

THE HIGH COURT
JUDICIAL REVIEW

[2024] IEHC 292

[2021/1062JR]

BETWEEN

FRIENDS OF ARDEE BOG

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

LOUTH COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Ms Justice Miriam O'Regan delivered on 14 May 2024.

Issues

1. By letter of 5 May 2021 the notice party requested a determination from An Bord Pleanála (“ABP”), in respect of a proposed development which the notice party wishes to carry out namely the construction of a 4.5km road, the provision of four junctions along the road, the construction of two bridges over the River Dee and the River Gara; the construction of pedestrian and cycle facilities; new drainage arrangements: diversion of service and utilities; landscaping, fencing, safety barriers and public lighting, associated site works and work compounds. The proposed development was described as the N52 Ardee Bypass. The request of ABP was for a determination under s.50(1)(b) of the Roads Act 1993 (the “1993

Act”) in respect of the preparation of an Environmental Impact Assessment (“EIA”) Report and further pursuant to regulation 250(3)(a) of the Planning and Development Regulations 2001 (the “2001 Regulations”) as amended in respect of the preparation of a Natura Impact Statement (“NIS”), concerning the proposed development.

2. ABP made two decisions both dated 19 October 2021 namely: -
 - 1) directing the local authority not to prepare an Environmental Impact Assessment Report; and
 - 2) directing the local authority not to prepare a NIS;
in respect of the proposed development.

In these proceedings the applicant seeks to impugn the decisions. The declaratory relief sought against the second and third named respondents has been compromised as hereinafter appears.

- 3) Leave was granted to maintain the within proceedings on the basis of the statement of grounds of 15 December 2021.
- 4) Insofar as the applicant raises further particulars not identified in the statement of grounds in oral submissions, written submissions or indeed replies to the respondent’s submissions such matters will not be dealt with in accordance with jurisprudence and O.84, r.20(3) of the Rules of the Superior Courts.

5) In respect of grounds generally in the statement of grounds, ABP in its statement of opposition of 3 February 2023 and in written and oral submissions has raised pleading points to the effect that: -

- i. the applicant has not provided sufficient particulars of their various complaints;
- ii. it is alleged that the applicant's challenge is vague and hypothetical;
- iii. the challenge is based on bald unsubstantiated assertions and allegations not sustainable and not supported by any expert evidence;
- iv. most of the applicant's complaints are without substance and made without any reference to the evidence that was before the Board.

6) The local authority had previously progressed a proposed bypass of Ardee in or about 1999 and in 2001 approval for the project was received under the part 10 (now part 8) process. In 2005, an amendment to the alignment of the proposed bypass required a revised planning application under the part 8 process and was approved in July 2005. A compulsory purchase order was confirmed by ABP in September 2006. At that time two routes had been intended and the width of the roadway was expressed to be 13m wide for the Northern Bypass. In or about 2018/2019 the Northern Bypass route was cleared of hedgerows.

7) The applicants assert that this clearing amounted to rural restructuring with no EIA or AA conducted. As a consequence it is suggested: -

- i. Retention permission/substituted consent is required in respect of such clearing;

- ii. in the alternative, clearing is part of the proposed development of the notice party and therefore should have been considered by ABP in its determinations aforesaid;
- iii. in the further alternative, ABP was obliged to consider the prior works under its remedial obligation imposed by the EU.

General

8) In the within matter the following three directives are engaged: -

- i. Directive 92/43/EEC as amended (the “Habitats Directive”) in particular Article 6(3) thereof which provides that a plan or project not directly connected but likely to have significant effects either individually or in combination with other plans or projects on a European site, be subject to an appropriate assessment of the implications for the site in view of the site’s conservation objectives;
- ii. Directive 2009/147/EC (the “Bird’s Directive”) and in particular Article 5(d) thereof which provides that Member States shall take requisite measures to establish a general system of protection for all species of birds set out in Annex 1 thereof prohibiting deliberate disturbance of these birds particularly during a period of breeding and rearing insofar as disturbance would be significant having regard to the objectives of the Directive. Under Article 4 of the above Directive Member States are to put in place special conservation measures concerning the habitats of the qualifying interests identified in special protection areas (“SPA”).

- iii. Directive 2011/92/EU (the “EIA Directive”). Under Article 2 thereof Member States are obliged to adopt all measures necessary to ensure that before development consent is given, projects likely to have a significant effect on the environment, by virtue, *inter alia*, of their nature, size or location are made subject to an EIA.

The EIA is to identify, describe and assess in an appropriate manner the direct and indirect significant effects of a project on biodiversity with particular attention to species and habitats protected under the foregoing Habitats Directive and/or Birds Directive.

9) It is not disputed in these proceedings that under the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (SI No. 456/2011) it is provided that applications for the restructuring of rural land holdings are considered by the Minister for Agriculture. This status continued until after the commencement of the within proceedings, when in 2023, there was an alteration of the provisions of the Regulation aforesaid.

10) By virtue of Statutory Instrument No. 477 of 2011, Regulation 24(1) it is provided that the Minister shall establish the necessary conservation measures and, if need be, appropriate management plans specifically designed for the European sites or integrated into other development plans and appropriate statutory, administrative, or contractual measures which correspond with the ecological requirements of those species and habitats in respect of which the site is included as a European site or that are subject to the conservation objectives of the site.

As regards the development of public roads Annex 2, para. 10(e) of the EIA Directive aforesaid is incorporated into Irish law under s.50(1)(a)(iv) of the 1993 Act.

11) Under regulation 250(1) of the Planning and Development Regulations 2001 as amended it is provided that where a local authority proposes to carry out an own development it is required to carry out a screening on the impacts of same individually or in combination with other plans and projects. If it cannot be excluded on the basis of objective information that the proposed development either individually or in combination with other projects would have a significant effect on a European site the authority is required to determine that NIS is required and submitted to ABP for approval under s.177AE of the Planning and Development Act 2000 as amended.

12) The proposed route passes through a portion of the Ardee Bog pNHA. It is within 12.4km of the Dundalk Bay Special Protection Area and Special Area of Conservation and is 5.3km from Stabannan- Braganstown SPA.

Applicant's Evidence

13) At ground E1 it is stated that the facts and matters relied on in support of each of the grounds are identified in the verifying affidavit sworn by Anne Lennon. It is said that such facts and matters are incorporated into the statement of grounds by reference.

14) The facts set out in the statement of ground are verified by the affidavit of Ms Lennon of 13 December 2021 aforesaid. It is common case that she does not assert that she is an expert. She is a member of the applicant which was established in 2018 for the environment, conservation and protection of Ardee Bog pNHA over which the proposed

road will pass. She has been concerned for some years about the pHNA, the curlew and the greylag goose who feed on lands within or close to the pHNA. She complains that the Stabannan-Bragnarstown SPA only has generic conservation objectives, Dundalk Bay SPA having non-generic, but undetailed, objectives. She complains that neither SPA has a management plan.

15) Both species aforesaid are qualifying interests (“QI”) in respect of the Dundalk SPA with the greylag goose being a QI in respect of the Stabannan-Bragnarstown SPA. It is common case that these birds forage and breed outside of the SPA boundaries. The National Parks and Wildlife Service (NPWS) in a study identified that breeding curlews are in decline in Ireland. It is asserted that these curlew breed on the Ardee Bog although a nest has not yet been located on the bog.

On a survey in or about May 2019 the deponent met personnel from NPWS and subsequently a map was prepared by NPWS of location sightings of the feeding curlew. It is complained that given that the applicant has managed a log of sightings it could have shared it's records if it had been allowed participate in the process leading to the impugned determinations. In addition to the foregoing, the deponent states that the lands are liable to flooding which then attracts water birds including the greylag goose and whooper swan. A research paper of Frank Mitchell & Breeda Tuite has been exhibited to demonstrate the foreseeability of likely significant environmental impacts of constructing and operating a regional transportational link through Ardee Bog.

She sets out what is said to be a long history of direct relevance commencing in 2001 when it was the intention of the local authority to construct two bypasses, the northern road having a width of 13m, with no EIA or screening conducted at that time. In April 2005, the notice party gave notice of an intention to amend the proposed N52 alignment

with the proposed changes only being subject to public participation. The new proposed route was approved by the Council in June 2005 under part 8 of the 2001 Regulations. It is said that there is no indication that the Council adopted or approved any EIA or AA. A compulsory purchase order was affirmed by ABP on 14 December 2006 in respect of the full width of 13m and relating to both proposed routes north and south of Ardee. It is said to be evident from the report of the Inspector that during 2019 the Council erected fences and cleared the proposed northern route of hedgerows to a length of approximately 1.15km and land taken within the fences amounting to 27.5 hectares.

16) In the letter of 6 May 2021, the Council's application to the Board relates only to the northern route. It is asserted that the Inspector erred in her report and fell into error by failing to consider the increased volumes of traffic by the omission of the southern bypass route and failed to have regard to the clearing of vegetation without an EIA or EIA screening or AA or AA screening in respect of the extent of the lands aforesaid; the new width is said to be 15m wide and therefore it is asserted that this amounts to a different road design to what was considered in the past. It is asserted that there was insufficient information on the Board's file to assess impacts and the Board failed to properly regard the significance of the periodical flooding areas. It is said that the displacement of the birds by the new road has not been considered and it is likely that such displacement will occur. No information as to the competence of the persons carrying out the assessment on behalf of the Council is available and a survey of the breeding curlew could not have been conducted without detailed records the applicant has kept for several years. It is asserted that any competent surveyor would have sought and considered the applicant's records.

17) It is said there is a lack of conservation objectives, and it is said to be unclear therefore how an AA screening report with regard thereto could have been conducted in

respect of the greylag goose and the Stabannan-Bragnarstown SPA. In respect of the Dundalk SPA it is complained that the objectives are not detailed enough and there is no management plan.

18) It is said the creation of a series of large ponds for storm water was said not to be considered. The development is said to be in a highly vulnerable area with the relevant flood guidelines not having been considered.

19) It is claimed that there is no evidence of a justification test or a consideration of alternate locations. The deponent notes that ABP is required to have regard to the guidelines on flood risk management of 2009 in carrying out their functions under the planning legislation. Any proposed development in respect of flood risk areas must be supported by a site-specific flood risk assessment to avoid flooding or exacerbation of flooding.

Local Authority Screening Report

20) Accompanying the letter of application by the local authority to the Board in 2021 was a document comprising an AA screening and an EIA screening prepared by Roughan O'Donovan ("ROD").

21) The report of ROD is a substantial document running to 92 pages in all. It identifies references, methodology, surveys and studies, best practice, and the pertinent law in undertaking and identifying the nature and extent of the AA and EIA screening.

References are considerable including the publication of Mitchell and Tuite, (referred to in Ms Lennon's affidavit) and three publications of the NPWS. The map identifying

where curlews have been seen, created by the NPWS was one of the reference documents. Section 3 of the ROD document “identifies three European sites with potential pathway to the development”. It went on at para. 3.3 to identify that it is necessary based on best scientific knowledge that the development would not give rise to an ecological impact constituting significant effects on the European site.

22) In various surveys the closest greylag goose was 1.5kms from the proposed route. Insofar as surveys were concerned guidelines for field surveys were identified at p.47.

The NPWS curlew map was adopted identifying where it had been seen. Potential pathways for impacts from the works to the European sites were identified as: -

- i. the greylag goose was the only QI in respect of the Stabannan-Bragnarstown SPA and that breed was recorded as feeding on agricultural grassland around Ardee Bog during the day and roosting in Dundalk Bay;
- ii. there was a potential for a hydrological connection;
- iii. Dundalk Bay is located 12.4kms to the northeast of the proposed project and is also hydrologically connected. Various Q.I.s, including the greylag goose and curlew, were said to frequently feed inland from coastal sites on agricultural grassland.

23) These potential pathways were then considered to ascertain whether or not the proposed project was likely to have a significant effect on any of the sites identified. In this regard, it is clear from the reference from various caselaw, both European and domestic, the author was mindful that mitigation measures might be incorporated vis-à-vis the EIA but not in respect of an AA. The opinion of Advocate General Sharpston in

case C-258/11 was noted to the effect that, under the Habitats Directive, the possibility of their being a significant effect on the site will generate the need for an appropriate assessment, the first stage of the Article 63 process having a very low threshold. AG Sharpston did note at para. 51 of her opinion that the threshold laid down in respect of the first phase may not be set too high. The assessment must be undertaken having regard to the precautionary principle which applies where there is uncertainty as to the existence or extent of risks. The national authority may grant consent only if they are convinced that it will not adversely affect the integrity of the site concerned. Mitigation measures which comprise standard construction technology, for example, SUDS, can be taken into account in an AA screening assessment. Conservation objectives were identified as being to maintain or restore the favourable conservation conditions of the bird species listed, special conservation interests/qualifying interests.

24) At para. 17 it was noted that the impacts would be short term and readily reversible at some future stage. It was noted that the birds have to travel past the M1 to reach either the Dundalk SPA or the Ardee Bog and return to the Dundalk area for roosting. At p.4 it was noted that the NPWS provided data on site designation, habitats and species (including birds) of conservation interest to enable the preparation of the AA screening report. It was noted that field surveys were conducted throughout 2020 including habitats and in respect of wintering and breeding birds and in this regard it was indicated that the surveys would adhere to best practice guidance and during recommended optimal survey periods. The ecological baseline of the receiving environment was used for the purpose of assessing ecological effects likely to have impacts on the European site with any assumptions because of gaps in data made in strict accordance with the precautionary principles identified in EU caselaw.

25) At p.23 of the ROD report, it was found that there were no direct effects on the SPAs or the Special Conservation Interest (“SCI”) of the proposed development. It was noted that the adjacent lands offered an abundance of similar agricultural habitats as the site of the proposed route of the road. The author was satisfied that there was no evidence of connectivity between the site and the SAC and there was no potential for indirect effects on the Dundalk SPA or SCI.

26) Insofar as the Stabannan-Braganstown SPA is concerned this was dealt with at para. 24 of the report where it was noted that the greylag goose was the QI of this SPA. It would roost at night in Dundalk and forage and rest in the environment of the proposed development. However, because of the linear design and modest scale of the road and bridges, the author was satisfied that this would ensure that there was no barrier to bird motility or a collision risk.

27) Aside from a potential hydrological connection there was also the potential for loss of habitat resting places used by the QI and SCI species and noise and other disturbances to the QI and SCI species together with a collision risk at take-off and landing for the birds.

Having considered the risks a conclusion was reached based on: -

- i. the birds would avoid the area because of visual and noise issues;
- ii. the birds successfully avoid other bridges and have to cross the M1 to reach Dundalk Bay for roosting;
- iii. the elevation of the bridges would be between 3 and 5 metres whereas birds fly at 25 metres;

- iv. because of various works to be conducted and drainage the ecological pathway was excluded in respect of both Stabannan-Bragnarstown and Dundalk Bay;
- v. there is ample space for foraging of birds in the surrounding area.

ABP Inspector's Report

28) The Inspector's report runs to 28 pages and outlines the purpose of the report along with the background, history, nature of the proposed development and legislation in respect of the environment. In her assessment the Inspector had before her the EIA and AA screening aforesaid, the project details, site maps and flood risk scenario maps. The provisions of s.50 of the 1993 Act were noted including circumstances in which an EIA screening might be required as opposed to being mandatory. It was noted that ABP requested of the notice party details as set out in schedule 7A of the 2001 Regulations and confirmation of the status of their part 8 process. It appears that the details requested were furnished, but not in the correct format, however sufficient to enable the Inspector to be satisfied that she could complete her report.

29) The screening criteria in respect of both assessments was identified. Individual and in combination effects (with other plans and projects) were considered. The inspector expressed the view that having regard to the nature, scale and location of the proposed road development on a circa 4.5km linear site it is predicted that the impacts would be short lived and readily reversible at some stage in the future.

30) At para. 3 it was noted: -

“The linear site was fenced off several years ago under the previous proposals for the Ardee Bypass.”

At para. 13 of the report it was noted that the proposed road would be mainly located within an agricultural area and fenced off during construction. It is recorded: -

“The proposed development would require some additional felling of trees and hedgerows, but not any significant clearance of natural vegetation, given that the site was previously cleared of vegetation several years ago.”

31) The Inspector concluded that having regard to all matters set out in her report the characteristics of the project would not be likely to have significant impacts on the environment and would not justify the need for an EIA.

32) Following that assessment the inspector conducted an AA screening. It was concluded that there would be no direct or indirect effects on the SPA or any other SCI species, individual or in combination with other projects.

33) Ultimately, the inspector was satisfied that it was reasonable to conclude on the basis of the information on the file which she considered adequate in order to issue a screening determination that the proposed development either individually or in combination with other projects would not be likely to have a significant effect on the Dundalk Bay SPA or SCA or on the Stabannan-Bragnarstown SPA or any other European site in view of the conservation objectives of those sites and the submission therefore an NIS was not required.

ABP Decisions

34) In its orders both of 18 October 2021 the reasons and considerations of the Board were recorded having regard to, among other matters, submissions made by the local authority including the screening reports, the report and recommendation of the person appointed by the Board to make a report and recommendation on the matter.

Jurisprudence

35) The following caselaw is engaged: -

- i. In *Martin v An Bord Pleanála* [2008] 1 IR 336 the Supreme Court held in dismissing the appeal that the phrase “development consent” within the meaning of the EIA Directive referred to a decision which entitled the developer to proceed with the project as a whole and not simply part of the project. Development consent might consist of the decision of two or more competent authorities. The Supreme Court was satisfied that nowhere in the Directive was it suggested that one competent body must carry out one single global environmental impact assessment and that interpretation would run contrary to the plain meaning of the provisions of the Directive which envisages that more than one authority might be responsible at different stages for exercising obligations arising from the Directive.
- ii. *Peter Sweetman v An Bord Pleanála* [2018] 2 IR 250 at para. 38 stated the rationale behind collateral attack jurisprudence was clear: -

“A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe

should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid... The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like.”

- iii. In *Connolly v An Bord Pleanála & Ors.* [2021] 2 IR 752 at para. 73 *et seq* Clarke CJ identified where reasons for a decision can be found. Any materials can be relied on as being a source for relevant reasons, subject to the important caveat that it must be reasonably clear to an interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned. Although a party cannot be expected to trawl through a vast amount of documentation. It is not necessary that all of the reasons must be found in the decision itself. Reasons may be found or in other documents expressly referred to in the decision elsewhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable inquiry that the matters contended actually formed part of the reasoning.

“75. In the context of a process such as that which occurred in this case, the reasonable observer would undoubtedly look to the Inspector's report but also have regard to the reservations expressed in that report, to the further information, including

the NIS, which the developer was required to submit because of those reservations and to the rationale found in the decision itself for the Board expressing itself as being satisfied that those reservations had been met.

79. It seems to me, therefore, that the reasons for the Board's development consent decision in this case can, at a minimum, be found in the Inspector's report and the documents either expressly or by necessary implication referred to in it, the s.132 notice and the further information and NIS subsequently supplied, as well as the final decision of the Board to grant permission including the conditions attached to that decision and the reasons given for the inclusion of the conditions concerned.”

- iv. In *Fitzpatrick v An Bord Pleanála & Ors.* [2019] 3 IR 17 the Supreme Court was dealing with a challenge to permission to Apple by An Bord Pleanála in respect of a data centre where Apple indicated a plan for further hubs in the long term. ABP carried out an assessment of the immediately proposed development and not the masterplan. The question arose as to whether or not ABP was obliged to do an EIA in respect of the masterplan and if not, what consideration was it to give to the masterplan and further the need to pose a question to the CJEU was also raised. At para. 26 Ms Justice Finlay Geoghegan identified that the primary and core contention of the applicants was to the effect that the masterplan was the project for the purposes of the EIA Directive. At para. 67 the Court noted that it was not possible to interpret the Directive

to the effect that it makes an EIA mandatory for anything other than the specific projects submitted by the developer. It was said that the Directive was unambiguous, and an “entire project” is not the same as “a specific project in respect of which an application has been submitted”. At para. 79 the Court concluded that An Bord Pleanála was not obliged to do an EIA in respect of the masterplan but rather the obligation was in respect of the planning permission sought with an obligation to take account insofar as possible of potential later plans. The Court was satisfied that there was no necessity to pose a question of the CJEU.

- v. In a Supreme Court judgment of Mr Justice Woulfe of 15 November 2022 in the case of *Ballyboden Tidy Towns Group v An Bord Pleanála & Ors* [2022] IESC 47 the appellant claimed that there was a temporal limit on s.177 AE of the 2000 Act as amended in respect of development consent, required by EU law. The argument was based on the fact that with the passage of time the accuracy of environmental information may degrade in respect of an AA. It was acknowledged that there was no CJEU decision on point and reference was made to Advocate General Kokott’s opinion together with other opinions when it was stated that “it cannot be held that an assessment is appropriate where information both reliable and updated data concerning the birds in the SPA are lacking.” An alternate argument was to the effect that Article 6(3) of the Habitats Directive was directly effective and not fully transposed into Irish law and therefore the respondent was obliged to impose conditions in respect of time periods. At para. 44 the Court was of the view that Article 6(3) could not reasonably be interpreted as imposing any such obligation

including based on the fact that the article did not include any express temporal limited. The Court was further satisfied that there was no necessity to pose a question of the CJEU as the matter was so obvious as to lead no scope for any reasonable doubt.

- vi. In *Cork City Community Association v An Bord Pleanála & Ors.* [2022] IESC 52, a decision of the Supreme Court of 21 December 2022 it was noted that the relevant County Council originally intended to carry out the proposed development pursuant to s.179 of the 2000 Act and part 8 of the 2001 Regulations. In the High Court it was alleged that there was a lack of jurisdiction on the part of ABP to carry out an EIA screening *via* s.177AE of the 2000 Act. It was noted that s.177AE applied to local authority own development requiring an AA. The High Court was satisfied that the jurisdiction in ABP to conduct an EIA screening could properly be read to in s.177AE by necessary implication and the Supreme Court was satisfied that the High Court was correct in this regard. At para. 47 the Supreme Court indicated that s.177AE could be viewed as obscure or ambiguous and therefore the interpretation that should be given should be a construction reflecting the plain intention of the Oireachtas where that intention can be ascertained from the Act as a whole. The Court was satisfied that it was the intention that ABP would have the jurisdiction to make an EIA screening determination during the course of the s.177AE application. The same intention can be ascertained from s.179 of the 2000 Act and from a consideration of the effects of that provision on relevant parties of the 2001 Regulations. Statutory provisions should be read where possible so as to produce a

workable and coherent interpretation and in the case before the Court it was held that ABP having jurisdiction to make an EIA screening is the only possible interpretation which produces a workable interpretation of the statutory scheme.

- vii. In *Holohan & Ors. v An Bord Pleanála* [2017] IEHC 268, a decision of Humphreys J of 4 May 2017 under the heading “Whether the court can review the correctness of a board finding on the content of an EIS (or AA) in the case of manifest error”, the issue considered was as to the standard of review required by EU law. The Court referred to the decision of Hogan J in *NM v Minister for Justice & Equality* [2016] IECA 217 when it was held that contemporary judicial review constitutes an effective remedy for the purposes of Art 39 of the Asylum Procedures Directive. Hogan J noted that the judicial review Court cannot review the merits of the decision. The decision can however be quashed for unreasonableness or lack of proportionality. It can ensure that the conclusions follow from the premise and also quash for material error of fact. However, the Court cannot decide that the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong on the merits, if there is material to support it and if the conclusion is reached by a logical process, without disproportionately interfering with rights. Humphreys J was satisfied that the point must also apply in other areas of administrative law. At para. 103 Humphreys J indicated that given the wide scope of judicial review in Ireland, the proposition that it provides an effective remedy is *acte clair*.

- viii. In *Reid v An Bord Pleanála (No. 2)* [2021] IEHC 362 Humphreys J discussed the standard test of reasonableness insofar as it affects scientific doubt – that standard being the decision will stand if there is material to support it before the decisionmaker. At para. 45 Humphreys J said the test was to the effect that, has an applicant demonstrated that a reasonable expert could have a reasonable scientific doubt as to whether there could be an effect on the European site? At para. 75 it was indicated that there is a need to establish evidentially matters that a reasonable expert would have said created doubt so as to require APB to examine the NIS more critically without being asked to do so. Disagreement doesn't establish an expert would see material on their face as not excluding reasonable scientific doubt.
- ix. In *Heather Hill Management Company v ABP & Ors.* [2022] IEHC 146 the Court noted at para. 235 and referred to the comments of AG Kokott in *Waddenzee Case C-127/02*, to the effect that under the Habitats Directive the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. The competent authorities must make a decision having assessed all the relevant information which is set out in particular in the AA. The conclusion of this assessment is of necessity subjective in nature. The competent authority can be certain that there will be no adverse effects even though from an objective point of view there is no absolute certainty. At para. 279 the Court noted that the validity of an AA generally is to be judged in the context of judicial review on the evidence before the respondent and the applicant is enabled to adduce

expert evidence on the basis of material before the respondent as to what the applicant considers best scientific knowledge, and without such opinion the applicant is reduced to legal argument only and therefore runs a higher risk of failure.

- x. In *Monkstown Road Residents Association v ABP & Ors.* [2022] IEHC 318 Holland J discussed the nature of the judicial review appeal in that case in the context of an EIA. It was noted that there is a presumption of the validity of the ABP decision until the contrary is proved – in this regard the Court referred to the case of *Rathenisk* [2015] IEHC 18, a judgment of Haughton J in 2015. It was further noted that in judicial review the Court is concerned with the legality and not the merits. The Court would be slow to interfere with the decision of an expert administrative tribunal in this regard. The Court referred to the decision of Barniville J in *Rushe v ABP* [2020] IEHC 122 at para. 220 in that regard. The Court referred to the EU screening guidance at para. 116 of its judgment to the effect: -

“The decision to be made for screening is essentially whether the proposed project is or is not likely to have significant effects on the environment.”

- xi. In *Concerned Residents of Treascon & Clondoolusk v ABP* [2022] IEHC 700, Humphreys J was dealing with a planning application for a solar farm. The application was accompanied by an NIS and permission was granted on 05 May 2021. The point was made in the appeal of the grant of permission to the effect that the State had failed to properly transpose Annex 2.1(a) of the EIA Directive in respect of restructuring of rural

land holdings. Further, in the statement of grounds it was stated that each of the grounds pleaded and reliefs sought are identified in a verifying affidavit which was said to be incorporated by reference to the statement of ground. The Court indicated that this was not a legal ground and should have been in the factual section of the statement of grounds.

A further complaint was to the effect that the Board failed to conduct a justification test and failed to have regard specifically or at all to the 2009 Guidelines which was said to amount to a specific planning policy requirement (SPPR) which under s.28 of the 2000 Act is binding. The Court was satisfied that this argument was misconceived as it is inherent in the context of an SPPR that same must be expressly articulated and as it was not there was no basis to say it was implied. The Court at para. 28 differentiated between “have regard to” and “comply with”. To blur these lines would undermine legal certainty. The appellant claimed that the Board failed to make a screening determination for an EIA by failing to take into account the relevant selection criteria set out in Annex 3 of the EU Directive – this refers to the asserted failure to do an EIA in accordance with Annex 2 of the Directive. The applicant contended that the removal of a significant amount of hedgerows to rural land restructuring involved nearly 1km. The Court was satisfied that in accordance with EU law this was a valid argument. The Court further held that the Board did not have statutory EIA jurisdiction and the interpretation of the legislation in the light of EU law, that would impose an obligation on the Board as opposed to the State to conduct an EIA, is not available as it would be *contra legem*. The Court also noted that EU

law does not require the centralisation of EIA functions in relation to a project into a single authority let alone into the regular planning process. The Court was satisfied that in the circumstances there was no obligation to transpose the EIA Directive in full to the planning legislative regime as distinct from into the overall legislative regime. The Court considered that para. 87 of Regulation 477/2011, and in particular Regulation 42(20) thereof, that the wording of the Regulation was such that it did not confer the EIA function regarding rural restructuring under the planning legislation.

- xii. In *Reid v An Bord Pleanála* [2024] IEHC 27 Humphreys J was dealing with an argument that a previous decision was central to the in combination assessment for a modification permission claiming that the decision granting 2019 permission failed to identify all relevant TUFA locations. Further, other complaints were made in respect of the 2019 decision. It was argued by the appellant that there was a remedial obligation on the Board, as distinct from amounting to a collateral attack, to remedy this status, the Court was satisfied that to engage such remedial obligation:
- a. the claim must be properly pleaded under O.84 of the Rules of the Superior Courts;
 - b. there must have been an earlier decision without the necessary EIA as required by EU law and the prior breach must be established by order of the CJEU or a domestic Court subject to the argument that an applicant should have

- the option of evidentially establishing such a breach in the proceedings challenging the subsequent decision;
- c. the applicant should not be precluded from raising the point as EU law on the topic precludes finality;
 - d. the applicant must call on the decisionmaker to carry out the remedial obligation (in this matter the applicant would not have had an opportunity to do so as there was no public participation); and
 - e. the particular decision making process concerned must be an appropriate way to give effect to the remedial obligation.

The Court indicated that the remedial obligation is normally predicated on a prior finding that there was a breach of EU law in relation to remediation. This requires sufficient evidence. Furthermore, in finding against the applicant's complaint the Court said that the appropriate way to implement the remedial obligation would be reverting to the EPA which considered the relevant issue and granted the relevant licence.

- xiii. In *St Margaret s Recycling v ABP* [2024] IEHC 94 Phelan J considered the construction of a planning decision. At para. 57 it was indicated that planning decisions, documents and policy should be construed not as complex legal documents drafted by lawyers but rather in a holistic manner. Paragraph 73 indicated that there was a high threshold to challenge the Board decision on the basis of insufficient information.

xiv. In *Power v ABP* [2024] IEHC 108 Holland J addressed the issue raised to the effect that no proper AA could be carried out without specific conservation objectives. The application was limited to seeking an amendment of prior planning permission. At para. 156 the Court noted that Commission guidance of 2001 does not preclude an AA without specific conservation objectives. In the absence of site specific guidance it is assumed, at a minimum, that the site and species should not deteriorate and there should be no significant disturbance. At para. 158 the Court expressed the view that the Commission guidance clearly envisages an AA absent conservation objective which is inconsistent with the argument that no proper AA can be conducted without conservation objectives. In para. 161 the Court quoted from Advocate General Capeta's opinion in *The Commission v Germany* case C-116/22 of 20 April 2023 to the effect that the Commission objectives would be evident before specific designation of the site, to a certain degree. At para. 175 it was noted that the central issue of the assessment under Article 6(3) of a project was as to whether or not the project would adversely affect the integrity of a site. The Court indicated that in all but rare cases it would be impossible without specific conservation objectives to conduct the necessary AA. In para. 177 it was said that the conservation site specific objectives were not a precondition to an AA and a purposive view should be adapted. In the particular circumstances of that matter the Court was satisfied that an AA was

valid notwithstanding the lack of specific conservation objectives for the site.

36) In submissions the applicant did not seek to argue against the principles identified in the judgments aforesaid in the High Court and in accordance with the *World Port* [2005] IEHC 189 decision it is appropriate that the foregoing principles should be followed by this Court.

37) In *Sweetman v Ireland v ABP* case C-258/11, a decision of 11 April 2013, it was held that the Article 6(3) of the Habitats Directive assessment must not have lacunae and must contain complete precise and definitive findings and conclusions capable of removing all reasonable scientific doubt in respect of a potential effect on a European site (para. 44).

38) In *Namur-Est Environnement ASBL v Région wallonne* case C-463/20 (a judgment of 24 January 2022) at para. 55 it was noted that Article 2(2) of the EIA Directive expressly provides that the assessment may be integrated into existing national consent procedures - the assessment may not necessarily be conducted in the context of a procedure especially created for that purpose and it need not necessarily be conducted in the course of a single procedure. In para. 56 it was noted that the Member State has a discretion in respect of the procedural conditions under which the assessment is to be conducted and to apportion the various competences relating to that assessment among several different authorities in particular by conferring on each of them decision making powers.

39) In the Commission Notice of 21 November 2018 on managing Natura 2000 sites it is said that the conservation measures can take the form of appropriate statutory,

administrative or contractual measures, and it needs be, the form of appropriate management plans, indicating that management plans may not always be necessary. The choice is left to the member state in line with the principle of subsidiarity. The Habitats Directive sets out the results to be achieved and leaves it up to the Member States how to do so in practice.

40) In the opinion of Advocate General Sharpston in Case C-258/11 it was said setting the bar too low for an AA screening would amount to legislative overkill.

Grounds and Submissions

41) *The applicant argues that a mandatory EIA is required because of: -*

- i. *the fact and removal of hedgerows which amounts to restructuring of rural landholdings. This relates to the County Council's activity in or about 2018/2019 when those rows were removed. Further, or in the alternative, under this ground it is argued that the decision of the Board was irrational and resulted in a circumvention of EU law.*
- ii. *It is said that the Council cannot implement part only of development consent and it should be all or nothing.*
- iii. *The Board was not at liberty to ignore activity by the Council vis-à-vis the hedgerow.*
- iv. *In the further alternative it is argued that the matter before ABP incorporated in part respective consent and accordingly a full EIA and AA should have been directed. The Board failed in its remedial obligation.*

- v. *The Board failed to take into account relevant selection criteria specified in Annex 3, in respect of a development incorporated in Annex 2 of the EIA Directive.*
- vi. *It is said that the Board failed to have regard to the impacts of constructing only one leg of the bypass to cater for traffic flow.*

42) None of the foregoing takes into account Statutory Instrument 456 of 2011 where as far as an activity of rural restructuring is concerned an application for consent should be made to the Minister for Agriculture. Under Regulation 6 the Minister having received a complaint can direct a reinstatement and Regulation 7 deals with the making of such a complaint to the Minister. In addition, the Member States are entitled to apportion competency, among several different authorities if necessary. As was noted by Humphreys in *Concerned Residents of Treascon & Clondoolusk* [2022] IEHC 700 ABP simply does not have authority in respect of rural restructuring. The complaint in respect of the remedial obligation to comply with was identified by Humphreys J in *Reid no. 7* aforesaid.

43) Although the point relative to carrying out part only of a development is well made, nevertheless any remediation should be addressed to the Minister as opposed to the Board.

44) There was no application before ABP in respect of a second by-pass, and no indication that a second by-pass was intended in the future, therefore this issue simply did not arise for consideration.

45) That portion of the application which involves alleged retrospective consent has not been identified, and in any event, ABP has no authority in respect of rural restructuring.

Regulation 7 and 7A of the 2011 Regulations fully transpose Annex 2 and 3 of the EIA Directive, and these regulations were considered in both the Local Authority report and the inspector's report.

46) *It is complained that the decision of the Board in each matter contravenes s.50(1)(a)(e)(ii) of 1993 Act as it fails to specify the main reasons for the determination or any features of the proposed development or measures proposed to avoid or prevent significant adverse effects on the environment.*

47) In accordance with *Connelly* aforesaid the reasons can be, at a minimum, in the Inspector's report and the documents either expressly or by necessary implication referred to in it, the s.132 notice and further information. Given the nature and extent of these documents, discussed above, the fact that the Board expressly stated it had regard to: -

- i. the submissions made by the local authority including the AA screening Report of April 2021; and
- ii. recommendation of the person appointed by the Board to make a report and recommendation on the matter (the Inspector)

the general assertion of a failure to give reasons has not been made out.

48) The order of the Board was to the effect that neither a full EIA nor AA was required on the basis that the project under consideration would not have a significant adverse effect on the environment either individually or in combination with other plans or projects. In the circumstances no outstanding risk was identified.

49) Finally, in this regard the decision of the Board did not involve the grant of any development consent.

50) *The applicant argues that the Board failed to take into account the 2009 flooding guidelines identified by the Minister for the Environment Heritage and Local Government, which it is asserted require a justification test or to consider alternatives. It is said that the guidelines comprise a PRRL.*

51) Paragraph 1.3 of the Guidelines provides the purpose of same is to ensure that flood risk is considered *inter alia* in the assessment of any planning application. At para. 1.4 of the Guidelines it is necessary for the relevant authority to have regard to the Guidelines. In *Treason* the Court was satisfied that the Guidelines were not an SPPR. The Board was not considering a planning application and the decision of the Board was never to be a decision to either grant or refuse consent. The Guidelines were referenced in the Local Authority report.

52) *The applicant complains that absent an application for development consent the Board did not have jurisdiction to issue an AA screening decision - the Board order indicates that the application of the Local Authority was made under regulation 250(3)(a) of the 2001 Regulations which relates solely to an application for development proposed to be carried out by a local authority. The applicant argues that reg. 250(3)(a) does not state that ABP power thereunder can be triggered by request from a local authority and at the date of submission of a request for a determination, on 5 May 2021, no application was pending.*

53) Regulation 250(3)(a) of the 2001 Regulations provides that the Board shall where it considers that an application for a development proposed to be carried out by a local authority would be likely to have a significant effect on a European site, require the local authority to prepare or cause to be prepared an NIS in respect thereof. In this matter, the local authority has indicated that it proposes to carry out a development by the construction of an Ardee Bypass and asked the Board for a determination in respect of the need for an NIS. The local authority in response to questions raised as to the status of the Part 8 development consent indicated to the Board that the implementation of the Part 8 process was dependent on the determination of the Board in respect of both the EIA screening and the AA screening.

54) Paragraph 51 of the judgment of Woulfe J in the Supreme Court in *Cork Community Association*, aforesaid, was satisfied that having regard to the explicit power and duty of the Board to consider the likely effects on the environment of the proposed development that the Board must have, as a necessary incidental power, the power to make a determination in an EIA screening. The Court was satisfied that the provisions of the Act “could have been more felicitously drafted”. Where there is ambiguity or obscurity in a construction of a legislative provision the construction that reflects the plain intention of the Oireachtas ascertained by the Act as a whole would be the correct construction. In accordance with s.5 of the 2000 Act the Court was satisfied that this determination was to be made by the Board.

55) Reg. 250(1) of the 2001 Regulations provides that a local authority shall, where it proposes to carry out a development, conduct an AA screening.

Reg. 250(2) provides that where, following the AA screening, likely effects cannot be excluded the local authority is to prepare an NIS and seek approval from ABP under s.177AE of the Act.

Reg. 250(3)(a) provides that ABP shall, where it considers a local authority application for development proposed to be carried out would be likely to have a significant effect, require the local authority to prepare an NIS.

56) Under the legislation, insofar as effects an AA, a local authority may effectively grant own consent where an NIS is not required, but where an NIS is required an application for consent must be made to ABP. Reg 250(3)(a) does not include (reading the legislation harmoniously) an application to ABP for development consent under s.177AE as this is dealt with under reg. 250(2) with the NIS already prepared by the local authority by the time an application is made to ABP. Accordingly, it does appear that reference to an “application” in reg. 250(3)(a) admits of reference to a development for which the local authority deems it may grant own consent.

57) Regulation 250(3)(a) does not specify how ABP power thereunder might be triggered. In my view the application for development consent was in fact being processed by the local authority by virtue of the commission of the ROD report (reg. 250(1)), however, the form of the application would depend on the outcome of the requested determination of ABP sought in the letter of 5 May 2021, that is, own consent application or s.177AE application.

58) Given the wording of reg. 250(3)(a) which refers to an “application for development proposed...” and not an “application for consent...” or an “application for approval...”

(see the wording of reg. 250(2)), the status of the local authority process on 5 May 2021 did come within the ambit of reg. 250(1)(a) reference to an “application for development proposed”.

59) In these circumstances ABP did have authority under reg. 250(3)(a) to make it’s determination. Alternatively, such power could properly be read into the regulation by necessary implication (see *Cork Community Association* aforesaid).

60) Furthermore, it is noted that the statement of grounds does not reference the 2001 Regulations (rather, reference is made to the Planning and Development Act, 2000 as amended) which was a point made in ABP’s statement of opposition. There was no application made by the applicant to amend it’s pleadings in this regard.

61) *The applicant complains that the AA screening of the Board is invalid and knew or ought to have known that the development would be likely to have a significant effect on a European site. The applicant relies on the clarification provided by Advocate General Sharpston (herein before set out) in case C-258/11. This is a quantitative submission without the benefit of expert evidence having considered the Board’s order and all documents and information before the Board. Furthermore, it does not appear to me to be an appropriate matter to raise on a judicial review.*

It is said that the Board should have known that the threshold for an NIS had been exceeded in circumstances where the SPAs did not have management plans there is uncertainty as to the effect of stormwater ponds and there was no adequate regard for bird disturbance.

62) In so far as particulars of these claims are concerned at paras. 28 and 29 of the grounds within the statement of grounds it is said that these arguments relate to the failure in the context of the Board's functions to adequately protect the birds or the bird's habitat with specific reference to the breeding curlew.

63) These allegations are made without reference to the materials before the Board without identifying any evidence of bird disturbance, or the nature of the uncertainty as to the effect of stormwater ponds regarding wildlife and conservation birds and without verification from a reasonable expert.

64) *The complaint is also made of an impossibility to consider best scientific knowledge in the absence of management plans or detailed conservation objectives for the SPAs. It is complained that the failure to require the Council to identify the individuals who prepared components of the AA screening report and EIA screening report renders the screening invalid or defective.*

65) Management plans are not always necessary (Commission Notice of 21/11/2018, aforesaid).

66) It is not the case that an AA can never be conducted absent detailed conservation Objectives (Case C-116/22 Commission v Germany and Power v ABP 2024 IEHC 108).

67) The applicant has not explained on what basis failure to identify such individuals gives rise to an invalid ABP decision.

68) *The applicant argues that the AA screening is invalid as same was made in contravention of Regulation 27 of SI 477/2011 (The Birds and Natural Habitats Regulation) in failing to have regard to its duty as a public authority in relation to nature conservation. In the statement of grounds at para. 28 particulars given in this regard is said to relate to the failure to adequately protect the birds or the habitat of the breeding curlew. In submissions it was said that this ground is premised on the failure to notify the local authority of the requirement for an EIA or AA.*

69) This is a merits-based argument, without expert evidence, without particularising in the statement of ground the nature of the disturbance of the birds which is said to be absent from the screening.

70) *The applicant argues that the respondent failed to have regard to the criteria identified in Annex 3 of the EIA Directive and the County Council did not respond to information sought by the Board in the requested format.*

71) Schedule 7 and 7A of the 2001 EIA Regulations mirror the criteria set out in Annex 3 aforesaid and is fully dealt with in pp. 4 to 11 of the County Council's screening report.

In addition, the argument as to the correct format is a matter of form over substance and would not give rise to the exercise of a discretion to afford the reliefs sought.

72) *The applicant argues that the AA screening decision was invalid as it contravenes Regulation 42(1) of SI 477/2011 on the basis that the Board's assessment was not made in view of best scientific knowledge and in view of the conservation objectives of the site and no proper regard was had to the in combination effects. It is argued in this regard that*

there is an absence of a management plan in respect of the SPAs and there are no detailed conservation objectives. There was no public participation allowed and the applicants were not consulted and could have provided better scientific records as to curlew movements if sought.

73) The general complaints made by ABP in its statement of opposition referenced at para. 5 hereof apply to each of these complaints. Public participation is not mandated in the circumstances and it is clear from the local authority's screening reports that a number of documents of the NPWS were consulted including the map prepared by the NPWS of curlew sightings.

74) Insofar as breeding curlew on Ardee Bog is concerned, it is noted that in her grounding affidavit Ms Lennon did identify a curlew nest seen on a farmer's land who subsequently delayed his farming activity on the lands. Ms Lennon does not identify on the NPWS map or otherwise where this nest was seen.

75) *The applicant maintains that the impugned decision contravenes Article 2(1) of the EIA Directive which states that before development consent is given a project likely to have significant effects on the environment requires an assessment involving public participation.*

76) The applicant argues that this ground arises under SI 456/2011 being the Agricultural Regulations in respect of which ABP has no role.

77) Development consent was not afforded in either Decision.

78) *It is said that the AA decision contravenes Article 6(3) of the Habitats Directive 1992 in failing to conduct a screening properly or at all.*

79) This is a merits-based argument that the low threshold for a stage 2 AA had been exceeded. The argument is made without engagement with either the local authority or the Board's screening, without particulars in the statement of ground. As it is merits based it is inappropriate for a judicial review application in the absence of scientific evidence adduced by the applicant to support this proposition.

80) *It is said that the impugned decision contravenes Article 5(d) of the 2009 Birds Directive in failing to contain measures to prohibit the deliberate disturbance of the curlew and greylag goose and/or to specify reasons and mitigation measures. It is said that the screening seems to have been conducted on the basis of mitigation measures that are nowhere clearly set out or understood.*

81) No evidence of disturbance of the birds or the mitigation measures complained of was put before the Court on behalf of the applicant and the pleadings in this regard are vague, hypothetical and fail to comply with O.84, r.20 of the Rules of the Superior Courts. The lack of any scientific evidence is also relevant.

Conclusion

82) I am satisfied that the applicant has not discharged the onus on it to identify that the basis on which the Board came to its determination was flawed. No manifest error was properly particularised and identified. No scientific evidence has been adduced by the Applicant. The statement of ground is such that it does not comply with the necessary specificity required by the rules of Court. ABP did have sufficient information before it to make the findings it did. In the circumstances the relief of *certiorari* is refused.

83) The applicant made three initial complaints against the State respondents two of which are no longer being pursued. The third issue has been resolved by consent between the parties on the basis of this Court making the following declaration: -

A declaration that prior to the publication of the Stabannan and Braganstown conservation objectives, the second and third named respondents failed to have in place quite specific conservation objectives for the Stabannan-Braganstown SPA, contrary to its obligations under EU law.

84) As this judgment is being delivered electronically, the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered. In default of such submissions being filed, no order for costs will be made.