondent, will have to be judged.
21. A Natura Impact Statement (NIS) was prepared on behalf of the developer by Forest, Environmental Research and Services Limited in February 2016. It noted that base line conditions at the site were ascertained by carrying out a site visit on 19th February, 2016. It noted that while the proposed development site consists largely of GA1, a habitat of limited ecological value, the proposed development site was located immediately adjacent to a potentially significant ecological corridor in the form of a significant drainage/stream network and associated habitats. It stated that the hydrological connectivity of that network should be addressed in any hydrogeological assessment.
22. At para. 2.4.1 the author gave a description of the source-pathway-receptor linkages (SPR) in the following way:
- “The proposed development site is immediately adjacent to a watercourse. Although current OSI data would appear to indicate that this watercourse is an isolated ditch, the historical 20-inch map (see Figure 21) includes a much more hydrologically complex landscape, which indicate that watercourses may have now have been piped underground. Again, this highlights the requirement for a comprehensive hydrogeological assessment of the proposed development to identify potential SPR linkages that are not immediately evident.”*
23. The statement noted that the proposed development would comprise a waste processing/transfer facility to process: bulky waste, commercial & industrial waste; commercial food waste; construction & demolition waste; non-hazardous end of life vehicles; household waste; incineration waste; waste electrical and electronic equipment; storage of batteries & accumulators; hazardous waste and waste tyres. They came to the conclusion that there was potential for impacts on ground water and/or surface water (contamination with various pollutants, including hydrocarbons etc) during both the construction and operational lifetime of the proposed development. The author stated that any impact on ground/surface water could potentially impact on the water quality of Lough Oughter and the ecological integrity of the conservation interests of habitats/species associated with Lough Oughter and the associated water bodies with which there was a physical and/or ecological connection.
24. The authors went on to note that there was a potential secondary impact involving the potential for importation of alien invasive plant species onto the site. No evidence for such species was observed during the field visit. The author stated that given a potential for an SPR linkage between the site and one or more Natura 2000 sites, there was therefore a potential for impacts associated with alien invasive plant species. Essentially what was

envisaged here, was that alien plant propagules would enter the water system and would be carried to the European sites.

25. The author concluded in relation to screening for appropriate assessment, that while the development was not directly connected with, or necessary to the management of a Natura 2000 site, it may have significant impacts on one or more Natura 2000 sites. Screening had identified potential impacts upon a Natura 2000 site associated with the proposed development. Therefore, applying the precautionary principle and in accordance with Art. 6(3) of the Habitats Directive, it was determined that a stage two appropriate assessment was required.
26. In section three of the NIS, the authors carried out the stage two appropriate assessment. They came to the conclusion that the primary source of concern with regard to the proposed development, owing to both construction activities and the nature of the proposed development, involved the potential for contamination of ground water/surface water during the construction and/or operation of the proposed development. It was considered, however, that the risk associated with those potential impacts, could be reduced to a negligible level through the implementation of suitable mitigation/preventative measures.
27. In relation to the potential for contamination of European sites by alien invasive plant species, the authors opined that there was a potential for the importation of propagules of invasive species onto the development site, which was immediately approximate to a sensitive ecological receptor in the form of the drainage/stream network immediately adjacent to the site that may form an SPR linkage between the site and a Natura 2000 site. It was considered, however, that the risk could be reduced to a negligible level through the implementation of suitable mitigation/preventative measures.
28. In section 4 of the NIS, the authors dealt with mitigation/preventative measures. As considerable emphasis was laid by the applicants upon the first paragraph thereof, it is appropriate to quote it in full: -

"The primary risk factor regarding impacts of the development upon the Natura 2000 network concerns potential impacts upon ground/surface water quality or impacts upon local hydrology, requiring a comprehensive hydrogeological assessment of the proposed development to be undertaken as a mitigating measure (it must be noted that the author of this NIS is not qualified to comment on the findings of the hydrogeological assessment or any preventative/mitigating measures and it is assumed by this NIS that all the hydrogeological impact assessment of the proposed development is comprehensive)."

29. While a reading of that paragraph on its own, may indicate to the reader that the author of the NIS was stating that a comprehensive hydrogeological survey would have to be undertaken and that he was not in a position to comment upon it, nor was he aware of its content; that conclusion is not born out by the remainder of this section of the NIS.

30. After the first paragraph quoted above, the author goes on to state that an assessment of the potential impacts on local hydrological assessment of the proposed development “*has been prepared*” by Envirollogic Hydrogeological and Hydrological Consultants. The author of the NIS stated: “*This report (which is also presented as Chapter 7 of the EIS) should accompany this NIS.*” The author then went on to quote precisely the conclusions that had been reached by Dr. O’Reilly in his hydrological assessment of the area and his conclusions thereon, as set out in Chapter 7 of the EIS.
31. In that assessment, Dr. O’Reilly had noted that the potential impacts to the hydrological and hydrogeological environment had been assessed and appropriate mitigating measures had been presented. Dr. O’Reilly reached the opinion that there were no likely significant impacts on the hydrological or hydrogeological environment associated with the proposed development of the site. It was not anticipated that any impacts would arise following the implementation of the mitigation measures outlined in the EIS.
32. On this basis, the author of the NIS concluded that all mitigation/preventative measures as outlined in the hydrogeological assessment must be implemented and evidence of such provided to the relevant authority on request. Thus, it is clear that the author of the NIS, while stating that it was not within his competence to carry out a hydrogeological survey, accepted and was aware of the conclusions that had been reached by Dr. O’Reilly in that regard, when giving his definitive opinion as contained in the NIS.
33. In relation to possible contamination by invasive plant species, the author recommended that all material imported to the site during both construction and operational lifetime must be accompanied by a written guarantee that the material was free from any propagules of alien invasive plant species, in order to mitigate against the risk of contamination of the European sites by such species.
34. In conclusion, the author noted that following the identification of a potential impact upon a Natura 2000 site through an appropriate assessment screening exercise, a stage two appropriate assessment of the proposed development had been carried out in accordance with the requirements Art. 6(3) of the Habitats Directive. The author went on to state that the risks to the safeguarding and integrity of the qualifying interests and conservation objectives of the Natura sites described in the report, had been addressed by the inclusion of a number of mitigation and preventative measures to ensure that the proposed development had minimal significant impact on the Natura 2000 network.

(b) The Environmental Impact Statement.

35. An Environmental Impact Statement was prepared by Boylan Engineering and Environmental Limited in March 2016. However, as is clear from the content of the NIS, a very late draft, if not the final draft of the EIS, must have been available to the author of the NIS when he completed his report in February 2016, as he quoted directly from the conclusions of Dr. O’Reilly, as contained in Chapter 7 of the EIS.
36. It is not proposed to summarise the entirety of the EIS, but instead, to focus on those areas that are of particular importance to the essential challenge made by the applicants

in this case; namely, the issue of contamination of the European sites by water and other liquids escaping from the development site and making their way to the European sites.

37. In para. 2.5.1 of the EIS, the authors deal with the building in which the waste would be processed. They noted that the floor surface of the shed would be concrete and would be designed so that any liquid from waste processing, would be captured and not allowed to escape the confines of the shed. The report also noted that the design incorporated a proposed truck wash, to be located close to the northeast boundary of the site, which would be used for cleaning all waste collection vehicles which entered the site at periodic intervals. They noted that the truck wash would comprise a manual lance steam wash unit; an underground chamber, which would act as a wash recycling tank, and a silt retention chamber.
38. The authors noted that the site would also include two bunded fuel storage tanks to the rear of the shed. Tank number one, would have a capacity of 8,000 litres designated to on-site plant, while tank number two would have a capacity of 45,000 litres, designated to the company's fleet vehicles.
39. In para. 2.8.3 the authors dealt with foul water sewerage. They noted that sanitary waste water would be discharged to the municipal foul sewer serving the waste management/industrial area, which was provided by the local authority. The site truck wash would also discharge to the foul sewer, subsequent to passing through a grit chamber and an appropriate wash down area.
40. Paragraph 2.8.4 dealt with waste water from the processing shed. It was noted that the waste processed in the facility shed was of a dry nature and would not involve the use of water. However, due to the nature of waste collected in skip containers, there was a possibility of some residual water arising from the waste itself. That liquid would be managed via the use of drains on the surface of the shed floor, which would capture and hold the liquid in an associated water holding tank. The liquid would not be of a hazardous nature and disposal of such material would be in accordance with the direction of the local authority at the permit stage of the application.
41. At the initial planning stage, the planning authority requested further information on these matters from the developer. On 11th November, 2016, Boylan Engineering furnished the further information as requested. In relation to details concerning the volumes of effluent to be generated in the processing shed, it was stated that there would be no water used in the processing of the waste materials, as previously stipulated in the EIS. All waste materials to be accepted, would be of a dry composition. Any runoff would be collected in an underground waste water holding tank, after being harnessed by access drains in the floor of the shed. The disposal of that material would be via collection by an authorised waste collection service, such as McBreen Environmental Drain Services. The volume of effluent which would be generated in the proposed shed would not exceed 100 litres (0.1m³) per day.

42. In relation to further information concerning the underground holding tank, Boylan Engineering stated that the runoff from the shed would not exceed 100 litres per day, based upon current figures from the existing facility run by the second notice party at Kiffa, Ballyjamesduff, Co. Cavan. The developer was proposing the installation of an 8m³ tank to facilitate the storage of runoff which was considered more than adequate for the facility, as it would have a total capacity of approximately 80 days.
43. In relation to surface water runoff at the site, which would be generated from rainfall on various surfaces, such as the roof of the main processing building and the associated administration building, as well as from the paved open yard areas; it was stated that roof water would be captured and held in the rainwater harvesting tank to the east of the shed and would provide water to the onsite truck wash facility. Overflow from the rainwater harvesting system would be directed to the underground attenuation tank adjacent to the carpark, prior to the discharge to the storm water rising main.
44. It was stated that the yard at the proposed facility would be split into two sections for the purposes of handling surface water runoff. The rear yard, was some 5,735m² in area, while the front yard was 6,400m². Surface water from both sections would be captured and passed through associated grit traps and class one full retention separator system, prior to being stored in the site's attenuation tank.
45. The authors stated that the outlets from the hydrocarbon interceptor systems, would include a shutoff valve, that could be closed in the event of an incident within the site, which may have the potential to impact on surface water quality. This would allow for the containment of the surface water within the confines of the site, followed by removal of the contaminant by an appropriately authorised waste collection contractor.
46. The discharge rate from the site attenuation tank to the local authority storm water network, would be controlled by a hydro-brake at the outlet from the attenuation system. This would allow for restriction of the flow to 171/s to mimic the runoff from a greenfield site. The purpose of such a system was to ensure that discharges from the site did not increase the likelihood of flooding of the receiving water in high rainfall events. It was stated that their understanding was that the waste management/industrial area sewer ultimately discharges to a natural watercourse. All discharges from the site would be as per agreement upon completion of a discharge licence application.
47. In relation to oil and chemical storage, it was stated at para. 2.17 that the proposed operations for the facility would involve the handling of fuel and various forms of engine and lubricating oils. The proposed storage for those materials were two bunded oil storage tanks, which would be situated over ground in the refuelling zone. The tanks would have an 8,000 and 45,000 litre capacity and would be used to hold green and white diesel respectively, to serve the Wilton Waste Recycling Limited fleet. It was stated that in the unlikely event of a chemical spillage in the yard area of the site, the material would be contained and managed appropriately, so as not to adversely impact on the surrounding environment, as detailed at para. 2.8.5, which dealt with surface water runoff from the yards, as already described.

48. At para. 2.18, the author gave a description of the acceptance and handling of waste that would be carried out at the facility.
49. Chapter 7 of the EIS dealt with hydrology and hydro-geology. That section of the EIS was prepared by Dr. Colin O'Reilly BAgSc, PhD of Envirologic Limited, on behalf of Boylan Engineering.
50. At para. 7.4.1, the author dealt with the issue of surface water catchment at the site. He noted that it was important to consider the surface water catchment and any other potential upgrading sources of contamination to local surface watercourses and the fate of any potential contaminants downstream. Where accessible, local streams were surveyed on 25th June, 2013 and 19th October, 2015 using RTK VRS technique and referencing Malin Head as elevation *datum*. Those levels, along with topographical contours, were used to define the upgrading and downgrading catchment as shown in Table 7.3.
51. The author noted that surface waters generated from precipitation currently falling on the site, ran naturally to a first order stream on the southern boundary. That watercourse accepted a number of drains before joining the headwaters of the Lismagratty stream 200m to the north. The Lismagratty stream flowed northwest and had an outfall into the Annalee River, 4.5km northeast of the site. The Annalee river is a moderately sized river that passes through Ballyhaise and ButlersBridge, before entering the Lough Oughter SAC complex. Hydraulic gradient from the site to the Annalee sees a fall from 106 MOD to 53 MOD, over a distance of 4.5km.
52. The author went on to note the runoff generated on the landfill site and recycling centre to the west of the development site, drained to the Corranure stream. It eventually enters the Cavan River, which enters the Lough Oughter SAC, 2.5km downstream of the confluence.
53. The author noted that site runoff in relation to the development site currently drains naturally to the watercourse along the southern boundary, and subsequently flows northeast to the Lismagratty stream. He noted that Cavan County Council had recently commissioned a collection tank, pumping station and rising main, to manage storm water within the boundary of its ownership. The author noted that storm water on the proposed development site would need to be discharged to the collection chambers at rates not exceeding pre-development greenfield runoff rates. Required attenuation volume was calculated in the following section. This was set out at para. 7.7.1.4.
54. In relation to attenuation storage, the author noted that from the data set out in Table 7.10 it could be seen that the storm water generated during a one in one-hundred-year event of duration six hours, on hardstanding, was 1,016m³. During a one in one-hundred-year storm of six hours' duration, the greenfield runoff rate from hardstanding would be 648m³. That was the maximum amount of surface water permitted to be diverted from the area to the surface watercourse. The balance, i.e. 360m³, must either be withheld *via* storm water attenuation and released slowly or else be disposed of *via* an infiltration trench.

55. The author assumed that there was negligible infiltration through the sub-soils in the attenuation area. Hence, at this site, the maximum potential attenuation volume would be required. He noted that the site was not prone to flooding. Encroachment of water from perched water table could be eliminated through the installation of perimeter French drains at the up-gradient site boundary and immediately up-gradient of the attenuation area.
56. The author went on to outline that there were two systems that were deemed suitable to provide for storm water attenuation. The option which was to be used at the site was a modular permeable attenuation system, such as BMS storm breaker, Stormtech, or JFC Hydrocell systems. The author went on to give a detailed description of the systems, which had a void ratio of up to 95%. In terms of outflow control, a hydro brake device would be installed at the outlet of the attenuation system to control storm water discharges, to pre-development greenfield runoff rates. There would also be a silt interceptor in the form of a silt trap, which would treat runoff from all hardstanding areas. The unit would treat storm water before it entered the attenuation device. The author gave examples of the type of silt interceptors that were available on the market.
57. The system would also have a hydrocarbon interceptor. The author noted that a class one by-pass petrol/oil interceptor would treat runoff from car-parking areas. A full retention inceptor would be installed on areas where risk of spillage was greater than normally expected. Storm water from roofed areas would not be passed through the oil interceptor. The unit would treat storm water before it entered the attenuation device. Finally, the author noted that rainwater would be harvested from roof runoff to provide an extra buffer for storm water directed towards the attenuation area and to reduce the reliance on mains water for activity such as washing of hardstanding areas, equipment and vehicles.
58. In Table 7.11, Dr. O'Reilly gave a summary of the potential impacts that could arise for the environment during both the construction phase and operational phase of the proposed development.
59. The author went on to set out the mitigation measures that would be necessary to eliminate, or at least reduce, the harmful effects that had been identified. He noted that the principle objectives of the mitigation measures were to do the following: plan and design water pollution, erosion and sediment control; minimise erosion and potential for soiled water to be generated by minimising site runoff volumes and the area of exposed ground; prevent natural, clean runoff entering the works area; provide appropriate control and containment measures on site; install drainage and runoff controls before starting site clearance and earthworks; prevent any direct discharges from the construction site into the southern stream through onsite treatment and overland flow treatment.
60. In Table 7.12 the author went through each of the risk events that had been previously identified and set out the mitigation measures that would have to be adopted in each case. He then went on to give the "predicted impact" on the environment after the

mitigation measures had been put in place. The predicted impacts during the construction phase were all estimated as being "imperceptible" or "neutral". During the operational phase of the development site, the predicted impacts on the environment were all deemed to be "neutral".

61. It is not appropriate in this judgment to set out all of the mitigation measures that were identified by Dr. O'Reilly. It will suffice to note that he described the containment system for storage of hydrocarbons; dealing with leakages from machinery and spillages during refuelling, in considerable detail. He noted that the bund around the tanks must be capable of holding 110% of the largest tank, or 25% above the aggregate capacity. Drip trays used for drum storage must be capable of holding at least 25% of the drum capacity.
62. In the operational phase, he noted that runoff contaminated with hydrocarbons was dealt with by providing that any potentially contaminated liquids/lubricants should be stored in sealed containers with a bund capable of withholding 110% of container volume. All runoff generated on hardstanding (excluding roofed area), would be passed through an appropriately sized hydrocarbon interceptor prior to leaving the boundary. A sampling chamber would be installed in a manhole prior to the inlet of the attenuation device. In relation to silt laden runoff, all runoff generated on hardstanding, would be passed through an appropriately sized silt interceptor prior to leaving the site boundary. In relation to contaminated runoff in the event of fire, a shutoff valve would be provided at the inflow to the attenuation device. This meant that any fire water would be retained on site. The lower site boundary was to be kerbed to withhold fire water within the site boundary.
63. In relation to residual impacts, Dr. O'Reilly stated that based upon the remediation measures outlined in the EIS, the predicted residual impacts on the hydrological and hydrogeological environment during the construction phase would be a short term imperceptible impact. The implementation of mitigation measures would ensure that the predicted impacts on the hydrological and hydrogeological environment would not occur during the operational phase and that the residual impact would be of a long term imperceptible significance.
64. In terms of monitoring, the author noted that a project specific construction and environmental management plan (CEMP) was to be established and maintained by the contractors during the construction and operational phases of the proposed development. The plan would cover all potentially polluting activities and include an emergency response procedure. He noted that any installations recommended under mitigation measures (*e.g.* silt fences) should be inspected on a daily basis by a designated person. During the construction phase, it was assumed that site runoff would be directed towards the existing stream on the southern boundary, which flows in an easterly direction. Site runoff during the operational phase would be directed towards the collection chamber and pumping station as described previously.

65. In relation to cumulative impacts, the author noted that all storm water leaving the site would pass through hydrocarbon and silt interceptors, meaning that there should be no cumulative impact to receiving water quality (surface waters and ground water). Installation of hardstanding would result in a cumulative decrease in recharge rates to the aquifer. The aquifer was deemed to be an attribute of low importance, used primarily for domestic supply to single houses. That had been mitigated against through the recommendation of an unlined attenuation area, which meant that there should be no cumulative impact to ground water recharge rates. Surface water leaving the site would be restricted to greenfield runoff rates.

66. Dr. O'Reilly gave his conclusion and summary in the following terms: -

"In the context of surface water, the primary impacts are to surface water quality, due to contamination with hydrocarbons and building materials such as concrete, and transport of silt from the site. A number of temporary mitigation measures have been recommended to prevent any negative impact to surface water quality during construction phase. Permanent mitigation measures, primarily installation of silt and hydrocarbon interceptors, should protect water surface quality during the lifetime of the proposed development. A storm water attenuation device shall control storm water flows from the site at pre-development greenfield runoff rates, and this will protect against any potential increase in flood risk due to the introduction of hardstanding. Attenuated storm water will be diverted to a pumping station, from which it will be discharged to the Lismagratty stream. The potential risk to ground water is less due to the protective coverage provided by a thick layer of low permeability overburden. As this is removed for site development the protection to the underlying aquifer is temporarily reduced. Mitigation measures will protect against any impact to ground water quality. Hardstanding will be installed on any areas where subsoil has been disturbed, thereby protecting the underlying aquifer. Ground water will be less vulnerable on areas of the site upon which elevation is due to be raised by placement of sub-soil. Foul water is to be discharged to a mains sewer network.

Potential impacts to the hydrological and hydrogeological environment have been assessed and appropriate mitigation measures have been presented. There are no likely significant impacts on the hydrological or hydrogeological environment associated with the proposed development of the site. It is not anticipated that impacts will arise following the implementation of the mitigation measures as outlined in the EIS."

(c) Further information.

67. As already noted, at the request of the planning authority, Boylan Engineering furnished further information on 11th November, 2016. This included further information on a wide range of areas including: details on connection to the public sewer; a revised map of inspection manholes to foul and storm water networks and a programme for maintenance of surface water drainage infrastructure, which provided that the programme for maintenance of surface water would be carried out in line with the current system at the

site at Kiffa, Ballyjamesduff, Cavan. That system consisted of weekly recorded inspections of the interceptor systems and drainage gullies. De-sludging was carried out periodically when required by a fully authorised and appropriately permitted waste collection operator.

68. Further information was also provided by furnishing a revised map of the surface water drainage system and further details of the unlined attenuation area. In relation to measures for protection of the environment, it was stated that all measures specified by the Inland Fisheries in their submissions for the protection of the environment, would be undertaken as part of the development. All such measures had been outlined in the various sections of the EIS. Furthermore, all operations at the facility, if granted permission, would be carried out in strict accordance with both planning conditions and the facility permit conditions relating to the site.
69. In terms of monitoring of the proposed facility in relation to surface water, dust, noise and odour, it was stated that the developer expected that the environmental monitoring requirements for the site, would be decided by the local authority and would be specified in the conditions of the waste facility permit, if granted. Any such conditions pertaining to environmental monitoring would be carried out frequently, as determined by the local authority. It was pointed out that the rear storage yard would be used for external storage of waste of a non-biodegradable nature. Any material proposed for external storage would have undergone processing.
70. Finally, at Appendix 21 of the further information document, Dr. O'Reilly gave specific answers to a number of queries that had been raised by the planning authority in relation to the hydrology and hydrogeological assessment that had formed part of the EIS. It is not necessary to set out the content of that further information. In essence, Dr. O'Reilly was giving further explanation or clarification on issues that had arisen in relation to his original assessment.

(d) The Inspector's Report.

71. As already noted, the inspector had carried out a site inspection of the proposed development site on 17th May, 2017. On 23rd May, 2017, she had the benefit of an oral hearing, at which evidence was given by a number of witnesses, including Dr. Colin O'Reilly. The applicants were represented by Mr. Gabriel Toolan, solicitor, at that hearing.
72. The inspector issued her report on 16th June, 2017. At section 9 thereof she dealt with environmental issues. She noted that while the preliminary flood risk assessment maps indicated that the site was not at risk of fluvial flooding, there was a potential for impacts to water quality during the construction phase of the development, including the risk of surface water becoming laden with silt and hydrocarbons and an increase in vulnerability of the underlying aquifer during excavations caused by a reduction in sub-soil depth.
73. The inspector noted that at the oral hearing, Dr. O'Reilly stated that the model used was that of the source (project proposal) pathway (flow) and receptor (aquifer) and when one of these areas were severed, the potential for impacts was removed.

74. She noted that mitigation measures had been included in the EIS to prevent loss of hydrocarbons. Internal perimeter drains would be installed within the building to capture any liquids, or spills that may occur. These would be directed to an 8m³ covered holding tank external to the building. Fuel tanks would be double-skin banded. Roof runoff would pass a rainwater harvesting tank, with excess passing through an attenuation area. Surface water from yards would be attenuated in line with SuDS recommendations, after passing through silt and hydrocarbon interceptors. Following attenuation, storm water would be diverted to a pumping station and discharged to the Lismagratty stream. All wastes accepted would be required to be in accordance with the terms of the waste facility permit and subject to conditions similar to condition 6 attached by the planning authority to its decision, that there would be no waste stored outdoors.
75. At the oral hearing an issue had arisen in relation to the runoff from the adjoining Corranure landfill site and the possible cumulative effects of runoff from the development site and that site. That was dealt with by Dr. O'Reilly, who stated that the runoff from the Corranure landfill and recycling centre drained to the Corranure stream and westwards thereafter, but the current proposal intended to drain from the development site to the Lismagratty stream. The inspector went on to note that while there appeared to be an inconsistency between the statements in the EIS in chapter 9 and in the hydrology chapter, chapter 7, in relation to where the runoff from the development site may go, the inspector was satisfied having heard the evidence of Dr. O'Reilly and having considered the proposed management of site drainage, as presented in the drawings accompanying the planning application, which clearly showed that all storm water would be collected and attenuated on site. Excess water would pass to the public storm water network. Surface water leaving the site could be monitored, as there was a shutoff valve proposed to allow for control. The surface water would enter the public storm water network, which was stated to have been upgraded recently and would be pumped to a topographical high, following which, it would pass through a series of settlement ponds and continue to join the Lismagratty stream.
76. On the key issue of possible water contamination, the inspector reached the following conclusion at para. 9.6.12: -

"I am satisfied that appropriate measures can be put in place to address any potential adverse impacts on water quality arising from the proposed construction and operational phases of the development. No waste would be stored externally and the handling and processing of waste internally in the building would be capable of being managed to ensure any hydrocarbons or inadvertent spills would be captured and directed into a contained system in the form of a sealed holding tank for removal offsite at intervals by a licensed contractor. All external yards would be concrete hardstanding areas and surface water would pass through silt interceptor and hydrocarbon interceptors in line with best practice. Foul water would be discharged to the main sewer infrastructure and any storm water in excess of greenfield runoff would be retained on site. Following mitigation by best

practice at the construction and operational phases, including appropriate control measures, I anticipate residual impacts would be imperceptible.”

77. At para. 9.8 of her report, the inspector came to the conclusion that the proposed development was in accordance with the proper planning and sustainable development of the area. She then went on to consider the environmental impact assessment. She addressed the mitigation measures that had been proposed during construction at para. 10.3.10. She found that with the implementation of appropriate mitigation measures, construction impacts would be temporary and slight, which she considered acceptable. Operation impacts would be long term and negligible. Cumulative impacts on soils and geology arising from the proposed development, taken in conjunction with existing, planned or proposed development, were not likely to arise. She noted that chapter 7 of the EIS had addressed hydrology and hydrogeology, which she had considered at section 9.6 of her planning assessment. She anticipated that residual impacts and cumulative impacts would be imperceptible, which she considered satisfactory. Her conclusion on the environmental impact assessment was that, by itself and in combination with other existing and proposed development in the vicinity, and, subject to the implementation of the mitigation measures proposed, the effects of the proposed development on the environment would be acceptable.
78. The inspector then went on at section 11 of her report to deal with the appropriate assessment. She described the stage one appropriate assessment and then went on to describe the stage two appropriate assessment. At para. 11.3.3 she stated that she was satisfied that the information presented in the NIS and accompanying documentation, was adequate to undertake an appropriate assessment of the proposed development.
79. Having referred to the mitigation measures, which were set out in section 4 of the NIS, which also referenced chapter 7 of the EIS, the inspector found that in terms of indirect effects, secondary effects and in combination effects, and taking into consideration the recommended mitigation measures outlined above, she was satisfied that no significant in combination effects would arise to the relevant qualifying interests from the proposed development in combination with other development plans and projects completed, approved but not completed, or proposed (but not yet approved). She came to the following conclusion in respect of her appropriate assessment at para. 11.4.1:

“On the basis of the information provided with the application, including the Natura Impact Statement which I consider adequate in order to carry out a stage two appropriate assessment, and the assessment carried out above, I am satisfied that the proposed development, individually or in combination with other plans or projects would not be likely to adversely affect the integrity of Lough Oughter and associated loughs SAC (site code 000007), or the Lough Oughter complex SPA (site code 004049), or any other European site, in view of the site’s conservation objectives.”

80. On this basis she recommended that permission be granted for the proposed development, subject to the conditions which she set out in her report. In relation to the conditions recommended by the inspector, of which all but one were accepted by the respondent, condition 7 stated as follows: -

"There shall be no unloading, deposit, handling, storage or sorting of waste materials outside of the proposed building. Any organic material shall be transported to and from the site in sealed containers. Reason: In the interest of amenities, public health and safety."

81. It will be noted that when this condition was transposed into the permission granted by the respondent, the word "building", was transposed as "facility". This inconsistency forms the subject of a separate ground of challenge to the respondent's direction and will be dealt with later in the judgment.

The Board's direction.

82. In a direction dated 6th November, 2017, the Board noted that the submissions on the file and the inspector's report had been considered by the Board at a meeting held on 3rd November, 2017. In its direction bearing reference PL02.248033, the respondent decided to grant permission generally in accordance with the inspector's recommendation for the reasons and considerations stated therein.
83. In its direction, the respondent set out the various planning policy documents and the documents that had been submitted in relation to the planning application, that had been considered by the Board, which included the inspector's report and recommendation. It was recorded that the respondent was satisfied that the information before it was adequate to undertake an appropriate assessment and an environmental impact assessment in respect of the proposed development. The respondent completed an environmental impact assessment and an appropriate assessment and concluded that it was appropriate to grant permission for the proposed development. In so doing, it adopted the report and recommendation of the inspector.
84. The conditions attached to the planning permission will not be set out verbatim. It will suffice to provide a general summary of those conditions.
85. Condition 1 was in a fairly standard form. It provided that the proposed development shall be carried out and completed in accordance with plans and particulars lodged with the application. It provided that where the conditions of the permission required details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of the development and the development shall be carried out and completed in accordance with the agreed particulars.
86. Condition 2 provided that the mitigation measures set out in the EIS and the NIS shall be completed in full. Condition 3 provided that details of materials, colours and textures of all external finishes and external hard surfaces to the proposed facility shall be submitted

to and agreed in writing with the planning authority prior to the commencement of development. Condition 4 provided that the signage scheme for the facility shall be submitted to and agreed in advance in writing with the planning authority. Condition 5 provided that the site shall be landscaped in accordance with a comprehensive scheme of landscaping, the details of which had to be submitted to and agreed in writing with the planning authority prior to commencement of the development.

87. Condition 6 provided that construction of the development shall be managed in accordance with a construction and environment management plan, which would outline the project specific environmental measures that are to be put in place and procedures to be followed for the scope of construction works and shall be submitted to and agreed in writing with the planning authority prior to the commencement of development.
88. Condition 7 provided that there shall be no unloading, deposit, handling, storage or sorting of waste materials outside of the proposed facility. Any organic material shall be transported to and from the site in sealed containers.
89. Condition 8 provided that prior to commencement of development, a detailed invasive species management plan shall be submitted to and agreed in writing with the planning authority. Condition 9 provided that water supply and drainage arrangements, including the attenuation and disposal of surface water, shall comply with the requirements of the planning authority for such works and services. Condition 10 dealt with hours of site development works and operation of the proposed facility. Condition 11 set an upper limit for noise levels between the hours of 08:00 and 20:00 hours.
90. Condition 12 provided that the development shall not become operational until such time as the access road junction with the R188 regional road had been improved by the planning authority. Condition 13 dealt with archaeological appraisal of the site and condition 14 provided for payment of a financial contribution by the developer. Finally, condition 15 provided that the developer would pay a financial contribution as a special contribution under s.48(2)(c) of the Planning and Development Act 2000 in respect of improvement to the junction of the access road to the facility and the R188 regional road.

The grounds of challenge to the respondent's direction.

(a) *That the planning permission was defective because it left over matters to be agreed between the developer and the planning authority post-consent, which was not permissible where the development could have an adverse effect on a European site.*

91. Mr. Oisín Collins SC, on behalf of the applicants, submitted that while s. 34(5) of the Planning and Development Act 2000 (as amended) and the decision in *Boland v. An Bord Pleanála* [1996] 3 IR 435, permitted a planning authority to impose conditions whereby certain "points of detail" were left over for post-consent agreement between the developer and the planning authority, that power was considerably restricted by the judgment of the CJEU in *Holohan v. An Bord Pleanála*.

92. It was submitted that the effect of the *Holohan* decision was that where the proposed development involved matters coming within the EU directives on the environment and the Habitats Directive, then it was only in extremely limited circumstances that the planning authority could leave matters over for post-consent agreement between the developer and the authority. It was submitted that only very minor matters could be left over for agreement with the local authority subsequent to the permission being granted and only in circumstances where the competent authority was certain that the development consent granted established conditions that were strict enough to guarantee that those parameters would not adversely affect the integrity of the site (see para. 47 of the court's judgment).
93. It was submitted that in this case, where the screening for appropriate assessment had determined that there was a likelihood of adverse effects on the European sites due to the construction and operational phases of the development, it was impermissible for the respondent to have left over the range of matters that it had done for post-consent agreement between the developer and the first named notice party. It was submitted that the test set down in the *Boland* case was all but redundant in cases where the proposed development could have an adverse effect on a European site; in such cases, the effect of the judgment in the *Holohan* case meant that it was all but impossible for the competent authority to leave over matters for post-consent agreement between the developer and the local authority.
94. It was submitted that in the present case, given the level of uncertainty that existed in relation to the matters that had been left over for post-consent agreement, those conditions attaching to the respondent's direction were invalid and accordingly the direction itself had to be struck down.
95. In response, Mr. Fintan Valentine SC, on behalf of the respondent, submitted that the *Boland* test had not been displaced by the *Holohan* test. It was still permissible for a competent authority to leave over matters for post-consent agreement between the parties. All that the decision of the CJEU in *Holohan* had done, was to tighten the circumstances and range of matters which could be left over for post-consent agreement.
96. Counsel referred to the decisions in *Sliabh Luachra against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888 and *Kemper v. An Bord Pleanála* [2020] IEHC 601, as support for the proposition that conditions known as "points of detail" conditions, can still be left over for post-consent agreement, even where one was dealing with the effect of a proposed development on European sites.
97. It was submitted that while the decision of the CJEU in *Holohan* had placed strict criteria on the parameters within which such points of detail conditions could be provided for in cases where the proposed development involved possible adverse effects on a European site, it had not prohibited the use of such conditions in such circumstances.
98. The court is of the view that the submission made on behalf of the respondent on this aspect is correct. In the *Boland* case, the Supreme Court held that the respondent had

the power to grant permissions subject to what are known as “points of detail” conditions, whereby certain matters were to be agreed post-consent between the developer and the relevant planning authority. Hamilton C.J. stated as follows at p.466-467:

- "5. *In imposing a condition that a matter be left to be agreed between the developer and the planning authority, the Board is entitled to have regard to:*
- (a) *the desirability of leaving to a developer who is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise;*
 - (b) *the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience;*
 - (c) *the impracticability of imposing detailed conditions having regard to the nature of the development;*
 - (d) *the functions and responsibilities of the planning authority;*
 - (e) *whether the matters essentially are concerned with off-site problems and do not affect the subject lands;*
 - (f) *whether the enforcement of such conditions require monitoring or supervision."*

99. The power of the respondent to impose such conditions was given statutory recognition in s. 34(5) of the Planning and Development Act 2000 (as amended), which provides that the conditions that can be attached pursuant to sub-s.1 of that section, may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development; if the planning authority and that person cannot agree on the matter, it may be referred to the Board for determination.

100. It is also well established that the direction of the respondent must be read in light of the planning documentation and the inspector's report relating to the proposed development. In *People Over Wind v. An Bord Pleanála* [2015] IECA 272, the court had to consider the situation where a proposed development could adversely affect the integrity of a European site, but such effect could be avoided by mitigation measures; to what extent, if at all, it was lawful for the detail of such measures to be left over by the Board for post consent agreement between the developer and the named authorities. The court gave its answer to that question in the following terms at paras. 58-61 of the judgment: -

- "58. *It is clear that the question of the detail of the mitigation measures and the manner by which the precise nature of these mitigation measures is to be finally determined is, in principle, a matter of national law save only that, as indicated in cases such as Sweetman, the national authorities cannot by reason of the*

delegation of such issues to local planning authorities permit the obligations imposed by Article 6(3) of the Habitats Directive to be compromised.

59. *So far as the issue of delegation is concerned under national law, it is clear from the Supreme Court's decision in Boland v. An Bord Pleanála [1996] 3 I.R. 435 that the delegation of technical matters of this kind is, in principle, acceptable. In Boland the Board had granted permission for the re-development and extension of the existing ferry terminal at Dún Laoghaire, subject to conditions in relation to the management of ferry traffic and new design plans for traffic access and egress arrangements. The Court held that these conditions were permissible, since they were "essentially technical matters of matters of detail relating only to one aspect of the development, viz., the control of the flow of traffic": see [1996] 3 I.R. 435, 467 per Hamilton C.J. The Chief Justice further stated that "what is required to be agreed is merely a matter of detail" and for that reason the conditions which prescribed that these details were to be agreed with the planning authority did not amount to an abdication of the Board of its statutory duties.*
60. *For our part, we can see no great difference in principle so far as the conditions at issue in the present case are concerned. The Board's statement of principle is crystal clear, namely, that no silt or sediment whatever should enter the run-off thus contaminating the up-stream watercourses. The realisation of that objective is largely a question of designing the appropriate engineering and hydrological solutions under the supervision of an environmental scientist or other similarly qualified professional. Given that the Board's decision has already articulated the relevant principle, the actual design of these mitigation measures is essentially a matter of detail in the sense envisaged by the Supreme Court in Boland.*
61. *For these reasons, therefore, we are of the view that the delegation of the finalisation of these conditions to the planning authority is within the scope of delegation envisaged in Boland and is not unlawful."*
101. The key question for determination in this case, is whether the judgment of the CJEU in *Holohan* has caused such a paradigm shift, that where one is dealing with an appropriate assessment, it is not permissible to leave over points of detail of the sort contained in the present planning permission. The question which was posed to the CJEU was in broadly similar terms and was set out at para. 41 of the judgment.
102. In giving its answer to that question, the CJEU pointed out that the competent national authority cannot grant permission where there is evidence that the proposed development is likely to have a significant effect on a European site, unless the authority has first ascertained by means of an appropriate assessment that it will not adversely affect the integrity of the site concerned. The court held that an assessment cannot be considered to be appropriate if it contains lacunae and does not contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the plan or project on the European site. All aspects of the plan or project must be identified in the light of the best scientific knowledge in the field. The court

observed that only those parameters as to the effects of which there was no scientific doubt that they might affect the site, could be properly left to be decided later by the developer. The court stated its answer to the question posed in the following way at para. 47: -

"In the light of the foregoing the answer to the eighth question is that Article 6(3) of the Habitats Directive must be interpreted as meaning that the competent authority is permitted to grant to a plan or project development consent which leaves the developer free to determine later certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site."

103. Thus, it is clear that the *Holohan* decision provides that it is still possible for a competent authority to leave points of detail to be agreed post-consent between the developer and the planning authority, as long as the parameters of the detail remain within the guarantee that the development will not have adverse effects on a European site.
104. The court is satisfied that the *Boland* test remains valid in relation to what matters may be left over for post-consent agreement, but insofar as the proposed development is one requiring an appropriate assessment, or may have an adverse effect on the environment, or on a European site, the test has been tightened to the extent that the level of detail to be agreed subsequently, must be such as to preserve the guarantee that there will be no adverse effects on the European site, no matter what is subsequently agreed between the developer and the planning authority on the relevant aspect of the development. In layman's terms, the amount of wriggle room that can be left over for post-consent agreement, has been reduced, but not eliminated.
105. The court is satisfied that this interpretation of the interaction between the decision of the Supreme Court in *Boland* and the subsequent decision of the CJEU in *Holohan* is correct, having regard to the decisions of the Irish courts subsequent to the CJEU decision.
106. In the *Sliabh Luachra* case, McDonald J. had to consider the legality of a condition whereby the respondent had left over for future determination the details of the CEMP relating to the method statements for construction, the location of the site and material compound and other elements of the construction required for the development to be carried out. That condition was similar to condition 6 in the present case. The learned judge considered the condition in the context of the *Holohan* decision and stated as follows at para. 103: -

"...As counsel for the respondent said, in the context of oral submissions, condition 16 is not, as contended by the applicant, a licence to agree terms and conditions in the future. It must be seen against the framework of what has already been addressed in detail in the EIS. To paraphrase what has been said by the CJEU in Holohan, the decision of the respondent contains conditions in conditions 1 and 2

that are, when read with the underlying documents, detailed enough and strict enough to ensure that the parameters of condition 16 will not adversely affect the Blackwater SAC or the freshwater pearl mussel in particular.”

107. The decision in the *Kemper* case was along broadly similar lines. In that case, Allen J. had to consider a number of conditions where matters had been left over for agreement between the developer and the planning authority. In particular, he had to consider the legality of such conditions in light of the *Holohan* decision. He dealt with this issue at paras. 259-266 of the judgment. He found that the condition in question was valid and gave the following conclusion at para. 266: -

“As Ms. Butler puts it, the mitigation measures for a fire occurrence at the RBSF were identified in the planning application, were identified by the Board, and were found to be satisfactory to remove any risk of adverse environmental effects arising from fire water runoff. The agreement required by condition 12 adds a layer of formality but does not introduce an uncertainty as to the absence of adverse effects. Any purported agreement reflecting mitigation measures less than those presented to and considered and approved by the Board would not be in accordance with the permission.”

108. Based on the foregoing authorities, the court holds that the *Holohan* decision does not prevent points of detail being left over for post-consent agreement, even where the proposed development could have adverse effects on a European site.
109. Insofar as it was argued on behalf of the applicants that leaving over such matters for subsequent agreement would eliminate public participation in the process, contrary to the provisions of the directives, the court does not accept that argument. The applicants have had considerable opportunity to make their views known. The first named applicant made submissions as to why the grant of permission should not be made at the initial stage, when the matter was before Cavan County Council. Further submissions were submitted when the appeal was lodged by the applicants. The applicants attended at, and participated through their solicitor, in the oral hearing before the inspector.
110. In *Arklow Holidays Limited v. An Bord Pleanála* [2006] IEHC 15 Clarke J. (as he then was) stated that it was open to any party to challenge an agreement reached post-consent, on the basis that it did not conform with the criteria specified in the decision of the Board. He went on to hold that in the circumstances it did not seem to him that there was any breach of the directive as interpreted by the Court of Justice in the *Wells* case in circumstances where the Board imposed a condition which complied with the *Boland* principles. In those circumstances any interested member of the public would have had the opportunity to engage in the process and to influence the criteria which the Board specified in its direction.
111. In his subsequent ruling in the same case, on an application for leave to appeal, which is reported at [2007] 4 IR 112, Clarke J. reiterated that points of detail conditions were permissible and again noted that it would be open to any member of the public to

challenge an agreement reached on the basis that it did not conform with the criteria specified in the decision of the Board. In those circumstances, he came to the conclusion that the imposition of such conditions could not amount to a breach of the undoubted obligation of public consultation set out in the directive (see paras. 11-17 of the judgment).

112. The court holds that when viewed over the totality of the process, the applicants have not been denied their right to participate in the process contrary to the provisions of the directives. As previously noted, in the event that an agreement goes beyond that permitted under the terms of the permission granted to the developer, the applicants will have the opportunity to challenge that agreement by way of judicial review. Accordingly, there is no breach of their rights to public participation under the directives.

(b) That the respondent did not conduct a proper appropriate assessment.

113. The requirements that must be met in order for an appropriate assessment to be valid, were set down by Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400 at para. 40: -

"40. It must be recalled that the appropriate assessment, or a stage two assessment, will only arise where, in the stage one screening process, it has been determined (or it has been implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site. Where that is the position, then, in accordance with the preceding case law, 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."*

114. The test set down in the *Kelly* case was accepted by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31.

115. Drawing on those two decisions, McDonald J. in the *Sliabh Luachra* case held that there are four requirements which must be met in order for there to be a valid appropriate assessment. He stated as follows at para. 19:-

- "(a) In the first place, the appropriate assessment must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which have the potential, either as a consequence of the development itself or in combination with other plans or projects to affect the European site in the light of its conservation objectives;*
- (b) Secondly, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any European site. This requires findings to be made following appropriate analysis and evaluation each in the light of the best scientific knowledge in the field. The findings and conclusions cannot have any lacunae or gaps;*
- (c) Thirdly, on the basis of those findings and conclusions, the planning authority, if it is to grant permission for the development, must be able to determine that no reasonable scientific doubt remains as to the absence of the identified potential effects. It is clear from the decision of Finlay Geoghegan J. in Kelly (in para. 48 of her judgment) that these findings must be appropriately recorded. In particular, Finlay Geoghegan J. said:-*

'In accordance with the CJEU decision in Sweetman, it is for the national court to determine whether the appropriate assessment (including the determination) was lawfully carried out or reached, and to do so, it appears to me that the reasons given for the Board's determination in an appropriate assessment must include the complete, precise and definitive findings and conclusions relied upon by the Board as the basis for its determination. They must also include the main rationale or reason for which the Board considered those findings and conclusions capable of removing all scientific doubt as the effects of the proposed development on the European site concerned in the light of ... its conservation objectives. In the absence of such reasons, it would not be possible for a court to decide whether the appropriate assessment was lawfully concluded or whether the determination meets the legal test required by the judgments of the CJEU'; and

- (d) Fourthly, where these requirements are satisfied, the planning authority may determine that the proposed development will not adversely affect the integrity of any relevant European site and will not be prevented from granting permission on Article 6 grounds."*

116. The court is satisfied that the court has to interpret the Board's direction in its proper context, where the Board had access to all the documentation submitted by the developer, together with the submissions of both the developer and the objectors on the appeal and the further information submitted by the developer and the evidence given at

the oral hearing before the inspector and the inspector's report itself. The court also has to have regard to the fact that both the inspector and the respondent stated that they had adequate information to enable them to carry out an appropriate assessment.

117. In addition, the court has to look at the respondent's direction in the context of conditions 1 and 2, which refer specifically to the planning documentation submitted by the developer; so the developer is obliged to provide the mitigating measures specified in its application documentation.
118. As the respondent expressly adopted the report of the inspector and her recommendations, one has to have regard to that report which was based on the documentation before her, the site visit which she carried out and with the benefit of oral evidence at the hearing held before her.
119. In essence, the applicants submit that the appropriate assessment that was carried out was incomplete on two grounds: firstly, because it is alleged that a comprehensive hydrogeological survey of the underground channels and streams linking the development site to the European sites was not carried out; and secondly, due to the alleged inconsistency between the statements made in chapters 7 and 9 as to where the water would discharge from the development site.
120. While the language used in the first paragraph of section 7 of the NIS, might suggest that the authors were stating that a comprehensive hydrogeological survey should be carried out and that they would defer to the opinion of the hydrologist in that regard, that statement is explicable by the fact that the NIS pre-dated the EIS, which contained the assessment done by the hydrogeologist and his conclusions thereon.
121. However, it is clear that the authors of the NIS had access to a fairly late draft of the hydrologist's assessment and report, because they go on to quote precisely from his conclusions, as appearing in chapter 7 of the EIS, which was formally published the month after publication of the NIS.
122. Where there are multiple authors of both documents, it is entirely logical and reasonable that while one report may be published later than the other, the content of the later published report, may well be available to the authors of the report which was published only a matter of weeks earlier. Accordingly, the court is of the view that the NIS cannot be read as meaning that a further and more comprehensive hydrogeological survey should be carried out, over and above that which had already been carried out by Dr. O'Reilly. The better interpretation is that the authors of the NIS were simply stating that such hydrological assessment would be necessary and they were leaving that to the expert in that area, being Dr. O'Reilly.
123. Turning to the specifics of the hydrological evidence before the inspector, which evidence was also before the respondent, it is clear that there was ample evidence to support the conclusion that when the mitigating measures were put in place, there would not be any significant adverse effects on either of the European sites.

124. In the course of argument at the bar, Mr. Oisín Collins SC suggested that the appropriate assessment that was carried out was deficient, because there was no examination of the course of the underground streams and channels linking the development site and the European sites. He suggested that bore holes should have been dug and sonar mapping carried out to determine the exact course of all streams and channels linking the development site to the European sites. However, there was no expert evidence put before the court that the appropriate assessment was deficient in this respect.
125. The court is of the view that this submission is not well founded. It misses the point that it was accepted by the developer, and by the authors of the EIS and the NIS, both at the screening stage and at the second stage of appropriate assessment, that there was the potential for contamination of the European sites by water and other liquids moving from the development site to the European sites. The linkage between the two sites was accepted. Dr. O'Reilly made it clear that an SPR linkage existed between the sites. He also stated that it was necessary to sever that linkage by cutting off a possible source of contamination at the source, which was at the development site itself.
126. In such circumstances, the court is of the view that the precise route of the underground streams and channels between the development site and the European sites was not greatly relevant, once the existence of their being a linkage between the sites and therefore a risk of contamination, was recognised and accepted.
127. To deal with that risk of contamination, an extensive series of mitigating measures was proposed in the planning documentation submitted by the developer. Those mitigating measures have been set out *in extenso* earlier in the judgment.
128. The effects of these measures were addressed by the hydrologist in the EIS, both at the construction phase and at the operational phase. As already noted, the summary of mitigating measures and their predicted impact was set out in Table 7.12 in the EIS. The predicted impacts for both the construction phase and the operation phase ranged between "imperceptible" and "neutral". In summary, the effect of the mitigation measures was to prevent harmful liquids, or other material leaving the development site and entering the water channels linking that site and the European sites. The court is satisfied that there was ample evidence before the inspector and the respondent to enable them to come to the conclusion that, once the mitigation measures were put in place, the risk of any significant adverse effects on the European sites had been all but eliminated.
129. This Court is not hearing an appeal from the decision of the inspector, or the respondent, in relation to the adequacy and effectiveness of mitigating measures. That is a matter for the experts, who have been entrusted by the Oireachtas to carry out the appropriate assessment and consideration of the planning application generally.
130. The court can only intervene if it is established that the appropriate assessment which was carried out, was deficient in terms of its scope; in other words, that it did not address a known risk adequately, or at all. The court is satisfied that all relevant risks to the European sites were properly addressed in the appropriate assessment conducted by the

inspector and the Board. The conclusions that they reached, that the risk of adverse effects could be adequately dealt with by the mitigating measures, which were specified in considerable detail in the planning documentation and in the further information provided by the developer, cannot be set aside by this Court.

131. The second ground on which it was alleged that a proper appropriate assessment had not been carried out, was due to the alleged inconsistency between the statements contained in chapter 7 and chapter 9 of the EIS in relation to where a discharge from the development site would go. The court is satisfied that this was adequately addressed by Dr. O'Reilly in his evidence at the oral hearing and it was accepted by the inspector based on that evidence, that any discharge from the site would drain into the Lismagratty stream. The court is satisfied that the inspector and the respondent, were entitled to act on the expert evidence of Dr. O'Reilly in that regard.
132. In conclusion on this ground of challenge, the court is satisfied that the appropriate assessment carried out by the inspector, which was adopted by the respondent, was not deficient in the manner alleged by the applicants. It addressed the risk of contamination of the European sites by adopting the proposed mitigation measures. There was evidence before the inspector from Dr. O'Reilly that these measures would virtually eliminate any negative effect on the European sites during the construction, or operation phases. The inspector and the Board were entitled to accept that evidence.
133. As the mitigation measures have to be implemented in full pursuant to conditions 1 and 2 of the planning permission, the court is satisfied that the respondent has performed a full and complete appropriate assessment and has adequately considered the environmental impact of the development, both on its own, and cumulatively with other developments in the area. The respondent was entitled to reach the conclusions that it did in its appropriate assessment and in relation to the lack of adverse environmental effects on the European sites. The court rejects this ground of challenge.

(c) Challenge in relation to condition 2.

134. Condition 2 provides that the mitigation measures set out in the EIS and the NIS shall be implemented in full. The applicants contend that this condition is unlawful because it is simply too wide. It makes a generic statement that the developer is to comply with the mitigation measures in the EIS and the NIS. It was submitted that such a broad generalised condition was not lawful, having regard to the specific requirements of the directives and the need to ensure that concrete measures to protect European sites are set out with specificity in the planning permission.
135. In response, counsel for the respondent pointed to the fact that condition 2 was little more than a reiteration of the broad obligation that was set out in condition 1. Condition 1 stated that the proposed development shall be carried out and completed in accordance with the plans and particulars lodged with the application. That, on its own, would have encompassed the mitigation measures set out in the documentation, which accompanied the planning application. It was submitted that condition 2 was really little more than a

“belt and braces” approach, to copper fasten that the mitigation measures, as specified in the planning documentation, had to be carried out by the developer.

136. Counsel submitted that condition 2 was a condition that was used on a frequent basis in planning applications and had been accepted as being valid by the Irish courts in a number of cases: *People Over Wind v. An Bord Pleanála*; *O'Brien v. An Bord Pleanála* [2017] IEHC 773; *Ratheniska v. An Bord Pleanála* [2015] IEHC 18.
137. Counsel further submitted that where the mitigating measures had been specified in great detail in the documentation submitted as part of the planning application, it was well settled that the decision to grant planning permission could be based on that documentation and on the inspector’s report and it was not necessary to recite all the mitigating measures again in the permission that was granted.
138. The court is satisfied that in looking at a decision of a planning authority, the court is entitled to have regard to the documentation that was before the planning authority at the time that it made its decision. This would generally include all the documentation submitted by the developer, any objections in relation to the development, together with any supporting documentation and the inspector’s report. This means that the court is entitled to have regard to all of the documentation that was before the Board at the time that it reached its decision.
139. The decision that issued by the Board has to be seen in the context in which it was given. The court is satisfied that condition 2 is a standard type of condition, which simply reiterated the obligation on the developer to carry out all the mitigating measures and monitoring thereof, in accordance with the documentation that had been submitted by it, as part of its application for planning permission.
140. In the present case, the mitigating measures had been specified in considerable detail, both in the initial submission from Boylan Engineering and in the further information provided by it. The size and location of the tanks was specified, the level of hardstanding in the facility was specified and the degree of monitoring of the mitigating measures was set out in detail. In these circumstances, there was nothing wrong with the respondent putting in a condition that the developer would have to comply with all the mitigating measures that had been specified by it in its planning application. Accordingly, the court rejects this ground of challenge to the respondent’s direction.

(d) The points of detail conditions are impermissibly wide.

141. It was submitted on behalf of the applicants that in the present case the respondent had been impermissibly vague in relation to the matters that had been left over for subsequent agreement between the developer and the planning authority.
142. As already noted, the court is satisfied that “points of detail” conditions are permissible at law, even where the proposed development could have adverse effects on a European site. As previously noted in this judgment, the degree of discretion that can be left over to

the developer and the planning authority for subsequent agreement is considerably lessened once there is any question of an adverse effect on a European site. The competent authority can only leave over for subsequent agreement, matters that come within parameters that can guarantee, that no matter what is agreed between the parties subsequently, there will be no adverse effects on the European site.

143. Bearing those limitations in mind, it has to be recognised that the planning permission has to be read in the context of the documentation that was submitted as part of the planning application; which documentation is made the basis for the permission as per condition 1.
144. The fact that details of specific aspects concerning the development are left over for subsequent agreement, only permits a degree of latitude to the developer and the planning authority for agreement within the ambit of the permission already granted. That permission incorporates the documentation submitted and the inspector's report, so the developer and the planning authority are not free to agree matters going outside the parameters on which the permission had been granted.
145. It is also necessary to consider the conditions in the context that this is a permission in relation to a waste processing facility, which will require a waste facility permit, under which the local authority will regulate operations at the plant. Thus, while there will be an overlap between some of the conditions specified in the planning permission, many of these matters will fall to be regulated primarily under waste management legislation and the regulations made thereunder.
146. It is against that background that the court must examine the individual conditions where matters have been left over for post-consent agreement.
147. Condition 3 provides that details of the materials, colours and textures of all the external finishes and external hard surfaces to the proposed facility shall be submitted to and agreed in writing with the planning authority prior to the commencement of development. This is dealt with in section 10 of the EIS, under the heading "Landscape and Visual Impact Assessment". The general topography of the area and the siting of the various structures within the facility, were identified within that section of the document. It is reasonable that the finer points of detail, such as the materials, colours and textures of the external features and external hard surfaces, should be left over for agreement. The court is satisfied that these are only minor technical matters and do not impact on the nature of the proposed development, nor do they have any impact on the European sites.
148. Condition 4 deals with the signage scheme for the facility, which again does not appear to enable anything greatly different to what is contained in the permission, to be agreed subsequently between the planning authority and the developer. Condition 5 provides that the site shall be landscaped in accordance with a comprehensive scheme of landscaping, details of which will be submitted to and agreed in writing with the planning authority prior to the commencement of development. The landscaping proposal, as put together by Earthlinks for Boylan Engineering, was very detailed. The final design was set

out at p.8 of its report, which included the species of tree that would be planted and the location of the trees within the facility. The landscaping proposal provided that a final detailed design shall be prepared as part of an overall final design package, once planning permission had been granted.

149. The court is satisfied that the issue of landscaping has been sufficiently set out in the planning documentation, such that the developer and the planning authority are not free to ignore the general parameters that have already been set down and accepted as part of the permission. It makes complete sense to hold over the final design of the landscaping proposals until such time as planning permission had actually been obtained for the facility, because it is not until that time, that the final contours and layout of the site would be known.
150. Condition 6 provides for the agreement of a CEMP post-consent. The court is satisfied that having regard to the provisions in the EIS relating to the mitigating measures that must be put in place during the construction phase, the degree of latitude that is left over for agreement as part of the CEMP, is not unduly wide and does not fall foul of the test in either *Boland* or *Holohan*.
151. Condition 7 was not challenged on the basis that it was unduly wide, but a challenge was made in relation to the discrepancy in the wording between condition 7 in the inspector's report and condition 7 in the final permission. This will be dealt with later in the judgment.
152. Condition 8 refers to the preparation of a detailed invasive species management plan, which has to be submitted to and agreed in writing with the planning authority. This condition has to be seen in the light of two things: firstly, condition 7 provides that any organic material shall be transported to and from the site in sealed containers. That condition also provides that any unloading, storage or sorting of waste material, shall be carried out indoors. Secondly, it was accepted that the method by which propagules would make their way out of the development site to the European sites, would be by way of watercourses running between the two sites.
153. The court is satisfied that the combination of the fact that materials must be sorted and dealt with indoors and the provisions that are in place in relation to the capture and storage of water from any activities carried on within the shed, are such as to render the agreement that can be reached between the developer and the planning authority post-consent, as being very limited in nature. In other words, the parameters are already set down.
154. The court is satisfied that in effect the only thing that is left over for agreement is what procedures shall be put in place for self-certification by persons bringing waste material to the facility, that there are not any invasive plant species among the waste that has been brought to the facility. Again, the importance of that self-certification is somewhat lessened by virtue of the fact that all organic material must be brought to and from the site in sealed containers.

155. Condition 9 deals with water supply and drainage arrangements including the attenuation and disposal of surface water, and provides that they shall comply with the requirements of the planning authority for such works and services. Again, the court is satisfied that the detailed mitigation measures and measures for attenuation of surface water, that are set out in the planning documentation, leave very little room for subsequent agreement between the parties. The court is satisfied that there is no room for the parties to agree measures that would go beyond, or conflict with, the measures already set out in the planning documentation.
156. Condition 10 dealt with hours of operation of the facility. It was not in contention on this application. Condition 11 dealt with noise levels. It set out that the noise level shall not exceed 55 DB(A) rated sound level at any point along the boundary of the site between 08:00 and 20:00 hours, Monday to Friday inclusive and shall not exceed 45 DB(A) at any other time. The condition provides that procedures for the purpose of determining compliance with this limit shall be submitted to and agreed in writing with the planning authority prior to commencement of the development. The court is satisfied that having regard to the detailed provisions in relation to noise, as contained at section 5 of the EIS, the remaining procedures for determining compliance with the limits set by the planning authority, are not unduly wide.
157. No complaint was made by the applicants in relation to conditions 12 to 15 inclusive.
158. In conclusion, the court is satisfied that the mitigating measures and the monitoring provided for in the planning documentation, is sufficiently precise to render the matters that have been left over for post-consent agreement, to be within acceptable parameters. The court is satisfied that the respondent has not given the developer a "free hand" in terms of what may be subsequently agreed between it and the planning authority. The court is satisfied that when viewed in context, the conditions only leave over matters of technical detail, that can only be agreed within defined parameters, as contained in the planning documentation. Accordingly, the court finds that the conditions left over for subsequent agreement are not impermissibly wide and are not such as to vitiate the planning permission granted to the developer.

(e) Lack of reasons for dropping condition 13 from the inspector's report.

159. It was submitted on behalf of the applicants that there was a general duty on decision makers to furnish reasons for their decisions. This applied to the respondent as it did to other decision makers. Furthermore, it was submitted that s.34 of the Planning and Development Act 2000 provided that the Board had to provide reasons where it was departing from the views expressed by the inspector in his or her report. It was submitted that that extended to a situation where the Board had decided not to implement a condition that had been recommended by the inspector.
160. In this case, the inspector had recommended at condition 13 that the development shall be operated and managed in accordance with an environmental management system (EMS), which shall be submitted to and agreed in writing with the planning authority prior

to the commencement of development. It was to include measures to minimise emissions from the facility and include a monitoring programme (intervals to be agreed with the planning authority) for the following: proposals for the suppression of on-site noise; proposals for the suppression of dust on site; the management of all landscaping; odour abatement; proposals for litter prevention; monitoring of surface water quality in any discharges and details of site manager contact numbers (including out of hours) and public information signs at the entrance to the facility. It was submitted that this condition had simply been omitted from the final permission granted by the respondent, without giving any reasons for its omission. It was submitted that the permission should be struck down due to the failure to give reasons for the omission of this condition.

161. In response, counsel for the respondent stated that while there was an obligation on the respondent to furnish reasons if it was not going to accept the inspector's report, or overall recommendation; that did not extend to circumstances where the respondent simply did not include one of the conditions laid down by the inspector in her report: see *Dunne v. An Bord Pleanála* [2006] IEHC 400.
162. It was submitted that while a subsequent amendment to s. 34(10) required reasons to be given in very particular circumstances, this case was not covered by that amendment. And in any event, it was submitted that that amendment only applied to circumstances where there was a variation of a condition between the inspector's report and the ultimate permission granted by the Board.
163. Without prejudice to that contention, it was submitted that the matters set out in condition 13 of the inspector's report, were already covered in the other conditions attached to the respondent's permission, which provided that all the mitigation measures specified in the EIS and the NIS had to be carried out, which included matters relating to noise, signage, landscaping, odour, etc.
164. The court is satisfied that the failure of the respondent to give reasons for its decision to omit condition 13 from the inspector's report, is not fatal to its decision. The court is satisfied that the statutory provisions in force at the time that this permission was granted, did not oblige the respondent to give reasons where it adopted the overall conclusions in the inspector's report and recommendation, but decided to omit one of the conditions that had been recommended by the inspector.
165. That issue was determined by the High Court in the Dunne case, where McGovern J. considered the argument that s. 34(10)(b) of the 2000 Act did not require the Board to give reasons for its failure to adopt a condition that had been recommended by the inspector. He accepted the submission made on behalf of the respondent in that case, that there was no obligation on the Board to provide reasons in such circumstances. He stated as follows at para. 28: -

"It seems to me that the submission of the first named respondent is correct and that there is no obligation on the first named respondent to give reasons why it

disagreed with its Planning Inspector on a particular condition which was recommended by the Inspector to be imposed.”

166. There are dicta to similar effect to be found in *O’Neill v. An Bord Pleanála* [2009] IEHC 202 and in *Wexele v. An Bord Pleanála* [2010] IEHC 68. Accordingly, the court is satisfied that there was no obligation on the respondent to give reasons why it reached the decision to grant the permission, but without condition 13 in the inspector’s report.
167. Furthermore, the court is satisfied that, having regard to the provisions of the EIS and the NIS in relation to the various matters that were specified by the inspector in condition 13 covering issues such as landscaping, noise, signage and odour, that condition 13 was effectively otiose, having regard to the obligation contained in conditions 1 and 2 for the developer to carry out all the mitigating measures that had been specified in detail in the documentation accompanying his planning application.

(f) Alleged bias.

168. It was submitted on behalf of the applicant that as the first named notice party intended to sell land to the developer, on which he would carry out the waste processing operation, there would therefore be bias on the part of the first named notice party as planning authority, to “go easy” on the developer when reaching agreement on the matters that had been left over for post-consent agreement. The court is not satisfied that there is any substance to this argument.
169. The court has to assume that a local authority will carry out its functions as planning authority in a proper manner. There is no evidence before the court that the first named notice party is likely to act contrary to its statutory mandate in agreeing the points of detail as provided for in the planning permission, due to the fact that it is the owner of the lands, which it hopes to sell to the developer for the purpose of operating the waste processing facility.
170. If the court were to hold that the direction of the respondent was invalid due to a perceived bias on the part of the first named notice party as planning authority, this would involve the presumption that the local authority would fail to carry out its statutory duties as planning authority in a proper manner. Secondly, if the court were to make such finding, it is not clear who could then agree the points of detail with the developer.
171. The court is satisfied that if due to bias, or for any other reason, the local authority were to agree inappropriate matters with the developer, in the exercise of their powers under the conditions attaching to the planning permission, the applicants would have a right of action by means of initiation of judicial review proceedings. This was clearly stated in the *Arklow Holidays* case. Accordingly, the court declines to strike down the direction of the respondent on this ground.

(g) Difference in wording between condition 7 in the inspector’s report and in the Board’s direction.

172. This aspect was only raised by the applicant's counsel in his replying submissions in response to the oral submissions of counsel for the respondent. It was submitted on behalf of the applicants that as condition 7 of the conditions imposed by the inspector, prohibited any unloading, deposit, handling, storage or sorting of waste materials outside of the proposed "building"; whereas condition 7 in the permission granted by the respondent, provided that these activities should not occur outside of the proposed "facility", the entire permission was bad.
173. In response to this argument, counsel for the respondent submitted that this was clearly a typographical error, as it was clear that the Board had adopted the report and recommendation of the inspector including the conditions attached to the recommended permission.
174. The court is satisfied that the discrepancy in the wording between the two conditions, is in fact due to an error in the transcription of the conditions from the inspector's report, to the ultimate permission granted by the respondent. It is abundantly clear that the respondent adopted the report and recommendations of the inspector. It was clear that having regard to all the mitigating measures that had been put in place, in particular the level of detail in relation to the bringing of organic material into and from the site, in sealed containers and the provisions in relation to the carrying out of operations within the shed and the provisions relating to the collection of any waste water from inside the shed itself, that it was clearly envisaged that all operations would take place indoors within the facility. The fact that the word "facility" has been used in condition 7 of the conditions imposed by the respondent, is clearly an error.
175. If the word "facility" were to be read as meaning the overall site, then condition 7 as imposed by the respondent would simply mean that there should be no unloading, deposit, handling, storage or sorting of waste materials outside of the development site itself. That would make absolutely no sense at all. The court is satisfied that this was merely a typographical error and that the word "facility" in the permission that has been granted by the respondent to the second named notice party, should be read as meaning the word "building". The court is satisfied that until this typographical error was spotted by eagle-eyed counsel, all the parties to this process, being the planning authority, the developer and indeed the objectors, understood the condition to mean that the processing, sorting and storage of all waste, had to take place indoors. Accordingly, the court declines to strike down the permission on this ground.
176. Finally, during the course of the hearing, it was not so much a submission, but a suggestion was made that the court should view the efficacy of the permission that had been granted by the respondent to the developer through the prism of alleged wrongdoing on the part of the first named notice party in relation to its ownership and control of the landfill site at Corranure.
177. It was submitted that the first named notice party, as owner of the site and another party, who operated the landfill site, had received very large fines in the District Court for offences connected with the operation of that landfill site. The court was informed that on

appeal the very large fines that had been imposed in the District Court, were substantially decreased on appeal to the Circuit Court. The court was further informed that the landfill site has since ceased operation.

178. The court is not satisfied that it should act on unsubstantiated hearsay evidence in relation to criminal activities that may have taken place at another location owned by the first named notice party. The essential issue before this Court was whether the respondent was correct to give its direction that planning permission should be granted to the developer for the waste processing facility at the site the subject matter of these proceedings. There is no basis upon which the court could declare that permission unlawful, due to some alleged illegality in relation to the running of another facility, not by the developer, but by the first named notice party, which is the local authority for the area.

Decision of the court.

179. For the reasons outlined herein, the court refuses all of the reliefs sought by the applicants in their notice of motion.

180. As this judgment is being delivered electronically, the parties will be allowed a period of four weeks within which to furnish brief written submissions on the terms of the final order, and on costs and on any other matter that may arise.