[2020] IEHC 122

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

[2016 No. 232 JR.]

BETWEEN

JOHN RUSHE AND MAIRE NÍ RAGHALLAIGH

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WESTERN POWER DEVELOPMENTS LIMITED

NOTICE PARTY

AND

GALWAY COUNTY COUNCIL

NOTICE PARTY

AND

MARTIN WALSH, AN TAISCE, IRISH PEATLAND CONSERVATION COUNCIL, AINE NÍ FHOGARTAIGH AND MICHAEL O RAGHALLAIGH, STIOFÁN Ó CUALÁIN AND MAIRE NÍ RAGHALLAIGH ON BEHALF OF OLD TOWN/KNOCKRANNY RESIDENTS FOR ENVIRONMENTAL CONSERVATION AND DEVLOPMENT CONSULTATION

NOTICE PARTIES

JUDGMENT of Mr. Justice David Barniville delivered on the 5th day of March, 2020

Introduction

1. This is my judgment on an application by the applicants for an order of *certiorari* quashing a decision of the respondent, An Bord Pleanála (the "Board"), which was made on 19th February, 2016 to grant permission to the first notice party, Western Power Developments Limited (the "Developer"), for the development of a wind farm at Cnoc Raithní (Knockranny) and Na hArd-doiriú (Ardderroo), Moycullen (Maigh Cuillinn), County Galway.

2. The applicants live in the vicinity of the proposed wind farm. In addition to seeking an order of certiorari, the applicants also sought various declarations and, if necessary, a preliminary reference to the Court of Justice of the European Union (the "CJEU") pursuant to Article 267 of the Treaty on the Functioning of the European Union (the "TFEU").

3. The applicants' challenge to the Board's decision was advanced on two general legal bases. The primary basis for the applicants' challenge was their contention that, in deciding to grant permission for the proposed development, the Board failed to comply with the provisions of Council Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive") and s. 177V of the Planning and Development Act, 2000 (as amended) (the "2000 Act") in relation to the appropriate assessment (the "AA") purportedly carried out by the Board. Counsel for the applicants confirmed at the hearing that the main focus and emphasis of the applicants' challenge was in relation to the AA purportedly carried out by the Board under the Habitats Directive and s. 177V of the 2000 Act. By far the greatest time was spent at the

hearing by the applicants' counsel on the AA part of the applicants' case. The second basis on which the applicants sought to challenge the Board's decision concerned the Environmental Impact Assessment (the "EIA") carried out by the Board in respect of the application which the applicants contended was in breach of the provisions of Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment (the "EIA Directive") and Part X of the 2000 Act.

4. While a number of other bases or grounds of challenge were set out in the pleadings, these were not pursued by the applicants in their written submissions or at the hearing. The applicants did not pursue any application for a reference to the CJEU pursuant to Article 267 TFEU.

5. The applicants' application was opposed by the Board and by the Developer. Their application was supported by Martin Walsh, the third notice party. Mr. Walsh is a Circuit Judge in England and Wales. He is the owner of a cottage, situate in Knockranny, in the vicinity of the proposed development. Mr. Walsh participated in the planning process before the planning authority, Galway County Council (the "Council"), and submitted an appeal from the Council's decision to grant permission for the proposed development to the Board. In addition to swearing an affidavit in support of the applicants' challenge (and attempting to advance some additional grounds of challenge himself), Mr. Walsh provided a written submission, appeared at the initial hearing, made oral submissions and, following an adjournment of the proceedings, provided an additional written submission prior to the resumed hearing of the case. Apart from the Developer and Mr. Walsh, none of the other notice parties (who had participated in the planning process) participated in the proceedings.

6. As will be seen, the proceedings have had a somewhat tortuous history. Although listed for hearing on two occasions prior to the hearing before me, they were adjourned to await developments in and, ultimately, the outcome of, an appeal taken by the Board to the Supreme Court in the well-known case of *Connelly v. An Bord Pleanála* [2018] IESC 31 ("*Connelly*"). All parties were agreed that the judgment of the Supreme Court in *Connelly* and that court's discussion of the obligations of the Board in carrying out an AA under the Habitats Directive and s. 177V of the 2000 Act, was the most directly relevant authority for the AA part of this case. Most of the submissions of the parties were directed to the question as to whether the Board had complied with what the Supreme Court held in Connelly were the obligations imposed upon it in carrying out an AA. As well as that, and exemplifying the constantly evolving jurisprudence, both Irish and European in this area, the parties also sought to rely on emerging case law from the CJEU. Reliance was placed by all the parties initially on the opinion of Advocate General Kokott in *Case C-461/177 Holohan & ors v. An Bord Pleanála* (opinion delivered on 7th August, 2018) and subsequently on the judgment of the CJEU in that case (delivered on 7th November, 2018) ("*Holohan*"), which had been referred to the CJEU by the High Court (Humphreys J.) in *Holohan & ors v. An Bord Pleanála* [2017] IEHC 268. During the first part of the hearing before me, Advocate General Kokott's opinion in *Holohan* was available, and the

parties made submissions in relation to it. However, the hearing did not complete within its allotted time and had to be adjourned. By the time of the resumed hearing, the judgment of the CJEU in *Holohan* had become available. The parties were given an opportunity of making further submissions in relation to the judgment of the CJEU in that case. Further oral submissions were made on behalf of the applicants, on behalf of the Board and on behalf of the Developer. Mr. Walsh was unable to attend to make further oral submissions, but furnished a further written submission which I have considered for the purposes of my judgment.

7. While the greater part of this judgment deals with the AA part of the applicants' case, and although the applicants' counsel accepted that if the applicants did not succeed on the AA part of their case, they would not succeed on the EIA part of the case, the applicants did not formally withdraw their EIA case and it is, therefore, necessary to deal with that part of the case in the course of this judgment.

8. I have also found it necessary in this judgment to make some observations in relation to the pleadings in the case and to consider the obligations on an applicant in judicial review proceedings, in general, and in planning cases, in particular, to set out clearly what its case is in the pleadings and, in particular, in the statement of grounds. I have found it necessary to do so in this case in circumstances where the case made at the hearing by the applicants differed significantly in some respects from the case pleaded by them and from the case made in the applicants' written submissions, at least insofar as the AA part of the applicants' case was concerned. I have concluded that the applicants ought not to be permitted to advance certain elements of the AA case which they sought to make at the hearing, in circumstances where those elements were not pleaded and not addressed in the written submissions filed on behalf of the applicants in advance of the hearing. I was satisfied that by reason of the clear obligations imposed on an applicant in judicial review proceedings under the Rules of the Superior Courts (the "RSC"), as considered by the Supreme Court, and by reason of the further obligations on an applicant in planning judicial review proceedings under s. 50A of the 2000 Act, it would not be appropriate to permit the applicants in this case to advance a case not pleaded and not addressed in their written submissions.

Structure of Judgment

9. In this judgment, I address the factual background to the proceedings, in particular, the history of the Developer's application for permission leading to the decision of the Board which is challenged in these proceedings. I then set out the grounds of challenge advanced by the applicants in the pleadings and in their written submissions. I make some observations in relation to the pleadings and the pleading obligations on an applicant in judicial review proceedings, in general, and planning cases, in particular. I then turn to consider the AA part of the applicants' case and outline my decision in relation to that part of the case. I then address the EIA part of the applicants' case and outline my decision in relation to that part of the case. Finally, I set out my conclusions.

Summary of Decision

10. In brief summary, for the reasons set out in some detail in this judgment, I have concluded that the applicants have failed in their challenge to the Board's decision on both the AA and EIA grounds advanced by them with the support of Mr. Walsh. I have concluded that, insofar as the AA part of the case is concerned, the Board in its decision complied with its duties and obligations under the Habitats Directive, as interpreted and applied in the case law of the CJEU and of the Irish Courts. In particular, I have concluded that the Board correctly identified and applied the test for AA set out and discussed by the Supreme Court in *Connelly* and that there is nothing in the recent judgment of the CJEU in *Holohan* which would persuade me to reach a different conclusion.

11. I have also concluded that the applicants have failed in their challenge to the decision of the Board on EIA grounds. I have decided that the Board (and its inspector) did engage with the submissions and observations made and did assess the environmental aspects of the development, contrary to the applicants' contentions. I have found that the Board (and its inspector) did consider and assess the cumulative effects of the development (including grid connection) on the environment for the purposes of the EIA Directive and the effects of the development in combination with other relevant developments, plans and projects for the purposes of the Habitats Directive. In those circumstances, therefore, I reject the applicants' challenge to the Board's decision and refuse their application for judicial review.

Factual Background

12. I set out in this section the relevant factual background. Most of the facts set out below were not in dispute between the parties and I accept them. The relevant facts found by me are as set out below.

The Developer's Application

13. On 13th August, 2013, the Developer applied to the Council for permission for the development of a wind farm on a site approximately 4.5 kilometres northwest of Moycullen in County Galway and 2.5 kilometres west of the N59 (Galway-Clifden) national secondary road. The Developer applied for a ten-year permission for a wind farm comprising eleven turbines, a mast, a 110kV substation, a new entrance, roads and site works at the site at Cnoc Raithní (Knockranny), County Galway. The proposed wind farm, the subject of the application, would be adjacent to a number of existing, extant and proposed wind farms located within approximately 10kms of the site of the proposed development. The site is located within a strategic wind farm area under the Galway Wind Energy Strategy, 2011-2016 (the "WES"). There is an existing wind farm (five turbines) at Inverin, 10.4km southwest of the development site. In addition, permission exists for wind farms at a number of other sites close to the development site as follows: Uggool Wind Farm (16 turbines, 2.6km northwest of the site); Cloosh (22 turbines, 4.3km west of the site); Seecon (23 turbines, 5.2km northwest of the site); Letterpeck (7 turbines, 5.3km south of the site); Leitir Gungaid (10 turbines, 6.9km south/southwest of the site); and Lettercraffroe (8 turbines, 7.3km northwest of the site). In addition, an application for permission for a further wind farm (29 turbines, directly to the west/northwest of the site) at Killaguile, Letter, Uggool, Ardderroo and Finnauin (the "Ardderroo application") was refused by the Board in December, 2015. At the time of the consideration of the

Developer's application, another wind farm was in the planning process (at Knockalaugh, 12 turbines, 3km south of the site). I note the submission made by Mr. Walsh to the effect that the proposed development, together with the development the subject of the Ardderroo application, and other wind farms already permitted would, when developed, be the fifth largest onshore wind farm in Europe and the largest development of its type on the island of Ireland. As noted, however, the Ardderroo application was refused by the Board in December, 2015.

14. While the site of the proposed development is not a protected European site for the purposes of the Habitats Directive, a screening assessment carried out in respect of the application demonstrated that there were some eight European sites (including SPAs and cSACs) within 15 kilometres of the site of the proposed development, which it was considered were at risk of being significantly impacted from the proposed wind farm. The sites in question were the Connemara Bog Complex cSAC (located 100/250 metres to the south of the site); Ross Lake and Woods cSAC (2.1/2.7km northwest of the site); Connemara Bog Complex SPA (4.5/5.1km southwest); Lough Corrib cSAC (4.7/5km east); Lough Corrib SPA (6.4/6.9km north/northwest); Lough Corrib Ramsar Site (6.8km east); Inner Galway Bay SPA (13.1km southeast); and Inner Galway Bay Ramsar Site (13.1km southeast two European sites were screened out).

15. Those European sites have different qualifying interests/features of interest and different conservation objectives. As we will see, certain of the qualifying interests of those European sites were the subject of extensive consideration during the course of the planning process and have featured in the applicants' claims in the proceedings in relation to the Habitats Directive and the AA part of the case.

16. The Developer had applied previously for permission to develop a wind farm (consisting of fourteen wind turbines) on the same site. The Board refused permission for that development on 8th August, 2012. The reasons for the Board's refusal were set out in the Board's decision of that date. However, in summary, there were two reasons. The first was that the Board considered that the development did not take into account the archaeological heritage of the site and considered that the development would be seriously detrimental to the archaeological and cultural heritage of the site. The second reason was that the Board considered that there were potential issues in relation to geotechnical/peat slippage risks which were not fully resolved for all turbine locations and that, as a consequence, it was considered that the risk of environmental damage was unacceptable. The previous application was, therefore, refused for reasons of archaeology and potential peat slippage.

The Council's decision

17. Having sought and obtained further information from the Developer and having considered various internal and external reports and observations, the Council decided to grant permission for the development subject to 28 conditions. One of those conditions concerned the marsh fritillary butterfly, a qualifying interest in respect of the Connemara Bog Complex cSAC, close to the development site. The condition provided that if

development had not commenced by August, 2014, a further survey had to be carried out in respect of that species during August/September.

The appeal to the Board

18. There were five third party appeals against the decision of the Council to grant permission for the proposed development. Among those to appeal were Mr. Walsh and a number of the other notice parties to the proceedings. In addition, several observers made observations in relation to the appeal.

The Inspector's report

19. The Board appointed an inspector to prepare a report in respect of the appeals. The inspector carried out a site inspection on 24th September, 2014 and furnished a detailed report (91 pages) to the Board in November, 2014. It will be necessary to consider certain aspects of the inspector's report when dealing with the AA and EIA aspects of the applicants' case. For present purposes, it is sufficient to refer in general terms to the inspector's report and her conclusions.

20. Having considered the appeals and the various submissions and observations made, the inspector commenced her general planning assessment at s. 11.0 of her report. In that section of her report, the inspector dealt (amongst other things) with archaeological impacts (s. 11.3), peat stability (s. 11.4), ecology (s. 11.7) and water quality and surface water drainage (s. 11.8). In dealing with peat stability (at s. 11.4), the inspector reviewed the evidence provided and the submissions made on the issue over the course of several pages of the report. She considered that the issue of peat stability had been satisfactorily dealt with by the Developer and concluded that the locations for the turbines selected by the Developer had been appropriately addressed in terms of stability and that the peat depth and slope at the locations chosen was acceptable. She concluded that the peat deposits area has been satisfactorily addressed and appeared to her to be an appropriate means of storing excess material. In the course of that section of her report, the inspector considered the expert evidence tendered on behalf of the appellants/observers as well as the Developer's evidence and reached the conclusions to which I have referred. The inspector addressed the issues concerning water quality and surface water drainage at s. 11.8 of her report. While she noted a number of concerns raised by the appellants/observers, she was satisfied that these issues had been satisfactorily dealt with by the Developer, subject to strict compliance with certain mitigation measures set out by the Developer in its Environmental Impact Statement (the "EIS").

21. The inspector's report in relation to EIA was contained in s. 12.0 of her report. She referred in that section of her report to the EIS which was submitted by the Developer with its planning application (in four volumes). The inspector noted (in para. 2.2.1 on p. 69 of her report) that there was "*a large degree of commonality between the significant issues identified and assessed under the planning and appropriate assessments and the likely significant direct and indirect effects of the proposed development on the environment*". As a consequence, she stated that the EIA set out in that part of her report should be read in conjunction with the general planning assessment at s. 11 and the AA

at s. 13 of the report. In considering the likely significant direct and indirect effects of the proposed development in the area of ornithology, the inspector noted that that issue also had to be considered with the relevant section of the AA contained in the report. She noted that with regard to likely significant impacts, the EIS had noted that one species of high sensitivity was recorded within the site, namely, the golden plover. The EIS had noted that predicted negative impacts which were possible for birds included collision with turbines and rotor blades (in the operational phase). While the EIS had stated that the potential for collision was low for the particular species, the inspector considered that the stated impact on birds, particularly from collision during the operational phase, was not satisfactory "*particularly in light of the concerns raised about the golden plover in the appropriate assessment below*" (s. 2.2.1, p. 70 of the report). The inspector was of the opinion, therefore, that a "*significant residual impact*" was likely to arise. The inspector also considered the potential impacts on human beings, ecology, hydrology and hydrogeology and soils as well as in several other areas.

22. The inspector expressed her conclusion in relation to the EIA part of her report (at p. 75) as follows: -

> "*I have considered the EIS and all submissions/observations received which are relevant to impacts on the environment, inspected the site, and have assessed the direct, indirect and cumulative effects of the development on the environment. Having regard to the above, I am of the opinion that the direct and indirect effects on the environment of the proposed development have been identified and described. It is my view that accepting my concerns in respect of the impact on an Annex 1 bird species which I outline in greater detail in the AA below, the potential impact of the proposed development can be adequately mitigated and is not likely to result in a significant impact on the environment."*

The Annex 1 bird species to which the inspector referred in that conclusion was the golden plover (which she had specifically made reference to in the paragraph on ornithology on p. 70 of her report).

23. The inspector addressed the AA issues in s. 13.0 of her report. At s. 13.1, she noted the obligations contained in Articles 6(3) and 6(4) of the Habitats Directive and described what was involved in the carrying out of an AA before consent or permission could be given in respect of a proposed development. In that section of her report, the inspector made reference to the Natura Impact Statement (the "NIS") submitted by the Developer and drew particular attention to a table in the NIS (table 13) and to the reference to confidence levels of predictions of likely impacts referred to there. The inspector noted that the authors of the NIS had included an additional confidence category between the categories of *unlikely* (5-50% chance of occurring as predicted) and "*probably*" (50-95% chance of occurring as predicted). The additional category included was "*probably/unlikely*" which the authors of the NIS stated had been used to indicate that the level of probability was within the higher percentages of the "*unlikely*" category (5-50%), with a probability of approximately 30-50%. The inspector noted that there was no

reference to that category in any of the relevant guidelines prepared in respect of the assessment of significance, either for the purposes of an EIS or an NIS or for the assessment of either. The inspector stated that, in her opinion, the use of that additional category "*confuses the report with the combination of two effectively opposing meanings*". She stated that it was not clear why there was any need to include "*probably*" within the "*probably/unlikely*" category since the "*probably*" category started at 50% and went higher under the relevant EPA guidance (see pp. 75-76 of the report). I will return to this issue later as it forms part of the pleaded case advanced by the applicants.

24. The inspector then considered the development the subject of the application and the particular characteristics of the project. She looked at the European sites likely to be affected according to the stage I AA (screening) set out in detail in the NIS submitted by the Developer. The screening assessment had identified eight sites within 15km of the development site which it was considered were at risk of being significantly impacted from the proposed development. The inspector identified the sites in question, noted their respective distances from the development site and the particular qualifying interests at issue. The inspector then considered each of the sites and the particular conservation objectives in respect of each site (s. 13.4).

25. The report then set out other relevant plans or projects for the purposes of assessment of in combination effects. She referred to the extant permissions for wind farms and turbines within 15kms of the site by reference to a table (at p. 83). She included in that table, the wind farm the subject of the Ardderroo application which was refused by the Board in December, 2015, more than one year after the inspector's report.

26. In considering the likely significant effects on designated sites (in s. 13.6), the inspector referred to the issue of habitat loss (at s. 13.6.1) and noted that some of the habitat loss expected to occur within the development site included loss of habitat that might be of importance to protected species on the relevant designated or European sites outside the development site. The inspector felt that the loss of onsite habitat was likely to have a particular impact on the golden plover, the Greenland white-fronted goose and the marsh fritillary butterfly. With regard to the latter species, the inspector concluded that she did not consider the impact to be significant. With regard to the golden plover, the inspector agreed with the NIS that the impact of habitats loss on that species would be slight, short-term negative impact which would not be considered to be significant. With regard to the Greenland white-fronted goose, the inspector felt that the impact of habitat removal on the site would be imperceptible.

27. The inspector then considered the potential effects on peat stability and water quality in s. 13.6.3 of her report. She referred back to her consideration of the issue of peat stability in s. 12 of the report which concerned the EIA. She agreed that the development would have a neutral impact on the issue of peat stability. The inspector did not have any concerns in relation to the question of water quality. The inspector noted that the construction phase had the potential to pose a significant risk to freshwater habitats and referred to the manner in which the infrastructure had been designed to avoid such risk.

While referring to what she had stated earlier in her report about the "*probably/unlikely*" category and while noting that she considered that to be "*somewhat confused",* the inspector did not consider that it would pose a significant effect to the relevant designated sites.

28. In the next section of her report (which was misnumbered 13.2.2 and commenced on p.85), the inspector considered the question of disturbance/displacement of protected species during construction. The NIS had noted that there was a possible risk of disturbance to a number of species from the construction phase of the proposed development. The main species of concern were the golden plover, the marsh fritillary butterfly, the Greenland white-fronted goose and the lessor horseshoe bat. With respect to the marsh fritillary butterfly, which was known to occur in the Connemara Bog Complex cSAC (located 100/250 metres to the south of the development site), and had the potential to breed within the proposed site, the inspector noted that while no butterflies or nests were observed within the site, construction work on the site could destroy breeding colonies. While the NIS had noted that to be a significant short-term impact, the probability was stated to be unlikely. While noting the Developer's response to the appeals that in over two years of site visits by ecologists, no observations had been made of marsh fritillary adult butterflies, the inspector was of the view that it would be *"prudent, if the Board are minded to permit the proposal herein, prior to construction to undertake a survey of the habitat to be removed for this species and that works should be carried out outside of their breeding season*" (p. 86). It is to be noted that the inspector was expressing the view that such a survey would be prudent "*prior to construction*" and not prior to consent being given in respect of the development. I consider the significance of that distinction later in the judgment.

29. As regards the golden plover, the inspector noted that that particular species was known to breed in the Connemara Bog Complex SPA (4.5/5.1km to the southwest of the site), in the Lough Corrib SPA (6.4/6.9km north/northwest of the site) and in the Inner Galway Bay SPA (13.1km to the southeast of the site). The inspector noted that particular significance had been attached in the NIS to the golden plover. She noted that there was no evidence on the site of any breeding golden plover and that they were recorded flying over the site on a number of occasions, with the potential that suitable breeding and foraging habitat could occur on the site. She stated that if the species were breeding on site during construction, there would be a significant impact. However, the avoidance of some construction activity during the breeding season would reduce the possibility of a negative impact. The NIS had described the potential impact as a short-term moderate impact with the likelihood of such impact being considered "*probably/unlikely".* Having reiterated her concerns in relation to the use of that category of significance, the inspector considered that "*abundant suitable habitat within the surrounding area would mean that any possible moderate short-term impact is unlikely*". She did not consider that the impact on the golden plover during the construction phase could be described as significant (p. 86). She agreed with the conclusions in the NIS as to the unlikelihood of a negative impact on the Greenland white-fronted goose.

30. The inspector then considered the issue of disturbance/displacement of protected species during operation of the wind farm at s. 13.2.4 of her report (pp. 87-88). The inspector identified the main risk for protected species during the operation of the proposed wind farm was the risk to birds and bats of collision with the turbine blades. The inspector referred to the NIS and to the evidence contained in the NIS in relation to the golden plover, which she noted was known to occur within the Connemara Bog Complex SPA, the Lough Corrib SPA (it is assumed that there is a typographical error in this paragraph of the inspector's report which refers to the Lough Corrib SAC rather than the Lough Corrib SPA) and the Inner Galway Bay SPA. The NIS referred to observations made of flocks flying over the site and noted that "*the birds"* (i.e. the golden plover species) fly over the rotor height. However, the inspector noted that reference was made (in the NIS) to the risk of collision being heightened by the fact that the golden plover flies in large flocks with a higher risk of collision in foggy and misty conditions. The inspector noted that the NIS assessed there to be a possible significant risk to the species from collision, although the likelihood of the impact occurring was stated to be unlikely by reference to the density reduction of breeding golden plover within 500 metres of turbines. The NIS considered that while the displacement risk to breeding golden plover would be a significant long-term negative impact, the probability of that occurring was considered to be unlikely. However, the inspector was not persuaded of this. She identified gaps in the analysis in relation to the risk of collision by the golden plover with the turbines during operation. She noted that the observations of the golden plover flying over the site and the flight paths identified were in very close proximity to three of the proposed turbines. In that regard, the inspector stated: -

"I am not clear as to how an unlikely likelihood can be derived from this impact assessment, particularly given the recording of the species flying over the site and to the concerns expressed in respect of their flight behaviour. The spacing of the turbines is stated to reduce the risks somewhat but I cannot say that the NIS has satisfactorily demonstrated that such a risk is unlikely. While it may be a clumsy use of language or an inadequate explanation of the mitigation considered to derive from the siting and design, I consider the applicants have not proven beyond all reasonable scientific doubt that the proposed works would not have an adverse effect on this species."

It is evident from the context in which the inspector expressed this conclusion that the species to which she was referring in the context of the particular risk identified was the golden plover. The inspector did not have similar concerns in relation to other species, such as the Greenland white-fronted goose.

31. At para. 13.6.6 (pp. 88-91) of the report, the inspector considered the mitigation measures set out in the NIS. She noted that the NIS stated that much of the mitigation was designed into the scheme and layout and considered that to be reasonable in circumstances where the Developer had had the opportunity of revising the scheme to address concerns expressed in the previous application (particularly in relation to peat

stability and archaeology). The inspector considered the list of mitigation measures proposed to be reasonable.

32. The inspector expressed her conclusions in relation to AA at para. 13.8 (p. 89) of her report. She stated that having considered the NIS, she had a number of concerns. The first concerned the "*probably/unlikely*" category for assessing the likelihood of the impacts occurring. She considered that to be confusing and noted that there was no reference source to justify its use. However, it is clear from her report that the second concern she had was a more significant one. This concerned the impacts of the operation of the wind farm on the golden plover. She stated that "*more critically*" she considered that a "*serious weakness*" arose in respect of the consideration of that issue. In that context, she referred to the judgment of Finlay Geoghegan J. in the High Court in *Eamon (Ted) Kelly v. An Bord Pleanála* [2014] IEHC 400 ("*Kelly*") and the test for AA set out in that judgment, which the inspector paraphrased as providing that an assessment could not be regarded as appropriate *"if it contains gaps or lacunae, lacks complete, precise, definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the proposal on EU sites".* The inspector considered that the authors of the NIS had not proven that there would not be an adverse effect on a qualifying interest, namely, the golden plover, known to occur in three of the European sites within 15km of the development site. She explained her reasoning for that conclusion.

33. Noting that the risk of collision during the operation of the wind farm was considered to be significant, the inspector did not consider that the Developer had provided adequate information *"to prove beyond reasonable scientific doubt that the wind farm will not impact on the natural flight lines of the golden plover and would not have an adverse impact on the integrity of the Connemara Bog Complex, Lough Corrib SPA and Inner Galway Bay SPA, having regard to their conservation objectives*" (s. 13.8, p.89). Again, it is clear from the manner in which the inspector expressed her conclusion as regards the second of her concerns, when read with the earlier part of her report, that the second concern which the inspector had related to the risk of collision of the golden plover with the turbine blades during the operation of the wind farm.

34. The inspector set out her conclusion and her recommendation at s. 14.0 of her report. At s. 14.1, the inspector repeated her conclusion that, having regard to the assessment of the significance of the impacts likely to occur (the risk of collision of the golden plover with the turbine blades), the inspector did not consider that the Developer had provided adequate information to prove "*beyond reasonable scientific doubt*" that the wind farm would not impact on the natural flight lines of the golden plover and would not have an adverse impact on that protected species and on the integrity of the three European sites concerned. In those circumstances, the inspector concluded that the Board could not accept the findings set out in the NIS and that permission should be refused for that reason.

35. In s. 14.2, the inspector set out her recommendation which was that the Board should refuse permission for the reasons and considerations set out by her under the heading

"*Reasons and Considerations".* It is unnecessary to repeat those reasons and considerations here, save to observe that the inspector makes express reference to the requirement that the competent authority be "*certain, based on scientific knowledge*" that the plan or project would not adversely affect the integrity of one or more of the European sites in question. In the second paragraph of the "*Reasons and Considerations",* the inspector recommended that the Board record its dissatisfaction with the information contained in the NIS and other supporting documentation and that it was not satisfied that the particular European sites would not be adversely affected by the proposed development *"in particular, by virtue of the disturbance, barrier effects to movement and collision risk arising from the construction and operation of the wind farm on birds of special conservation interest known to traverse the site and the network of SPA's in the vicinity of the site, notably the golden plover*". The only protected species referred to in this context and in connection with this risk was the golden plover. Although the inspector referred to "*birds*" of special conservation interest and used the phrase "*notably*" in referring to the golden plover, it is clear from a reading of the relevant parts of the inspector's report (to which I have just referred) that the inspector's concerns related solely to the golden plover and not to any other species.

Board's considerations of Inspector's report and s. 132 request

36. The Board met on four occasions between 9th December, 2014 and 12th May, 2015 to consider the inspector's report. In a letter dated 25th May, 2015, the Board requested certain further information from the Developer by 14th September, 2015 pursuant to s. 132 of the 2000 Act (the "s.132 request"). The s. 132 request dealt with two things.

37. First, consistent with the conclusions expressed by the inspector in relation to the absence of adequate information to prove beyond reasonable scientific doubt that the wind farm would not have an adverse effect on the golden plover and on the integrity of the relevant European sites, the Board requested further information from the Developer. The Board stated that in the absence of evidence to the contrary, it would not be satisfied that the integrity of the relevant European sites might not be adversely affected by the proposed development, in particular, by virtue of the disturbance, barrier effects to movement and collision risks arising from the construction and operation of the wind farm on *"birds of special conservation interest known to traverse the site and the network of SPAs in the vicinity of the site, notably the golden plover*" (using precisely the same language used in the second paragraph of the reasons and considerations set out in s. 14.2 of the inspector's report). The Board stated that, in those circumstances, the proposed development might be contrary to Article 6(3) of the Habitats Directive. The Board concluded the first part of the request by stating that on the basis of the documentation submitted, the Board considered that the Developer had not provided adequate information *"to prove beyond reasonable doubt that the wind farm will not impact on the natural flight paths of the golden plover and would not have an adverse impact on this protected species or on the integrity of the*" three European sites concerned. The Board requested the Developer to address those concerns by way of the submission of a revised NIS.

38. The second issue dealt with in the request concerned an issue that was not referred to in the inspector's report. This issue arose from the judgment of the High Court (Peart J.) in *O'Grianna v. An Bord Pleanála* [2014] IEHC 632 and [2015] IEHC 248 ("*O'Grianna*") concerning the connection of the proposed wind farm development to the national grid. The Board was of the view that *O'Grianna* might be relevant to the proposed development and was concerned that the details submitted in respect of a connection to the national grid might be inadequate for the purposes of carrying out an EIA for the entire project, including the assessment of cumulative impacts. In those circumstances, the Board considered that, in the absence of detailed proposals for the connection to the national grid, it might not be possible for the Board to complete an EIA in accordance with the requirements of the EIA Directive. In those circumstances, the Board requested the Developer to submit a revised EIS to incorporate sufficient information to enable it to complete an EIA in relation to the overall proposal, including the grid connection. It further stated that the revised EIS should consider the cumulative effects of the proposed wind farm and the proposed grid connection. The Developer was also requested to submit a revised Habitats Directive screening and, if necessary, a revised NIS in respect of the overall proposal, including the grid connection.

Response to s. 132 request

39. In response to the request, Malachy Walsh & Partners, engineering and environmental consultants on behalf of the Developer, submitted the following to the Board on 21st August, 2015: (1) a revised NIS to address the concerns expressed by the inspector and by the Board in relation to the golden plover (which attached, at attachment 2, a document entitled "*Response to request for further information on golden plover*" (the "Golden Plover response")); (2) a revised and updated EIS to address the grid connection route. The revised NIS also took account of the works associated with the construction of the grid connection route.

Submissions/Observations in response to further information

40. The Board sought submissions or observations in relation to the information provided by the Developer in response to the s. 132 request. Submissions and observations were received from several persons including the applicants and various of the notice parties. Two observations were made by Mr. Walsh in relation to the additional material provided by the Developer in response to the request, on 22nd October, 2015. I should add that Mr. Walsh had previously communicated with the Board, on 23rd October, 2014 commenting upon the Developer's application as well as on the Ardderroo application, requesting the Board to consider the points made by him in that communication and enquiring whether the Board intended to deal with the Developer's application individually and, if so, whether it intended to have regard to the Ardderroo application when doing so. Mr. Walsh stressed that it was not intended that that communication be considered as a further representation to the appeal in relation to the Developer's application. A member of staff of the Board responded to Mr. Walsh's communication on 24th October, 2014 stating that the Board did not comment on how it proposed to assess or deal with current appeals or other applications and that Mr. Walsh's communication would not be placed on the relevant files. The two submissions or observations made by Mr. Walsh, a year later,

on 22nd October, 2015, were among the submissions and observations considered by the Board in its decision on the Developer's appeal (as appears from pp. 12 and 16 of 33 of the Board Order recording the Board's decision).

The Board's decision

41. The Board met to consider the appeal on 17th November, 2015. It decided to defer the case for consideration at a further Board meeting. That meeting took place on 15th December, 2015. As appears from the Board Direction of 20th January, 2016, the Board decided at that meeting that it would not be necessary to refer the file for an addendum report from the inspector on foot of the Developer's response to the s. 132 request and subsequent responses. The Board proceeded to deal with the appeal without referring the file for a further report from the inspector.

42. The Board's decision is recorded in the Board Direction dated 20th January, 2016 and the Board Order dated 19th February, 2016 (and the terms of the decision are identical in each document, for convenience I will refer to the Board Order when describing the terms of the Board's decision. The Board decided to grant permission for the development subject to seventeen conditions). Under the heading "*Reasons and Considerations*" (at pp. 5 and 6 of 33 of the Board Order), it was stated that in coming to its decision, the Board had regard to a number of matters, which were listed at paras. (a) to (j). Among those matters were national policy relating to the development of sustainable energy sources, the provisions of the "*Wind Farm Planning Guidelines*" issued by the Department of the Environment, Heritage and Local Government in 2006, the policies of the planning authority set out in the Galway County Development Plan, 2015-2021 and the following further matters: -

"*(f) the pattern of existing and permitted development in the area, including other wind farms,*

(g) the distances from the proposed development to dwellings or other sensitive receptors,

(h) the range of mitigation measures set out in the documentation received, including the Environmental Impact Statement… revised Environmental Impact Statement… Natura Impact Statement… and revised Natura Impact Statement,

(i) the planning history of the site and surrounding area, and

(j) *the submissions and observations made in connection with the planning application and the appeal, and the report of the Inspector."*

43. The Board Order recorded that the Board had formed the view that the proposed development would be in accordance with the proper planning and sustainable development of the area. It then went on to explain why the Board had decided not to accept the inspector's recommendation to refuse planning permission. The Board stated that it had considered all of the documentation on the file, including the Developer's response to the s. 132 request and the EIS and revised EIS, and the NIS and revised NIS.

Having done so, the Board Order stated that the Board completed an EIA and an AA "*as documented below*" in the Board Order. The Board Order continued: -

"*The Board considered that the concerns that had been expressed by the Inspector in respect of the disturbance, barrier effects to movement and collision risk arising from the construction and operation of the wind farm on birds of Special Conservation Interest known to traverse the site, notably the Golden Plover, had been satisfactorily addressed by the applicant.*"

44. The Board Order contained separate sections dealing with the AA and the EIA. In relation to AA, the Board Order stated that the Board considered that the information before it, including the NIS and revised NIS, was adequate to allow for the carrying out of an AA and that the Board "*completed*" an AA. The Board Order dealt with both stages of the AA, namely, the stage I screening stage and the Stage II AA itself. In relation to screening, the Board Order stated that the Board considered the nature of the proposed development together with the characteristics and conservation objectives for ten European sites located within 15km of the proposed development and the distances between the site of the proposed development and the specified European sites and any other such sites. The Board Order then noted that the NIS had screened out the need for a stage II AA in the case of two of the European sites and that the inspector had accepted that screening. The Board concluded, on the basis of the information available, including the inspector's report, that the proposed development, either individually or in combination with other plans and projects, would not be likely to have a significant effect on either of those two European sites in view of their conservation objectives. The Board agreed, therefore, to the screening out of the two particular European sites.

45. The Board then went on to consider the stage II AA itself. The Board Order referred to the s. 132 request made by it in May, 2015 on the basis of the inspector's report, and her conclusions and recommendations in relation to the golden plover. The Board Order recorded that the Board had decided to request a response from the Developer to the s. 132 request "*prior to completing*" the AA.

46. The Board then expressly dealt with the inspector's suggestion in relation to the marsh fritillary butterfly. It will be recalled that the inspector had expressed the opinion that it would be "*prudent*", if the Board was minded to grant the permission, for a survey of the habitat to be removed for the species to be undertaken prior to construction and that the works should be carried out outside the breeding season for that species. However, the Board considered that the further survey works suggested by the inspector "*was not necessary having regard to the nature and extent of the survey work that had been carried out to date in respect of this species and its host habitat in connection with the proposed development*" (p. 12 of 33). The Board, however, accepted the inspector's recommendation to include a condition requiring the works to be carried out outside the breeding season for that species "*as a precautionary measure*" (p. 12 of 33). Condition 6 of the conditions imposed by the Board was that the removal of site vegetation be carried

out outside the breeding season for the marsh fritillary butterfly "*as a precautionary measure in the interest of protecting the species*" (p. 21 of 33).

47. The Board Order then referred to the response received by the Board to the s. 132 request which it noted was circulated to the parties and new public notices were issued. The Board Order recorded the fact that responses and comments were received from a number of parties and observers including Mr. Walsh, the applicants and a number of the notice parties.

48. The Board Order noted that the Board examined the further information received from the Developer, including the revised NIS together with the comments from other parties and observers and: -

"…carried out further evaluation and analysis of the potential impact of the proposed development on protected bird species including, in particular, the Golden Plover."

While it is perhaps a slightly awkward wording, it is clear that the further information provided by the Developer on foot of the inspector's concerns and the s. 132 request concerned the impact on one protected species, namely, the golden plover and not on other protected bird species, for the reasons already discussed. The Board Order continued: -

"*In evaluating that issue, the Board was satisfied that the information contained within the further information submission and revised Natura Impact Statement was comprehensive, thorough and robust and had employed the best available scientific expertise in relation to research, the collection of survey data and the analysis of same*." (p. 13 of 33)

49. The Board Order then set out the Board's summary of the conclusions contained in the revised NIS, in a series of bullet points as follows: -

"• *There are no traditional feeding areas or over-wintering areas for the Golden Plover and no Golden Plover breeding at, or in the vicinity of, the site;*

• *Few, very small to small flocks of Golden Plover were observed at the site and in the region flying at high altitudes and migrating between sites;*

• *The largest flock observed represents 0.003% of the national over-wintering population;*

• *The proposed cluster arrangement of turbines yields ample flight corridors between turbines;*

• *Based on the scientific evidence presented in the revised Natura Impact Assessment (sic) there will be no significant disturbance and no effect on the Golden Plover as a result of the proposed wind farm;*

- *The proposed development will cause no significant effects to movement of Golden Plover and no significant collision risk; and*

- *The favourable conservation status of Golden Plover will not be affected by the project."* (p. 13 of 33)

50. The Board then noted that the submissions and comments received from other parties and observers did not identify "*any substantial issue or concern or provide any substantive scientific evidence that would cast doubt on the findings and the conclusions*" of the revised NIS. The Board then stated: -

"Following comprehensive evaluation, the Board found that the findings and the conclusions of the revised Natura Impact Statement could be accepted." (p. 13 of 33)

51. The applicants have raised issues in relation to the references in the Board Order to the Board having carried out "*further evaluation*" and a "*comprehensive evaluation*" and have suggested that nothing has been disclosed or revealed by the Board in relation to such evaluation. However, for reasons set out later in this judgment, I find that the "*further evaluation*" and "*comprehensive evaluation*" was recorded in the Board Order itself.

52. The Board Order then referred to the grid connection issue and noted that the Board accepted the conclusions of the revised NIS in relation to that element of the development.

53. The Board's conclusion in relation to the stage II AA was then set out as follows: -

"In conclusion, the Board was satisfied that it could be concluded beyond reasonable scientific doubt that the proposed development including grid connection, either individually or in combination with other plans and projects, would not adversely affect the integrity of the European sites… in view of these site's (sic) conservation objectives, during either the construction or operation phase of the wind farm development." (p. 14 of 33)

54. The applicants have sought to challenge that part of the Board's decision which carried out an AA in respect of the proposed development and contended that, in various respects (some of which were pleaded and others which were not), the Board's decision did not comply with the Board's obligations under Article 6(3) of the Habitats Directive and s. 177V of the 2000 Act, as interpreted and applied by the CJEU and by the Irish Courts, including, most relevantly for present purposes, by the Supreme Court in *Connelly*.

55. The Board Order contained a separate section on the EIA which it carried out under the EIA Directive and part X of the 2000 Act. The Board Order recorded the fact that the Board had considered the EIS submitted with the Developer's application, the submissions made by various parties and the inspector's assessment of the environmental impacts of the proposed development (as set out in her report) at a meeting on 12th May, 2015 and noted that the Board had adopted the inspector's report on the EIS and had concurred

with its analysis and conclusions, including the concerns expressed by the inspector in relation to the impact of the project on "*Annex 1 bird species*" (p. 16 of 33). For reasons already mentioned, this is a reference to the golden plover as it was the only Annex 1 bird species in respect of which the inspector expressed concerns.

56. The Board Order also recorded that the Board had noticed that issues had arisen in relation to the grid connection as a consequence of the judgment of the High Court in *O'Grianna* and that the Board had decided to issue the s. 132 request asking the applicant to respond to those issues prior to the Board completing an EIA. Reference was then made to the Developer's response to the s. 132 request and to the responses and comments received from interested parties and observers including the applicants, Mr. Walsh and a number of the other notice parties.

57. The Board Order then recorded the fact that the Board had considered the further information received from the Developer including the revised EIS together with the comments received from observers (being those listed on p. 16 of 33 of the Board Order). The Board Order continued: -

> *"The Board considered the Environmental Impact Statement and revised Environmental Statement (sic) submitted with the application, and other submissions on file, was adequate in identifying and describing the direct effects, indirect effects and cumulative effects in combination with other projects of the proposed development, including grid connection.*
>
> *The Board completed an Environmental Impact Assessment and concluded that the proposed development, subject to compliance with the mitigation measures proposed, and subject to compliance with the conditions set out below, would not have unacceptable impacts on the environment." (p. 17 of 33)*

The Proceedings

58. The applicants obtained leave to seek judicial review in respect of the Board's decision by order of the High Court (Humphreys J.), made on 18th April, 2016. The reliefs sought by the applicants in respect of the Board's decision and the grounds on which those reliefs were being sought were set out in an amended statement of grounds of the same date. As there was much dispute between the parties as to the case which the applicants sought to make at the hearing when compared with the case pleaded by them, it is necessary to refer to the case made by the applicants in the pleadings and, in particular, in the amended statement of grounds.

The Applicant's amended statement of grounds

59. The applicants sought an order of *certiorari* in respect of the Board's decision together with various declarations. Among the declarations sought were declarations that the decision of the Board was in breach of Article 6 of the Habitats Directive and/or s. 177V of the 2000 Act (i.e. the AA case) and a declaration that the Board failed to carry out an adequate EIA as required under the EIA Directive and/or s. 171A of the 2000 Act (i.e. the EIA case). Various other declarations were sought in the amended statement of grounds, together with a preliminary reference to the CJEU pursuant to Article 267 TFEU. However,

those other declarations and the request for the preliminary reference were not pursued. The applicants did pursue their claims in relation to AA and EIA. As noted earlier, however, by far the greatest attention was paid by the applicants in submissions and at the hearing to their AA case.

60. The grounds on which the applicants sought an order of *certiorari* and a declaration in relation to their AA case were set out in s. (e)(i), grounds 1 to 5 of the amended statement of grounds. At ground 1, it was pleaded that the Board erred and acted in breach of Article 6 of the Habitats Directive and/or s. 177V of the 2000 Act "*in the manner in which the appropriate assessment was carried out and/or recorded on the face of the Board direction of the 20th January, 2016 and/or the Board Order of the 19th February, 2016*". Ground 1 did not set out any particulars or details as to the manner in which it was being alleged by the applicants that the AA carried out and/or recorded by the Board in the documents concerned was in breach of Article 6 of the Habitats Directive and/or s. 177V of the 2000 Act.

61. At ground 2, the applicants contended that the AA purportedly carried out by the Board: -

"Did not address the substantive requirements for an appropriate assessment which had been set out in the CJEU and/or national case-law, namely that an appropriate assessment may not have lacunae and must have complete, precise and definitive findings which are capable of removing all reasonable scientific doubt remains (sic) as to the absence of such effects. The form of an appropriate assessment must include an examination, analysis, findings, conclusions and determination/decision."

62. Again, ground 2 does not expressly identify how it was said that the AA purportedly carried out by the Board did not address the substantive requirements for an AA set out in the CJEU and national case law. The ground did not identify the lacunae alleged to exist in the Board's decision and did not specify how it was said that the Board did not make "*complete, precise and definitive findings*" which were "*capable of removing all reasonable scientific doubt*" concerning potential adverse impacts on the protected sites having regard to their conservation objectives.

63. Ground 3 appeared to provide the particulars or details to support the two more general grounds set out at grounds 1 and 2. Specifically, ground 3 appeared to detail the lacunae or deficiencies identified by the inspector which it was alleged the Board did not properly address in its decision. At ground 3, it was pleaded that the AA, which was recorded in the Board Direction and/or the Board Order, did not include "*these elements, adequately or at all*", presumably being a reference to the elements required to be satisfied in an AA carried out by the Board, as pleaded in ground 2. The reason for this, as pleaded by the applicants, was due to the *"lacunae and/or deficiencies*" identified by the inspector in her report. Ground 3 continued: -

"*Specifically, the Board did not address the concern raised by the inspector in relation to the methodology that was deployed in the Natura Impact Statement (NIS)*

submitted by or on behalf of the [Developer*] and in particular in relation to the probable-unlikely category which was criticised by the inspector."*

64. At first glance, ground 3 seemed to suggest that the only lacuna or deficiency identified by the inspector concerned the "*probably/unlikely*" methodology deployed in the NIS. However, as appears from the inspector's report, and from the steps which the Board took on foot of that report, another lacuna or gap in the information provided to the Board for the purposes of the AA concerned the impact on the golden plover from the operation of the wind farm, although that was not expressly pleaded as a *lacuna* in ground 3, or elsewhere in the amended statement of grounds. It was, however, expressly dealt with as such in the applicants' written submissions.

65. In ground 4, the applicants alleged that the Board failed to conduct a proper assessment of the "*in-combination effects"* of the proposed development with other permitted wind farm developments in the vicinity and contends that, although the inspector identified other plans and projects in s. 13.5 of her report, it was alleged that there was no substantive analysis or assessment of the "*in-combination effects",* as required by Article 6 of the Habitats Directive and/or s. 177V of the 2000 Act.

66. Ground 5 alleged that the revised NIS (submitted by the Developer in August, 2015) was fundamentally deficient as it did not refer to the Ardderroo application (which was submitted on 16th September, 2014) and that, accordingly, the Board was unable to conduct an AA in light of the "*best scientific knowledge*" that was available or capable of being available.

67. The grounds on which the applicants sought an order of *certiorari* and declarations in relation to their EIA case were set out in s. (e)(ii), grounds 6 to 20 of the amended statement of grounds. Some of the grounds set out in those paragraphs were not pursued in light of the withdrawal of the applicants' case that the Board failed to comply with certain departmental guidelines. Ground 6 was expressed in very general terms and contended that the Board erred in failing to carry out an adequate EIA before development consent was given, as required by Article 3 of the EIA Directive and s. 171A of the 2000 Act.

68. Ground 7 was in similarly general terms in contending that the Board erred in purporting to have completed an EIA which was not in accordance with those statutory provisions. Neither of those grounds provided details or particulars as to the basis on which it was alleged that the EIA was not properly carried out by the Board. Ground 8 was also in very general terms. There the applicants contended that the Board failed to identify, describe and assess, in the manner required, the direct and indirect effects of the proposed development on different aspects of the environment, without specifying how and why that was so.

69. Ground 9 contained a contention by the applicants that the assessment carried out by the inspector in s. 12.0 of her report was deficient as it allegedly failed to engage with and assess the submissions made by members of the public (including the applicants) and

was, therefore, in breach of Article 8 of the EIA Directive. The applicants alleged that that section of the inspector's report was an assessment of the EIS submitted by the Developer rather than an assessment of the information provided by the Developer and of the issues raised by the applicants and others.

70. Ground 10 appeared to be directed to the failure by the Board to provide the revised EIS to the inspector for further comment or report. Grounds 11 and 12 alleged, that although the Board adopted the inspector's report, it failed to assess the additional information submitted by the Developer and failed to include any substantive assessment of that additional information. The applicants contended in this ground that the information provided in the Board Order/Board Direction did not enable independent scrutiny to be carried out as to whether the assessment was conducted in accordance with the requirements of Article 3 of the EIA Directive and/or s. 171A of the 2000 Act. This ground, therefore, appeared to be directed to the alleged failure by the Board to assess the additional information provided by the Developer in response to the s. 132 request.

71. Grounds 13, 14, 15 and 16 contained allegations by the applicants that neither the inspector in her report nor the Board in its Direction and Order did not properly assess the cumulative effects of the development in various respects. The applicants were, therefore, challenging the Board's assessment of the cumulative effects of the development.

72. In ground 17, the applicants contended that there was no assessment by the Board in the Board Direction or in the Board Order of the cumulative effects of the proposed development in light of the revised EIS and revised NIS with particular reference to the grid connection.

73. Grounds 18, 19 and 20 were not pursued. Nor were the remaining grounds set out in s. (e) of the amended statement of grounds.

The Applicant's affidavit evidence

74. It is appropriate also to refer to the affidavits sworn by and on behalf of the applicants in order properly to understand the case which was being advanced by the applicants in the pleadings and affidavits and to compare that case with the case which the applicants sought to make, particularly in relation to the AA part of their case, at the hearing.

75. The principal affidavit sworn on behalf of the applicants was an affidavit sworn by John Rushe, the first applicant, on 11th April, 2016. It was argued on behalf of the applicants that a number of the issues which the Board and the Developer contended had not been pleaded were actually set out in the affidavits and, in particular, in the first applicant's affidavit.

76. In his affidavit, the first applicant described the development the subject of the application and the history of that application and of the appeal to the Board. The affidavit referred to the appointment of the inspector and referred to parts of her report. At para. 26 of the affidavit, the first applicant stated that the inspector had noted *"a number of deficiencies"* in the information provided by the Developer in its NIS and specific reference

was made to the golden plover and the observations made in connection with the potential negative impacts on that species at pp. 87 and 88 of the inspector's report. The first applicant referred, at para. 27 of his affidavit, to the inspector's conclusions in relation to AA (at s. 13.8 of her report) which, as mentioned previously, raised concerns in relation to the "*probably/unlikely*" category in the methodology used and *"more critically*", the consideration given in the NIS to the operational impacts of the proposed wind farm on the golden plover. The entirety of s. 13.8 of the inspector's report was set out at para. 27 of the first applicant's affidavit. Having reproduced that section, the first applicant stated, at para. 28 of his affidavit, that the AA carried out by the inspector identified three concerns or deficiencies which he summarised as follows: -

"(a) Further surveys are required for the marsh fritillary;

(b) The methodology in relation to the probable-unlikely category which was deployed in the NIS; and

(c) Consideration of the operational impacts on the natural flight lines of the golden plover…"

77. It was suggested that for these reasons the inspector recommended that permission should be refused. The first applicant then referred in his affidavit to the consideration by the Board of the inspector's report, to the s. 132 request, to the response to that request received by the Board and to the further submissions and observations from the appellants and other interested parties before referring to the decision of the Board as recorded in the Board Order and in the Board Direction.

78. Having set out those parts of the decision of the Board in relation to AA, the first applicant asserted (at para. 39 of his affidavit) that the Board did not address the concern raised by the inspector in relation to the "*probably/unlikely"* methodology and that "*for that reason*", the AA conducted by the Board was deficient. While referring to three alleged concerns or deficiencies (or *lacunae*) identified by the inspector (at para. 28 of his affidavit), the first applicant appeared to confine the applicants' case that the AA conducted by the Board was deficient, to the failure by the Board to address the "*probably/unlikely*" category used in the methodology contained in the NIS and revised NIS. The first applicant further contended (at para. 40 of his affidavit) that the Board failed to conduct a proper assessment of the *"in-combination effects*" of the proposed development and essentially repeated what was said in the amended statement of grounds on that issue. At para. 42 of his affidavit, the first applicant contended that the revised NIS was fundamentally deficient as it did not refer to the Ardderroo application and that, accordingly, the Board was unable to conduct an AA in light of the "*best available scientific knowledge".*

79. The first applicant set out the factual matters relevant to the applicants' EIA case at para. 43 and following of his affidavit. Paragraphs 43 and 44 repeated the equivalent pleadings in the amended statement of grounds. At para. 48 of his affidavit, the first applicant contended that the EIA conducted by the Board was fundamentally deficient and asserted

that, although the Board had adopted the inspector's report, it failed to assess the additional information submitted by the Developer. He further asserted that the assessment of cumulative effects contained in the inspector's report, as adopted by the Board, was fundamentally deficient and his affidavit repeated a number of the grounds set out on this issue in the amended statement of grounds.

80. Although it was in the context of the applicants' case that the Board's decision was irrational (a case not pursued at the hearing), the first applicant did criticise the decision of the Board to grant permission for the development having regard to the Board's refusal of the previous application by the Developer on the grounds that the Board was not satisfied that all geotechnical/peat slippage risks had been fully resolved for all turbine locations (para. 75 of the first applicant's affidavit). It was in that context (and in the earlier part of his affidavit which referred to the history of the application and the request by the Council for further information on issues such as peat stability) that the issue of peat stability was referred to in the first applicant's affidavit. It was not mentioned at all in the context of the alleged lacunae or deficiencies in the information provided by the Developer identified or referred to by the inspector. Nor were issues concerning hydrology or water quality raised either in connection with the complaints made by the applicants in relation to the AA or in relation to their EIA case.

The statement of opposition and the affidavit evidence of the Board and of the Developer

81. In their respective statements of opposition, the Board and the Developer objected to the manner in which the applicants had pleaded their case, particularly, in relation to the AA grounds. They contended that insofar as the AA case was concerned, the pleas contained in s. (e)(i), grounds 1 and 2 were too vague and general and could not amount to substantial grounds of challenge, save insofar as they were further particularised in the subsequent grounds. Essentially, both contended that the applicants' pleaded case was directed to the alleged failure by the Board to address the lacunae or concerns about deficiencies in the NIS which were identified by the Inspector. Both referred to the concerns expressed by the inspector in relation in relation to two issues: (a) "*the probably/unlikely*" category in the methodology used in the NIS and (b) the inadequacy of the assessment relating to the golden plover.

82. Both the Board and the Developer contended that the first concern was not a *lacuna*, deficiency or inadequacy in the information provided by the Developer in the NIS (or in the revised NIS) and the inspector was not suggesting that Board was precluded from undertaking an AA by reason of the insertion of this additional confusing category in the methodology used.

83. The second issue was a *lacuna* or deficiency identified by the inspector in the information provided by the Developer in the NIS submitted with its application. However, the Board and the Developer pleaded that that issue was fully and properly addressed by the Board in the steps taken by it following the inspector's report. Both relied on the fact that the Board made the s. 132 request and obtained additional information from the Developer in response to that request (including the revised NIS and golden plover response) and

submissions and observations from interested parties in relation to that additional information, all of which was considered and assessed by the Board in carrying out the AA recorded in its decision.

84. As regards the second concern identified by the inspector, the Board and the Developer accept that the inspector identified a gap or deficiency in the information provided concerning the potential adverse impact on the golden plover by reason of the operation of the wind farm. Both accepted that the Board agreed with the inspector that the Developer had not provided adequate information to prove beyond reasonable scientific doubt that the wind farm would not adversely impact on the golden plover and, therefore, requested the Developer to address that issue by providing a response to the s. 132 request and a revised NIS. The Developer did so and the Board carried out an AA taking into account the further information provided by the Developer.

85. Although the applicants did not expressly plead in the amended statement of grounds that the *lacuna* or deficiency identified by the inspector concerned the potential adverse impact on the golden plover, both the Board and the Developer accepted that the inspector had identified this as a *lacuna* or deficiency in the information provided for the purposes of an AA.

86. Both the Board and the Developer pleaded that the Board did assess the "*in-combination*" effects of the proposed development with other permitted wind farm developments in the vicinity of the site of the proposed development. Both pleaded that when deciding on the present application, the Board was aware of the refusal of the Ardderroo application some eleven days previously and that since the Ardderroo application was refused, it was not necessary for the Board to consider the potential impacts or cumulative effects of the development the subject of the Ardderroo application in combination with the development at issue. Both denied the allegation that the Board was unable to conduct an AA in light of the "*best scientific knowledge*" available.

87. Both the Board and the Developer, in their affidavits verifying their respective statements of opposition, addressed the issues raised by the first applicant in his affidavit concerning the "*probably/unlikely"* category of likelihood of impacts in the methodology used in the NIS and revised NIS. Both asserted on affidavit that this methodology issue did not form part of the inspector's recommended reasons for refusing permission for the development on AA grounds. The Board and the Developer also dealt in their affidavits with the concern expressed by the inspector in relation to the potential impacts of the operation of the wind farm on the golden plover and the manner in which the Developer had attempted to address the deficiencies in that regard identified by the inspector in the revised NIS and further information provided to the Board. The Board and the Developer also referred in their affidavits to the observations made by the inspector in relation to the marsh fritillary butterfly and contended that those observations did not form part of the inspector's reason for recommending that the Board refuse permission for the proposed development on AA grounds. Finally, both the Board and the Developer in their affidavits responded to the applicants' contention that the Board failed to consider the potential effects of the

proposed development in combination with other permitted wind farm developments in the vicinity.

88. In relation to the applicants' EIA case, both the Board and the Developer denied the applicants' claims in relation to the EIA carried out by the Board. Both pleaded that the inspector and the Board did evaluate the direct, indirect and cumulative effects, where relevant, of the proposed development on the environment. Both pleaded that it was necessary to read the inspector's report in its entirety. Both also relied on the terms of the decision of the Board, based on the inspector's report and the additional information provided by the Developer in response to the s. 132 request, as well as the further submissions made by various interested parties in response to that further information.

Mr. Walsh's affidavit

89. Mr. Walsh swore and affidavit on 16th August, 2016 in support of the applicants' claims in the proceedings, in his capacity as a notice party. At para. 3 of his affidavit, Mr. Walsh expressly endorsed and supported the applicants' statement of grounds. Mr. Walsh exhibited a copy of the two submissions made by him on 22nd October, 2015 in response to the additional information submitted by the Developer in August, 2015, as well as his email exchange with the Board's official in October, 2014 to which reference has already being made.

90. The main points that Mr. Walsh made in his affidavit in support of the applicants' case was that both the inspector and the Board had failed to carry out a proper AA in respect of the Developer's application by reason of their failure to address the potential environmental effects of the proposed development taken in isolation and in combination with other plans or projects, and, in particular, those other wind farm developments either in existence or the subject of pending applications for permission. Mr. Walsh was particularly critical of the Board for not taking into account, as part of its AA, the potential environmental impacts of the development the subject of the Ardderroo application (notwithstanding that that application was refused by the Board prior to its decision, the subject of these proceedings).

91. As regards the EIA part of the case, Mr. Walsh was critical of the EIA carried out by the Board and its inspector by reason of their failure to assess the cumulative environmental effects of the development at issue with other plans and projects within the locality.

92. While Mr. Walsh sought to make a case that the Board's decision failed to comply with the provisions of s. 34(10) of the 2000 Act, it should be said that that was not a case made by the applicants. As a notice party, it was not open to Mr. Walsh to advance a case not made by the applicants and for which no leave had been obtained from the High Court. In fairness, Mr. Walsh did not pursue that part of his case in the written submissions which he furnished or in the submissions which he made at the hearing.

The Applicant's written submissions

93. The applicants, the Board and the Developer exchanged written submissions prior to the hearing. Bearing in mind the case which the applicants sought to make at the hearing, it

is important to identify in general terms the case they were making in their written submissions.

94. On the AA part of the case, the only case which the applicants sought to make was that the inspector had identified concerns in relation to the information provided by the Developer with respect to the potential adverse effects on the golden plover. Those concerns were accepted by the Board which sought further information which was provided by the Developer. The applicants argued that the assessment carried out by the Board failed to comply with the AA requirements set out by Finlay Geoghegan J. in *Kelly*. However, the case in relation to AA advanced in the applicants' written submissions was solely directed to the impacts on the golden plover. No reference was made in the written submissions to the marsh fritillary butterfly or to the methodology point (other than a quotation from the inspector's AA conclusion) or to peat stability or to water quality or hydrology or to any of the other matters which the applicants sought to ventilate at the hearing.

95. The case made by the applicants in their written submissions in relation to their EIA claims was consistent with the pleadings. The applicants argued that the Board did not adopt the inspector's assessment as the inspector had carried out a report in relation to the EIS rather than conducting an EIA. Further, the applicants argued that the inspector had not dealt with the issue of grid connection or cumulative assessment with other developments. They further argued that the Board had not identified the direct and indirect effects of the proposed development on the matters set out in s. 171A of the 2000 Act and relied in this regard on a number of cases, including the judgment of the High Court in *Connelly* (the submissions pre-dated the judgment of the Supreme Court in that case).

96. Mr. Walsh provided a short written submission at the hearing. I refer to the submissions made by him below.

The written submissions of the Board and the Developer

97. In their written submissions, the Board and the Developer responded to the case made by the applicants in their written submissions. Therefore, as regards the AA case made by the applicants, both the Board and the Developer dealt only with the case made by the applicants in relation to the golden plover. As the submissions of the parties were all exchanged prior to the judgment of the Supreme Court in *Connelly*, and the parties were all proceeding on the basis of the judgment of the High Court (Barrett J.) in that case. As noted earlier, the proceedings were listed for hearing on two occasions and were adjourned in circumstances where the Board sought to appeal directly to the Supreme Court from the judgment of the High Court (Barrett J.) in *Connelly*. The hearing of these proceedings was adjourned while the Board's application for such leave was being considered by the Supreme Court. The proceedings were further adjourned once the Supreme Court gave leave to appeal to the Board to enable the judgment of the Supreme Court in Connelly to be made available. Once the Supreme Court had decided the appeal in that case, these proceedings were relisted for hearing. As explained earlier, there was a break in the proceedings and, in the interim period, the CJEU gave its judgment in

Holohan, which was the subject of further submissions by the parties. The only one of the parties to update their written submissions to reflect the judgment of the Supreme Court in Connelly was the Board.

98. I have taken some time in reviewing the pleadings in the case and the written submissions advanced by the parties as the Board and the Developer took issue with the case which the applicants sought to make at the hearing. They argued that that case went way beyond the case as pleaded by the applicants and as set out in their written submissions. They objected to aspects of the case being maintained by the applicants and responded to those parts of the case strictly without prejudice to their contention that the applicants should not be permitted to go beyond on the pleadings. In fairness, the objections related exclusively to the AA part of the proceedings which was the central focus of the oral submissions made on behalf of the applicants. I will consider and decide on these objections when dealing with the AA case which the applicants sought to make at the hearing. However, before doing so, it is necessary to set out certain fundamental principles and requirements applicable to pleadings in judicial review cases, in general, and in planning cases in particular. It is to that issue that I now turn.

Pleadings in Planning Judicial Review Proceedings: Obligations on the Parties

99. The obligations on an applicant in judicial review proceedings as regards the way in which its case is pleaded are set out in O. 84, r. 20 RSC. For present purposes, the most relevant provisions in O. 84, r. 20 are sub-rules (2), (3) and (4). O. 84, r. 20(2)(a) requires the statement of grounds to contain a statement of each relief sought and of the "*particular grounds upon which each such relief is sought*" (para. (ii)). Order 84, rule 20(3) provides that: -

> *"It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."*

100. Order 84, rule 20(4) provides that: -

> *"The Court hearing an application for leave may, on such terms, if any, as it thinks fit—*
>
> *(a) allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise,*
>
> *(b) where it thinks fit, require the applicant's statement to be amended by setting out further and better particulars of the grounds on which any relief is sought."*

101. There are corresponding obligations on a respondent who wishes to oppose an application for judicial review. Those obligations are contained in O. 84, r. 22. The respondent must file a statement of opposition. Under O. 84, r. 22(5), it is provided that it is not sufficient for a respondent in the statement of opposition: -

"to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (except damages, where claimed)."

102. This case is not concerned with any alleged deficiency in the manner in which the Board and the Developer pleaded their opposition to the reliefs being sought by the applicants. At issue is the manner in which the applicants have pleaded their case.

103. Order 84, r. 20(3) was inserted into the RSC by way of amendment to O. 84 by the Rules of the Superior Courts (Judicial Review), 2011 (SI 691 of 2011) and gave effect to the views expressed by Murray C.J. and by other members of the Supreme Court in *AP v. Director of Public Prosecutions* [2011] 1 I.R. 729 ("*AP*"). The application of this provision of the RSC and of the views expressed by the Supreme Court in *AP* in the context of planning judicial review proceedings was previously considered by Costello J. and Haughton J. in their respective judgments in the High Court in *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311 ("*Alen-Buckley (No. 1*)") and *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 541 ("*Alen-Buckley (No. 2*)"), by me in *Eoin Kelly v. An Bord Pleanála & ALDI Stores (Ireland) Limited* [2019] IEHC 84 ("*Kelly/ALDI*") and by McDonald J. in *Sweetman v. An Bord Pleanála & ors & IGP Solar 8 Limited* [2020] IEHC [39] ("Sweetman/IGP Solar").

104. In AP, Murray C.J. stated: -

"*In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought."* (at para. 5, p. 732).

105. The Chief Justice continued: -

"6. *It is not uncommon in many such applications that such grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted, particularly when such a ground is invariably accompanied by a list of more specific grounds.*

7. Moreover, if, in the course of the hearing of an application for leave it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.

8. There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant that in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds.

9. The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in any appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear…

10. In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this Court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained."

(per. Murray C.J. at paras. 6-10, pp. 732-733)

106. Similar observations were made by other members of the Supreme Court in the same case. At para. 7 of her judgment, Denham J. put it as follows: -

"When an applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required. On the ex parte application for leave the High Court judge may grant leave on all, or some, of the grounds sought or may refuse to grant leave. The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to appeal has been granted the basis for the review by the Court is established."

(per Denham J. at para. 7, p. 734)

107. In his judgment in the same case, Hardiman J. made the following observations in relation to the need precisely to define the grounds on which relief is sought in judicial review proceedings. He said (at para. 43 of the judgment): -

"*In too many judicial review cases, it will be found that little attention has been paid to the absolute necessity for a precise defining of the grounds on which relief is sought until the case is actually before the Court. In my view, this case furnishes an extreme example of this unfortunate tendency. The delay in the case and the consequent anxiety to the defendant are an obvious feature but they are not relied*

upon at all in the grounds and are only developed in the Solicitor's replying affidavit…" (at para. 43, p. 739).

108. These passages from the various judgments delivered by members of the Supreme Court in *AP* set out the obligations on an applicant who seeks judicial review to set out clearly and precisely each ground upon which each relief is sought in the proceedings and make clear that the order giving leave to seek the various reliefs on the grounds set out in the statement of grounds is what determines the jurisdiction of the court to conduct the review. Unless there is an application for leave to amend the statement of grounds to include an additional relief or additional grounds to support an application for existing relief, it is not open to the applicant to seek that additional relief or to advance that additional or those additional grounds. It is not open to an applicant to advance new arguments during the course of the hearing which go beyond the scope of the ground or grounds upon which leave was granted or to raise new grounds. These requirements, which are now reflected in O. 84, r. 20(3), are intended to ensure not only procedural fairness for the opposing parties in the judicial review proceedings, but also to avoid ambiguity or confusion as to the issues before the High Court, both for that Court itself and in the context of any appeal from the judgment of the High Court.

109. As noted earlier, these principles have been considered and applied in a planning context by a number of High Court judges. In *Alen-Buckley (No. 1)* (which concerned an application by one of the respondents to dismiss or strike out proceedings against it), Costello J. (in the High Court) drew attention to the provisions of O. 84, r. 20(3) and to the obligation on the applicants in that case to set out clearly their grounds of challenge against the particular respondent. The applicants had not identified any provisions of the relevant directives or of Irish statute law or regulations on foot of which they wished to advance their case against the relevant respondent. Costello J. granted the relief sought by that respondent. In *Alen-Buckley (No. 2),* Haughton J. (in the High Court) ruled out a number of arguments advanced by the applicants at the ultimate trial on the basis that they had not been pleaded and, therefore, fell outside the scope of the pleaded case. In his judgment, Haughton J. stated as follows: -

"The rules of pleading governing judicial review are quite clear and require applicants to state specifically each ground advanced and to particularise matters as appropriate. Linking new matters back to generally pleaded grounds is not permissible, nor is pointing to information which was before the Board. The Court is concerned with the contents of the documentation before the Board only in the context of arguments which have been correctly pleaded…

Where new arguments or evidence arises, an application should be made to amend the pleadings so as to include such arguments or evidence…"

(per Haughton J. at paras. 15 and 16).

110. I considered this very issue in *Kelly/ALDI*. Having considered the provisions of O. 84, r. 20(3) and the principles referred to in AP and in *Alen-Buckley (No. 2),* I concluded that

the applicant in that case had not complied with the provisions of O. 84, r. 20(3) in relation to the manner in which the particular ground sought to be relied on had been pleaded, although I was ultimately satisfied that the opposing parties had not been prejudiced by the applicant's failure to comply with the provisions of the rules or with the principles in *AP*. I was satisfied that the opposing parties had been in a position to deal with the particular point in their affidavits.

111. McDonald J. also had cause to consider the requirements of O. 84, r. 20(3) and the principles in *AP* in *Sweetman/IGP Solar*. He concluded that in that case the applicant had failed properly to plead his case against the State respondents in relation to the alleged failure by the State to properly transpose the EIA Directive. McDonald J. held that the case against the State respondents had not been properly pleaded in the statement of grounds. In particular, he held that it was not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it was being contended that a particular provision of Irish law failed to comply with a specific obligation imposed by the EU Directive concerned. He stressed that it was particularly important, in the case of an allegation of a failure properly to transpire an obligation under EU law, that the requirements of O. 84, r. 20(3) be observed. McDonald J. dismissed the applicant's claim against the State respondents on the ground that the statement of grounds failed properly to plead a case against those respondents as required by Order 84, rule 20(3).

112. The obligation upon an applicant (and indeed also upon a respondent who wishes to oppose an application for judicial review) to plead its case with particularity, as described in the authorities just referred to, applies with even greater force in the case of a planning judicial review having regard to the requirements of s. 50A(5) of the 2000 Act. That subsection provides that if a court grants leave to apply for judicial review in respect of a planning decision, "*no grounds shall be relied upon in the application for judicial review" under O. 84 RSC "other than those determined by the court to be substantial*" under s. 50A(3)(a), on the application for leave. An applicant is, therefore, under an even greater obligation than in ordinary judicial review cases, by reason of this additional statutory provision, to ensure that any ground relied upon by it at the hearing is one which the court granting leave to apply for judicial review has determined to be substantial. That does not necessarily preclude an applicant from seeking to amend its statement of grounds, either before or at the hearing, subject, of course, to the time limits and provision for an extension of time provided for in ss. 50(7) and 50(8) of the 2000 Act, and the attitude of the opposing party or parties and the court.

113. In my view, these pleading obligations imposed upon an applicant in planning judicial review proceedings are particularly important where those cases involve issues of very considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive. It is especially important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial

review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in *AP*, to ensure that there is no doubt, ambiguity or confusion as to what the applicant's case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court. It is not appropriate that a case brought on a particular basis, in which reliefs are sought on stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be advanced in support of the reliefs sought or new and additional reliefs are sought. Such a course would be unfair on the parties opposing the application for judicial review and on the court.

114. In responding to the submissions made by the Board and by the notice party in relation to the apparent difference between the AA part of the case sought to be run by the applicants at the hearing and that pleaded in the amended statement of grounds, the applicants drew attention to the relatively short time period within which an application for leave to seek judicial review must be brought in proceedings which seek to challenge a planning decision. Section 50(7) of the 2000 Act requires that such an application for leave be made within a period of eight weeks from the date of the impugned decision (with provision for an extension of time to be granted in circumstances set out in s. 50(8)). It was argued that it is often not possible within such a time period for an applicant properly to formulate its case and that very often the applicant may not be in possession of all of the relevant documentation in order to formulate its claim within that time period. I accept that can and does sometimes happen. However, where that it does, it is incumbent upon the applicant, at the leave stage, to raise that expressly and to refer to the possibility that it may be necessary for an application to be made to amend the statement of grounds arising from the provision of further information which is not at that time in the possession of the applicant. Furthermore, it is not uncommon for an application to be made at the hearing of the application for leave itself to amend the statement of grounds. That is precisely what occurred in the present case. An application was made by the applicants to amend the initial statement of grounds on the date in which the application for leave was made. I take the view that it is incumbent upon an applicant and its advisors in planning judicial review proceedings to apply to amend the statement of grounds at the earliest opportunity once a perceived basis for doing so comes to their attention. If that is done, the opposing parties can decide whether to resist the application for the amendment and, if so, the court can rule on that application. Circumstances may exceptionally arise where an application to amend the grounds or the reliefs sought is made at the hearing of the proceedings, in which case, subject to the attitude of the opposing parties, it can be considered and dealt with by the trial judge (as envisaged by Murray C.J. in *AP*). It is likely to be very rare in planning cases having regard to the statutory time limits and having regard to the fact that applicants in planning cases, such as the present case, tend to be represented by counsel and solicitors coming from a relatively small pool of highly experienced and specialised practitioners in the field.

115. In any event, apart from the application to amend the statement of grounds at the time of the application for leave, no application was made by the applicants to amend the

grounds on which they sought the various reliefs in respect of the Board's decision by reason of the AA purportedly conducted by the Board, either prior to or during the course of the hearing. On the contrary, it was maintained on behalf of the applicants that, notwithstanding that certain issues were not expressly pleaded in the amended statement of grounds, there was no requirement on the applicants to do so and no need to amend the proceedings, as the issues sought to be ventilated by the applicants at the hearing were caught by the grounds already contained in the amended statement of grounds. As I explain below, when considering the AA part of the case, I do not agree with that contention, insofar as it applies to certain of the grounds and argument sought to be raised on behalf of the applicants.

116. I will apply these important principles in considering the case sought to be advanced by the applicants at the hearing in challenging the Board's decision on AA and EIA grounds. I will deal first with the AA part of the applicants' case and will then deal with their EIA case.

Appropriate Assessment

General

117. The main emphasis or central focus of the applicants' challenge to the Board's decision was on AA grounds. I have referred earlier in this judgment to the case made by the applicants on the pleadings and in their written submissions in support of their challenge on AA grounds. Before returning to their pleaded case and then to the case which they sought to make at the hearing, it is appropriate to set out the legal context for their challenge to the Board's decision on AA grounds.

118. It will be recalled that while the site of the proposed development is not a protected European site for the purposes of the Habitats Directive, there are ten such European sites within 15kms of the development site, two of which were screened out from the requirement for stage II AA in the NIS accompanying the application, which screening out was accepted by the inspector in her report and by the Board in its decision. The inspector and the Board carried out a stage II AA to determine whether the proposed development would adversely affect the integrity of any of the other eight European sites in the vicinity of the development site. No complaint was made by the applicants in relation to the screening out of the two European sites or otherwise in relation to the stage I screening carried out in respect of the proposed development. The applicants' complaints concern and the stage II AA carried out in respect of the development.

Legislative Provisions: AA

119. The most relevant provision of the Habitats Directive for present purposes is Article 6(3). The most relevant provision of the 2000 Act for this case is section 177V.

120. Article 6(3) provides as follows: -

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications

for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

121. The reference to the "*site*" in Article 6(3) is a reference to the relevant protected European site. Article 7 of the Habitats Directive provides that the provisions of Article 6(3) are to apply to SPAs under Directive 2009/147/EC (the "Birds Directive"). The "*site*" in Article 6(3) (and in s. 177V of the 2000 Act) includes both SACs and SPAs. Both types of protected European sites are within the vicinity of the site of the proposed development at issue in the present case.

122. Article 6 of the Habitats Directive was implemented into Irish law by part XAB of the 2000 Act. The stage I screening stage in Article 6(3) was implemented by s. 177U of the 2000 Act. The stage II AA stage was implemented by section 177V. We are concerned in this case only with the stage II AA stage. The stage I screening stage in respect of the development concluded that the development was likely to have a significant effect on eight of the relevant European sites, either individually or in combination with other plans or projects. On that basis, it was necessary to carry out a stage II AA in respect of the proposed development.

123. Section 177V(1) provides that an AA carried out under part XAB of the 2000 Act "*shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not a… proposed development would adversely affect the integrity of a European site" and an AA "shall be carried out by the competent authority" where it has made a determination at the screening stage that an AA is required "before… consent is given for the proposed development".*

124. Section 177V(2) provides that in carrying out an AA, the competent authority *"shall take into account*" a number of matters, namely: -

"(a) the Natura impact report or Natura impact statement, as appropriate;

(b) any supplemental information furnished in relation to any such report or statement;

(c) if appropriate, any additional information sought by the authority and furnished by the applicant in relation to a Natura impact statement;

(d) any additional information furnished to the competent authority at its request in relation to a Natura impact report;

(e) any information or advice obtained by the competent authority;

(f) if appropriate, any written submissions or observations made to the competent authority in relation to the application for consent for proposed development;

(g) any other relevant information."

125. Under s. 177V(3), the Board is permitted to give consent for a proposed development *"only after having determined that the… proposed development shall not adversely affect the integrity of a European site".* Further, under s. 177V(4), consent for a proposed development may be given where the Board has made modifications or attached conditions to the consent where it is "*satisfied to do so having determined that the proposed development would not adversely affect the integrity of the European site if it is carried out in accordance with the consent and the modifications or conditions attaching thereto".*

126. Under s. 177V(5), the Board must give notice of the determination made by it having carried out the (stage II) AA referred to in s. 177V(1) and must give reasons for its determination. It must also make its determination publicly available (section 117V(6)).

Kelly and Connelly

127. Prior to the decision of the Supreme Court in *Connelly*, the leading authority in this jurisdiction on the correct application of the provisions of Article 6(3) of the Habitats Directive and s. 177V of the 2000 Act was the judgment of Finlay Geoghegan J. in the High Court in *Kelly*. That judgment was extensively considered, approved of and applied by the Supreme Court in *Connelly*.

128. The judgments in *Kelly* and *Connelly* stress the critical importance of competent authorities complying with the provisions of Article 6(3) of the Habitats Directive and part XAB of the 2000 Act (as I noted at para. 97 of my judgment in *Kelly/ALDI*). As observed by Finlay Geoghegan J. in Kelly, the determination which the Board makes under Article 6(3)/s. 177V in carrying out an AA in respect of the proposed development determines the authority's jurisdiction to take the planning decision (para. 34 of *Kelly*). In *Connelly*, Clarke C.J. stated at para. 13.4 of the judgment of the Supreme Court as follows: -

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

129. Therefore, compliance with the AA provisions contained in Article 6(3) and part XAB of the 2000 Act is essential in order to confer jurisdiction on the Board to grant consent for the proposed development. As I stated in *Kelly/ALDI:* -

> *"If the competent authority does not correctly apply those provisions, then it will not have jurisdiction to grant consent in respect of the development." (para. 97).*

130. In Connelly, the Supreme Court adopted and approved the summary given by Finlay Geoghegan J. in *Kelly* of what is required in order for the competent authority to carry out

an AA in compliance with the requirements of EU law, having noted that Finlay Geoghegan J. had considered and taken into account the judgments of the CJEU in *Waddenzee (Case C-127/02*) [2004] ECR 1-7405, *Commission v. Spain (Case C-404/09*) [2011] ECR 1-11853 and Sweetman & ors v. An Bord Pleanála (Case C-258/11) ECLI: EU: C: 2013: 220. In *Connelly*, the Supreme Court quoted in full the summary of those requirements (which was set out at para. 40 of the judgment of Finlay Geoghegan J. in *Kelly*). That summary was as follows: -

"'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."

(reproduced at para. 8.14 of the judgment of the Supreme Court in *Connelly*).

131. Having quoted and approved of that summary of the requirements for the conduct of an AA, Clarke C.J. in *Connelly* observed: -

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

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

> *"First, the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects. Fourth and finally, where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site*." (para. 8.16).

133. As recently noted by McDonald J. in the High Court in *Sliabh Luachra against Ballydesmond Wind farm Committee v. An Bord Pleanála & ors* [2019] IEHC 888 *("Sliabh Luachra*"), the findings of the Board (where it is the competent authority) that no reasonable scientific doubt remains as to the absence of the identified potential effects on the relevant European site or sites must be "*appropriately recorded".* At para. 48 of her judgment in *Kelly*, Finlay Geoghegan J. stated: -

> *"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 to the effects of the proposed development on the European site concerned in the light of the 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."* (para. 48).

134. In its judgment in Connelly, the Supreme Court made a number of further important points in relation to the requirements which must be satisfied for a valid (stage II) AA to be carried out by the Board. They may be summarised as follows: -

(1) A *"key requirement" of a valid and sustainable AA under EU law requires (a) "the identification of all aspects of the development project which might affect the protected site in the light of its conservation objectives" and (b) "the identification of precise and definitive findings and conclusions which can lead to a determination that no reasonable scientific doubt remains as to the absence of the identified potential detrimental effects."* (para. 13.1);

(2) While a conclusion to that latter effect is a necessary part of the process, it is not, in and of itself, sufficient. In order for the AA to comply with EU law, there must be *"a precise identification of the potential risks and, importantly, precise scientific findings to allay any fear of those risks coming to pass."* (para. 13.2);

(3) While not strictly speaking a reasons issue, but rather an issue concerning the validity of the AA determination which is necessary to give jurisdiction to the Board to grant permission, reasons must be given in accordance with the established case law in that area. In addition to reasons, there must also be "*complete, precise and definitive findings and conclusions which sustain the ultimate conclusion*." (para. 13.3);

(4) There is no reason why the analysis and conclusion of the Board in respect of the AA carried out by it (in order to ensure that it has jurisdiction to grant the permission sought) and the Board's decision as to whether to grant the permission and, if so, on what conditions, cannot be contained in one document (even though they are technically two different decisions). However, if that is how the Board proceeds (as it did in the present case), the Supreme Court in *Connelly* recommended that the Board take care to ensure that there is "*reasonable clarity as to which parts of such a document relate to an AA and which parts relate to more general planning considerations*", although that is not a formal requirement. The Court pointed out that provided the "*reasonable observer would be able to understand with reasonable clarity what the Board was deciding and why*", the decision of the Board would not be invalid. The Court stated that it "*might well make the task of all concerned a lot easier if the Board were to clearly distinguish, in any document recording its decision, those aspects of the document which are concerned with an AA from those which are concerned with more general planning considerations*" (para. 13.5). The Board did precisely that in the present case

(5) Not only must the Board reach the required conclusion, having carried out an AA, *"there must be found either in the decision itself or in other materials which clearly must be taken by express reference or by necessary inference to identify the reasons for the ultimate determination, the sort of complete, precise and definitive findings which justify that conclusion."* (para. 13.6);

(6) The decision of the Board having carried out an AA must contain "*the necessary findings which underpin the conclusion required to be reached for a valid AA*" without which the Board will be deprived of jurisdiction to grant permission for a development (para. 13.12).

(7) If those findings are not found in the decision itself or in other materials *"which are either expressly referred to in the Decision or must be taken by necessary implication from the Decision and the process leading to it to be findings underpinning the ultimate conclusion"*, the AA will be deficient and will not comply with EU law (para. 13.12).

Holohan

135. While the parties all agreed that the judgment of the Supreme Court in *Connelly* was the most significant judgment for the purposes of the applicants' case on AA, they also relied on the evolving jurisprudence of the CJEU, including the judgment of *Holohan*. The Opinion of Advocate General Kokott in that case was available by the time the hearing of the proceedings commenced before me. However, the judgment of the CJEU was not available until after the hearing was adjourned (as it had not finished within its allotted time). The CJEU's judgment in *Holohan* was available prior to the resumed date and the parties were given an opportunity of making submissions in relation to it.

136. The applicants, the Board and the Developer all agree that *Holohan* did not alter the requirements for a valid AA under EU law, as they were discussed and considered by the High Court in *Kelly* and by the Supreme Court in *Connelly*. However, reliance was placed by those parties on the answers given by the CJEU to certain of the questions referred to that court by Humphreys J. in the High Court. It should be noted, however, that, unlike the present case, the proposed development in that case (a road) crossed two European sites. The inspector appointed by the Board concluded that the information contained in the application, the EIS and the NIS was not adequate and that significant further information was required. Notwithstanding the inspector's conclusion, the Board decided not to seek further information and to grant permission for the development project. That context is important when considering what the CJEU said in answer to the ninth, tenth and eleventh questions raised (which were the relevant questions for present purposes). The CJEU interpreted those questions as seeking to ascertain whether Article 6(3) of the Habitats Directive had to be interpreted as meaning that "*where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons capable of ensuring certainty that, notwithstanding such an opinion, there is no reasonable scientific doubt as to the environmental impact of the work envisaged on the site that is the subject of those findings."* (para. 48). The findings and recommendation referred to where those of the inspector which recommended that further information be obtained for the reasons set out in her report.

137. In answering those questions, the CJEU repeated what it had said in earlier cases (referred to at para. 33, 34 and 43 of the judgment and including *Grace & Sweetman v. An Bord Pleanála & ors (Case C-164/17)* ECLI: EU: C: 2018: 593) and stated that: -

> *"…the assessment carried out under Article 6(3) of [the Habitats] Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned."* (para. 49).

138. The CJEU went on to state that if there were "*no conclusions capable of dispelling all reasonable doubt as to the adequacy of the information available, the assessment cannot be considered to be 'appropriate', within the meaning of Article 6(3) of the Habitats Directive."* (para. 50).

139. The CJEU stated that, in circumstances such as those which arose in the proceedings, it was necessary that the competent authority "*should be in a position to state to the requisite legal standard the reasons why it was able, prior to the granting of development consent, to achieve certainty, notwithstanding the opinion of its inspector asking that it obtain additional information, that there is no reasonable scientific doubt with respect to the environmental impact of the work envisaged on the site concerned*." (para. 51).

140. In answer to the three relevant questions, the CJEU stated that Article 6(3) of the Habitats Directive had to be interpreted as meaning that "*where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons, capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned*." (para. 52).

141. It seems to me that apart from confirming the well-established case law of the CJEU in relation to the requirements for an AA (as considered and applied by the Supreme Court in *Connelly*), the answers given by the CJEU in *Holohan* to the three relevant questions referred to it were particularly directed to the situation where the Board's inspector (or another scientific expert) had recommended that the information provided with an application for permission was inadequate and that significant further information was required. The CJEU outlined in *Holohan* what the competent authority (in that case, the Board) had to be satisfied of, in light of that recommendations, before it could carry out a valid AA and then proceed to consider the grant of permission for the development. In my view, the answer given to these questions by the CJEU makes clear that it was dealing with that particular situation, albeit that it was, of course, confirming previous case law of the CJEU as to the requirements for a valid AA under Article 6(3) of the Directive (see para. 49). Insofar as the applicants contended otherwise at the resumed hearing, I do not accept that contention.

142. I am satisfied that the necessary requirements for a valid AA under EU law are as set out by the High Court (Finlay Geoghegan J.) in *Kelly*, as discussed and approved by the Supreme Court in *Connelly*. It is now necessary to consider the applicants' case in relation to the AA actually carried out by the Board in this case.

The Applicants case on AA

143. I outlined earlier in this judgment the case made by the applicants on the pleadings and in their written submissions in relation to the AA part of the case. The case made by the applicants in their oral submissions at the hearing went considerably further than, and differed significantly from, the case made by the applicants in the pleadings and in the written submissions. I set out below the case made by the applicants at the hearing in relation to the AA part of the case. Where I have felt it necessary to do so, I have indicated the grounds and arguments which I believe the applicants ought not to be entitled to advance, in light of the pleadings and the particular obligations imposed upon an applicant in planning judicial review cases. In relation to those grounds which the applicants are entitled to pursue in accordance with the pleadings, I set out my conclusions and decision in relation to those grounds.

144. I have attempted to discern from the oral submissions made on behalf of the applicants at the hearing the various points sought to be advanced by them in challenging the Board's decision on AA grounds. They appeared to me to be as follows: -

(1) The Board's decision does not disclose or make available for public scrutiny the alleged "*further evaluation*" and "*analysis*" and the alleged *"comprehensive evaluation"* carried out by the Board in respect of the potential impact of the proposed development on a protected species, namely, the golden plover.

(2) While the applicants sought to rely on general pleas in the amended statement of grounds concerning the alleged deficiencies in the AA carried out by the Board, the specific case made by the applicants was that the inspector had identified *lacunae* or deficiencies in the information provided by the Developer for the purposes of the AA to be carried out by the Board and those *lacunae* or deficiencies were not addressed by the Board in the AA carried out by it. The applicants sought to rely on three *lacunae* or deficiencies identified by the inspector. They were: -

(a) issues in relation to the marsh fritillary butterfly;

(b) issues in relation to the methodology deployed in the NIS/revised NIS and, in particular, the use of the "*probably/unlikely*" category in determining the confidence levels of prediction of likely impacts; and

(c) issues in relation to the impacts on the golden plover during the operational phase of the wind farm.

(3) The applicants also sought to make the case that neither the inspector in her report nor the Board in its decision adequately assessed the adverse effects of several other aspects of the development on the integrity of the European sites. The case sought to be made by the applicants under this heading was not that the inspector had identified lacunae or deficiencies in the information provided, which the Board did not properly address in its decision, but that both the inspector and the Board failed to comply with their AA requirements (as identified and applied in *Kelly* and in *Connelly*) in relation to a number of other areas including peat stability, water quality and hydrology.

(4) The applicants (supported by Mr. Walsh) contended that, in purporting to carry out an AA in respect of the proposed development, the inspector and the Board failed adequately to consider the effects of the proposed development in combination with other plans and projects on the integrity of the relevant European sites. While making a general complaint in relation to the alleged failure properly to consider the in-combination effects of the development of other plans and projects, the applicants (and Mr. Walsh) forcefully argued that the inspector and the Board had failed to take into account at all the Ardderroo application.

145. I will deal with each of these complaints in turn

(1) Failure to disclose the "further evaluation"/"comprehensive evaluation"

146. The applicants contended that although the Board stated in the Board Order and Board Direction that it had considered various materials including the inspector's report, the s. 132 request, the response by the Developer to that request (including the revised NIS) and the submissions and observations from various parties and observers and carried out *"further evaluation and analysis"* of the potential impact of the proposed development on the golden plover before reaching its conclusion, the Board had not disclosed or made available for public scrutiny that *"further evaluation and analysis*". Similarly, they argued that although the Board had set out the conclusions of the revised NIS and the submissions and comments received from other parties and observers, and carried out a *"comprehensive evaluation*" before concluding that the findings and conclusions of the revised NIS could be accepted, the Board did not disclose or make available for public scrutiny the "*comprehensive evaluation"* to which reference was made in the Board Order and Board Direction. The applicants submitted that this was in breach of the Board's obligations under Article 6(3) of the Habitats Directive and, in particular, s. 177V of the 2000 Act.

147. Notwithstanding that this ground was not expressly pleaded in the amended statement of grounds, it was raised in the applicants' written submissions and was addressed in the oral submissions of the Board and of the Developer at the hearing. While the applicants were in breach of the requirements contained in O. 84, r. 20(3) RSC and with the requirements set out by the Supreme Court in *AP* in that they failed to include this point clearly and precisely in their amended statement of grounds, given that it was raised in the written submissions and not objected to by the Board or by the Developer and, on the contrary, was dealt with by those opposing parties at the oral hearing, I have concluded that it is in the interests of justice that I consider the point and no injustice is done to the Board or the Developer in my doing so.

148. I have concluded, however, that the argument has no substance or merit whatsoever. While it is the case that s. 177V and, subs. (6), in particular, requires the Board to make available to the public and to publish on the internet the determination it made in carrying out an AA in respect of a proposed development as well as the notice of its decision given to the applicant for the permission, there is no suggestion that the Board Order and Board Direction and the materials referred to in it (such as the inspector's report and the further information provided by the Developer on foot of the s. 132 request) have not been made publicly available. It appears to me that the applicants' argument is based on something of a misconception. The applicants' argument was predicated on the assertion that, by implication, at least, there must have been some other evaluation underlying the evaluation referred to in the Board Order and Board Direction which was not made available by the Board, notwithstanding its obligations under Article 6(3) of the Habitats Directive and s. 177V of the 2000 Act, as discussed and considered by the Supreme Court in *Connelly*. However, I accept the submission advanced on behalf of the Board and the

Developer that it is the decision of the Board itself as recorded in the Board Order, when read with the other documents referred to, such as the inspector's report, the s. 132 request, the response by the Developer to that request (including the revised NIS and the golden plover report), which contain the record of the Board's evaluation of the issues arising for the purposes of the AA carried out by it. The Supreme Court in *Connelly* confirmed that regard may be had to the inspector's report and to the further information requested by the Board and provided to the Board in light of the conclusions made by the inspector, in ascertaining the Board's decision and the reasons for it. It seems to me that a reasonable observer (and, as participants in the planning process, the applicants and the notice parties are reasonable observers), would understand that the evaluation carried out by the Board is that contained in the Board's decision as recorded in the Board Order which in turn refers to those other documents and materials. In my view, it is fanciful to suggest that there must be some other evaluation and analysis "*out there"* which has not been made available by the Board.

149. Clearly, the Board considered and discussed the information provided at the meetings preceding its decision, conducted its evaluation and analysis and recorded that in its decision. The Board's evidence was that it considered the inspector's report at meetings on 9th December, 2014, 16th December, 2014, 4th February, 2015 and 12th May, 2015 and concluded in the course of those meetings that it was necessary to seek further information under s. 132 of the 2000 Act in relation to the issue raised by the inspector concerning the potential impacts of the operation of the proposed development on the golden plover (as well as in relation to the grid connection). The Board's evidence was that, having obtained the response to the s. 132 request and having sought and obtained further submissions and observations from interested parties and observers (including the applicants and a number of the notice parties), the Board met on 17th November, 2015 where it decided to defer the appeal for consideration at a further meeting and met again on 15th December, 2015 when it did consider the appeal. The Board's evidence was that the outcome of that meeting was set out in the Board Direction (and Board Order). None of this is disputed by the applicants.

150. The Board Order and Board Direction both expressly recorded the relevant sequence of events which I have just summarised and expressly recorded the fact that the Board examined the further information provided by the Developer (including the revised NIS) as well as the submissions and observations from other parties and observers and "*carried out further evaluation and analysis*" of the potential impacts of the proposed development on the golden plover. It is evident from the terms of the Board Order and Board Direction that the Board evaluated this further information and these further submissions (having previously stated that it had considered the inspector's report and agreed with her conclusions). The Board Order and Board Direction expressly recorded that "*in evaluating"* the issue in relation to the golden plover, the Board was satisfied with the information provided. Having then set out the conclusions of the revised NIS and the submissions and comments received from other parties and observers, the Board Order (and Board Direction) stated that following "*comprehensive evaluation*", the Board found that the findings and conclusions of the revised NIS could be accepted. The Board then

went on in its decision to set out its conclusions in relation to the AA carried out by it having set out the basis for those conclusions. It seems to me to be clear from the uncontested evidence of the Board, and from what was expressly stated in the Board Order and Board Direction, that the "*further evaluation*" and the "*comprehensive evaluation*" was that which was carried out by the Board at the meetings referred to in the Board's affidavit evidence and recorded in the Board Order and Board Direction. It is, of course, a separate question as to whether the recording of the evaluation complies with the substantive requirements for a valid AA under EU law as outlined by the High Court in *Kelly* and by the Supreme Court in *Connelly*. That is an issue which arises in the context of one of the other grounds advanced by the applicants.

151. In conclusion, I do not accept that the applicants have made out a good case that the Board has failed to provide its "further evaluation and analysis" and its "comprehensive evaluation" as required under the Habitats Directive or under the 2000 Act. The decision of the Board as recorded in the Board Order which refers to the other documents to which the Board had regard in carrying out the AA in respect of the proposed development, constitutes the record of the evaluation which it carried out. There is no evidence before the court to the effect that there was some other evaluation "out there" which has not been provided to the court. Accordingly, I reject this ground of challenge to the Board's decision.

(2) Pleaded grounds of challenge

152. As noted above, the applicants sought to rely on the general pleas contained at grounds 1 and 2 of the amended statement of grounds concerning the alleged deficiencies in the AA carried out by the Board. It will be recalled that ground 1 of the amended statement of opposition alleged in very general terms that the Board erred and acted in breach of Article 6 of the Habitats Directive and s. 177V of the 2000 Act "*in the manner in which the appropriate assessment was carried out and/or recorded on the face of*" the Board Direction and/or the Board Order. No indication as to how or why that was so was provided in that ground. In ground 2, the applicants pleaded that the AA purportedly carried out by the Board "*did not address the substantive requirements*" for an AA which have been set out in case law of the CJEU and in national case law "*namely, that an appropriate assessment may not have lacunae and must have complete, precise and definitive findings which are capable of removing all reasonable scientific doubt remains (sic) as to the absence of such effects*". Ground 2 further pleaded that "*[t]he form of an appropriate assessment must include an examination, analysis, findings, conclusions and determinations/decision*". Again, that ground did not explain how it was alleged that the Board failed to comply with those substantive requirements in the Board Order and Board Direction. No indication was given in that ground as to how it was alleged that the AA carried out by the Board had *lacunae*, what those *lacunae* were and how it was alleged that the Board Order and Board Direction did not have findings of the requisite standard and was not in the proper form.

153. The applicants sought to rely on these two grounds to support a myriad of allegations in relation to alleged deficiencies in the AA carried out by the Board. The Board and the Developer strongly opposed the applicants' entitlement to rely on such general pleas to support allegations or grounds not expressly pleaded. I accept the submissions advanced by the Board and the Developer in support of their opposition to the applicants' reliance on these two general grounds. In my view, grounds 1 and 2 in the amended statement of grounds are too broad, vague and general and fail to provide any particulars or details of the alleged inadequacies in the AA carried out by the Board. Those two grounds amount to no more than assertions "*in general terms*" of the grounds concerned and fail to state precisely the grounds or give particulars in relation to them, as required by O. 84, r. 20(3) and by the principles set out by the Supreme Court in *AP* and in the other cases discussed earlier. It is not open to the applicants to use these general pleas as a springboard to freestyle through the decision of the Board and the documents and materials relied upon by the Board in its decision, such as the inspector's report, to attack the AA carried out by the Board. The opposing parties and the court were entitled to know precisely what case the applicants were making in relation to the AA by reference primarily to the pleadings as supplemented by the affidavits and by the written submissions. I am satisfied that the applicants were not entitled to rely on the broad, vague and general pleas contained in grounds 1 and 2 to support a case not clearly and expressly pleaded by the applicants.

154. The Board and the Developer argued, and I agree, that ground 3 of the amended statement of grounds provides the central claim made by the applicants in relation to the alleged inadequacy of the AA carried out by the Board (leaving aside the grounds concerning in-combination effects). In other words, ground 3 sets out the basis on which it was being alleged that the AA purportedly carried out by the Board did not comply with the substantive requirements for an AA as set out in the case law of the CJEU and in national case law. In ground 3 of the amended statement of grounds, the applicants pleaded that the Board failed to address the *lacunae* and/or deficiencies identified by the inspector in her report. The particular *lacunae* and/or deficiencies relied upon in ground 3 were the "*probably/unlikely*" category in the methodology used in the NIS (and revised NIS). That was the only lacuna or deficiency which it was alleged by the applicants in the amended statement of grounds was identified by the inspector but not addressed by the Board in carrying out the AA. That ground was expressly addressed by the Board and by the Developer in their respective statements of opposition. I address the merits of that claim below.

155. In addition to what was pleaded at ground 3 of the amended statement of grounds, it will be recalled from the review of the applicants' grounding affidavit (sworn by the first applicant) earlier in this judgment that the applicants did allege on affidavit that the AA carried out by the inspector identified three concerns or deficiencies. One of those concerned the "*probably/unlikely*" methodology and the others concerned the marsh fritillary butterfly and the operational impacts of the proposed wind farm on the golden plover. Although those latter two concerns were not pleaded, they were addressed in the applicants' grounding affidavit. The Board and the Developer addressed the points made

in relation to the methodology and the golden plover in their respective statements of opposition and verifying affidavits. They also addressed the points made in relation to the marsh fritillary butterfly in their affidavits.

156. When it came to the written submissions, the only *lacuna* or deficiency addressed in the written submissions on behalf of the applicants concerned the impacts of the operation of the wind farm on the golden plover. The applicants' written submissions did not mention the methodology point or the marsh fritillary. As a result, the written submissions on behalf of the Board and on behalf of the Developer dealt with the arguments advanced in relation to the golden plover only. The applicants sought to advance arguments in relation to all three issues in their oral submissions at the hearing (as well as several other alleged deficiencies in the AA) which were nowhere dealt with in the pleadings, affidavits or submissions and which I consider at (3) below.

157. While the Board and the Developer were prepared to and did address the case advanced by the applicants in relation to the three areas referred to (methodology, golden plover and marsh fritillary), it seems to me that insofar as the marsh fritillary and the golden plover are concerned, the applicants did not strictly comply with the provisions of O. 84, r. 20(3) in that those issues were not expressly dealt with and particularised in the amended statement of grounds and no application was made to amend the pleadings by the applicants to cover them. However, as they were dealt with by the applicants in their affidavit evidence and, insofar as the golden plover was concerned, also in their written submissions, and as the Board and Developer dealt with all of those issues in their respective statements of opposition, affidavits and submissions, I am satisfied that no prejudice would be caused to those parties and no confusion or ambiguity would arise as to the points actually in issue in the case, were the court to deal with them. I will, therefore, now proceed to consider the applicants' case in relation to each of those three issues.

(a) Methodology

158. The applicants contended that the inspector had identified a lacuna or deficiency in the information provided by the Developer with its application with respect to the methodology adopted by the Developer's consultants in the NIS (and repeated in the revised NIS) for assessing the probability of adverse effects of the proposed development on qualifying interests on the European sites in the vicinity. The inspector criticised the inclusion by the authors of the NIS of an additional confidence category, namely, the "*probably/unlikely"* category where the level of probability was within the higher end of the percentages 5-50%, i.e. approximately 30-50%. The applicants argued that the Board did not address the inspector's concern in relation to that particular category anywhere in its decision and that this was a *lacuna* or deficiency in the information provided which was nowhere addressed by the Board. As a result, they contended, the Board's decision did not comply with the substantive requirements for an AA as set out in the case of the CJEU and of the Irish Courts (most recently, the decision of the Supreme Court in *Connelly*).

159. The Board and the respondent disagreed and submitted that the inspector's concern in relation to the impugned category did not bear upon her ability or the Board's ability to carry out an AA in respect of the development. On the contrary, the inspector did carry out an AA (and recommended refusal on AA grounds in light of the potential for adverse impacts on the golden plover) as did the Board.

160. In considering this ground of challenge, it is necessary to examine what the inspector said in relation to this category in the methodology used in the NIS. She addressed it in the section of her report dealing with the AA (s. 13.0). In s. 13.1, the inspector referred to that part of the NIS in which reference was made to the methodology used for assessing the potential for significant impacts occurring in relation to the European sites. The NIS included a table of confidence levels of predictions of likely impacts in accordance with certain recommended guidelines. The table contained confidence level categories from "*near certain"* (more than 95% occurring as predicted) down to "*extremely unlikely*" (less than 5% chance of occurring as predicted). In between, were the categories "probably" (50%-95% chance of occurring as predicted) and "*unlikely*" (between 5% and 50% chance of occurring as predicted). The NIS had included an additional confidence category, namely, "*probably/unlikely*" which was used to indicate that the level of probability was within the higher percentages of the "*unlikely*" (5%-50%) category, i.e. *"approximately 30-50%".* The inspector noted that there was no reference to this additional category in any of the guidelines for assessing significance in an EIS or NIS. She expressed the opinion that the use of that category confused the report by combining two effectively opposing meanings and that it was not clear why there was any need to include the additional category (s. 13.1).

161. When it came to expressing her conclusion in relation to AA (at s. 13.8), the inspector expressed a number of "*concerns*". The first related to this additional category in the methodology. She repeated her view that it was confusing and was not supported by any reference source. She then went on to consider the potential operational impacts on the golden plover which she regarded as "*more critical".* That is all the inspector said about the additional category in the methodology. Significantly, the inspector did not state that the concern which she expressed about the inclusion of the additional category prevented her, or would prevent the Board, from carrying out an AA. On the contrary, the inspector carried out an AA and, having done so, recommended refusal of permission in light of the potential impacts of the operation of the proposed wind farm on the golden plover. The inspector did not recommend that, by reason of her concern in relation to the methodology, an AA could not be carried out. When the Board came to consider the inspector's report, it agreed with the deficiency she had identified in relation to the golden plover and sought further information by way of the s. 132 request. When it came to considering the Developer's response to that request and the additional submissions and observations submitted by interested parties and observers, the Board also decided that it was in a position to carry out an AA and did so. It did not mention the methodology issue in its decision (as recorded in the Board Order and the Board Direction). However, the Board was clearly aware of the concern expressed by the inspector (albeit that she did not see it as something which precluded the carrying out of an AA) and nonetheless felt in

a position to carry out an AA on the basis of all of the information provided, including the additional information furnished by the Developer and the subsequent submissions and observations. Indeed, it is not difficult to see why the Board proceeded to carry out an AA, notwithstanding the inspector's expressed concern in relation to the additional category in the methodology. The inspector had drawn the Board's attention to it and the Board was, therefore, clearly aware of it. Further, the additional category was in fact a conservative or precautionary one, in that the category still reflected an "unlikely" rather than a "*probably*" confidence level as to the likelihood of adverse impacts arising. Confusing and unsupported by the relevant guidelines as it may have been, the identification of a risk of adverse impact on a protected interest of any of the European sites within this additional category of "*probably/unlikely*" is still unlikely rather than probable.

162. I am unable to see how the concern expressed by the inspector in relation to this additional category, which did not amount to a reason for the inspector to recommend refusal on the basis of any deficiencies in the information provided for the purpose of the AA, and which did not prevent the Board or the inspector carrying out an AA (the Board having the benefit of the additional information and submissions provided), could amount to a failure to comply with the substantive requirements for an AA as set out in the case law of the CJEU and in the Irish cases (including *Connelly*) discussed earlier. I reject the applicants' challenge to the Board's decision on the basis of the additional category used in the NIS (and revised NIS) for determining the likelihood of impacts occurring. The use of this category in itself did not, in my view, invalidate the Board's decision.

(b) Impacts on golden plover

163. The applicants contended that the Board's decision failed to comply with the substantive requirements for an AA insofar as the Board failed properly to address the *lacunae* or deficiencies identified by the inspector in the information provided by the Developer as regards the potential impacts on the golden plover, a protected species in a number of the European sites in the vicinity of the proposed development, from the operation of the proposed wind farm. The applicants argued that the findings made by the Board and the conclusions made by it in relation to the golden plover did not satisfy the substantive requirements for an AA as identified in the case law of the CJEU and in national case law (including, most recently, the decision of the Supreme Court in *Connelly*). As noted earlier, while the applicants did not expressly advance in the amended statement of grounds any complaint in relation to the treatment of the golden plover in the AA carried out by the Board, that issue was referred to in the first applicant's grounding affidavit. It was one of the three concerns or deficiencies which he alleged the inspector identified in her report and was one of the reasons the inspector recommended that permission should be refused. Although not expressly raised in the applicants' amended statement of grounds, it was addressed in the statements of opposition of the Board and of the Developer and in their affidavits. It was also the main point advanced in relation to a part of the applicants' case in their written submissions and was, therefore, extensively dealt with by the Board and by the Developer in their responding written submissions. For

these reasons, I am satisfied that notwithstanding that the applicants have not strictly complied with O. 84, r. 20(3) and with the principles identified in *AP* and in the other cases referred to earlier, the applicants were nonetheless entitled to advance the case they made in relation to the golden plover and that no prejudice was caused to the Board or the Developer or confusion or uncertainty for the court. However, insofar as the applicants sought to make the case that the inspector's concern extended beyond the golden plover species into other species of birds, I am satisfied, for the reasons set out at (3) below, that the applicants were not entitled to make that case, as it was nowhere mentioned in the pleadings, in the affidavits or in the written submissions. In any event, as discussed later, the applicants were wrong in suggesting that the inspector's concern extended beyond the golden plover to other protected bird species. That is clear from her report and from the Board's consideration of that report, as recorded in its s. 132 request and in its decision.

164. As regards the golden plover, the applicants submitted that the inspector recommended that the Board refuse to grant permission for the proposed development because of the concern she had in relation to the treatment of the golden plover and that the Developer had not provided information to enable findings to be made and conclusions to be drawn to the requisite standard for a valid AA under EU law. Their case was that the Board was not in possession of any additional relevant material over and above that available to the inspector which would have enabled the Board to carry out a legally valid AA under EU law, in light of the deficiencies found by the inspector. They contended that no or additional information emerged following the s. 132 request which could have enabled the Board to reach a different conclusion to that reached by the inspector and that the findings and conclusions set out in the Board's decision did not satisfy the substantive requirements for an AA set out in the case law (including, most recently, in *Connelly*).

165. The Board and the Developer disagreed. They pointed to the concerns actually expressed by the inspector, to the Board's consideration of those concerns which led it to make the s. 132 request, to the response provided by the Developer to that request (including the revised NIS and the golden plover report), to the submissions and observations made by interested parties and observers and to the decision of the Board itself. They contended that the Board's decision (when read with all of that material) contained findings and conclusions to the requisite standard as required by (*inter alia*) the Supreme Court in *Connelly*.

166. I regard this ground of challenge to the Board's decision as the high point of the applicants' case and the most substantial case advanced by the applicants in challenging the Board's decision. However, for reasons which I now set out, I do not accept that the Board failed to comply with the substantive requirements for an AA under EU law in the way in which it dealt with the potential adverse impacts on the golden plover from the operation of the proposed wind farm.

167. It is clear that the inspector identified what she termed a "*serious weakness*" in relation to the material furnished by the Developer in respect of the consideration of the impacts

on the golden plover from the operation of the wind farm (s. 13.8 of her report). In setting out her AA conclusion, the inspector was clearly aware of the requirements for a valid AA as she made express reference to *Kelly* and correctly summarised the test set out by the High Court case (which was, of course, recently endorsed by the Supreme Court in *Connelly*). The inspector concluded that the authors of the NIS submitted with the application had not proved that there would not be an adverse effect on the golden plover (which was known to occur in three of the European sites within 15kms of the development site). In light of the risk of significant impact on the golden plover, the inspector concluded that the applicant had not provided adequate information to prove "*beyond reasonable scientific doubt*" that the wind farm would not impact on the natural flight lines of the golden plover and would not have an adverse impact on the integrity of the three relevant European sites, having regard to their conservation objectives. As appears from her AA conclusion (at s. 13.8) and her general conclusion (at s. 14.1), the reason why the inspector considered that the Board could not accept the findings set out in the NIS and that, as a consequence, permission should be refused "*in that regard*" was because of the absence of proof to the requisite standard that there would not be an adverse effect on the golden plover. That is the reason why she recommended refusal and that is also clear from the "*Reasons and Considerations*" which the inspector recommended to the Board (s. 14.2). The reasons supporting those conclusions and recommendations had been set out by the inspector earlier in her report.

168. The Board considered the inspector's report at a number of meetings (referred to earlier) before concluding that a request for further information should be made of the Developer. The terms of the s. 132 request which was made by the Board by letter dated 25th May, 2018 has previously been set out. It is clear from the terms of the s. 132 request that the Board was seeking further information in relation to the issue of concern identified by the inspector concerning the golden plover. It is also clear from the terms of that request that the Board considered that the applicant had not provided adequate information to prove beyond reasonable scientific doubt that the wind farm would not impact on the natural flight path of the golden plover and would not have an adverse effect on the protected species or on the integrity of the three relevant European sites. For that reason, the applicant was requested to address those concerns by way of a revised NIS.

169. The Developer did submit a revised NIS which attached the golden plover report. The revised NIS and the golden plover report sought to address the concerns expressed by the inspector in her report and by the Board in its s. 132 request. I reject the applicants' contention that the revised NIS and the golden plover report did not provide further or additional relevant information to the Board over and above that which was available to the inspector. I am satisfied, from a review of the revised NIS and from the golden plover report, that both documents provided significant further and additional information. The additional information and the amendments to the original NIS were marked in red in the revised NIS. The golden plover report was an entirely new document which was not before the inspector and contained information which had not been provided to her by the Developer. Most of the additional information in the NIS in relation to the golden plover was contained in s. 3.9.5.2 (in relation to the likelihood of impacts during the construction

phase) and s. 3.9.6.2 (in relation to the likelihood of impacts during the operation of the wind farm). Both sections of the NIS reproduced portions of the golden plover report attached to it in order to supplement the information contained in the original NIS. This additional information was supported by academic and scientific papers which were not before the inspector. The papers which were not before the inspector were marked in red in s. 7 of the revised NIS. The two relevant sections of the NIS and the golden plover report provided a detailed discussion on the potential impacts of the wind farm on the golden plover.

170. The golden plover report (attached to the revised NIS) was prepared by the Developer in order to address the concerns expressed by the inspector and endorsed by the Board (in its letter of 25th May, 2015). It was not before the inspector when she prepared her report. It is, therefore, an entirely new document which was considered by the Board. The report addressed the scientific basis of the assessment recorded in the revised NIS and contained an assertion that the "*best scientific knowledge in the field*" was used to inform the assessment on which it was determined, with a sufficient degree of certainty, that there would be no adverse impact on any of the European sites from the proposed wind farm and, in particular, no significant impact on the golden plover. The report described the "*expertise of skilled observers*" (s. 2.1), the "*essential preparatory work*" (s. 2.2), the bird surveys completed and a summary of the particular bird surveys for golden plover. The report then set out additional information from results of other surveys completed in the region.

171. In the summary of bird survey results for the golden plover (in s. 2.4), various tables were set out recording observations of golden plover outside the site of the proposed development and at the site. It was noted that during the period of the winter bird survey (between October, 2009 and March/early April, 2010), there were only three observations made from the site and all comprised of small flocks (none of which accounted for more than 0.003% of the national wintering population). It was further stated that all sightings were of birds in flight at elevations higher than turbine tip-height (which was stated to be typical of golden plover flight behaviour). It was further stated that there was no observation of golden plover foraging at or in proximity to the site despite the availability of a suitable habitat. The survey results indicated that the site and surrounds do not support over-wintering golden plover. As regards breeding, the report stated that there was no evidence of breeding golden plover within or in proximity to the wind farm site during the breeding bird surveys carried out.

172. As regards the additional information from results of other bird surveys completed in the region, an account was given of several surveys from wind farms in the area (described as the Galway Wind Park). Those survey results were set out in ss. 3.1 to 3.4 of the report. A summary of the observations of golden plover from those other bird surveys was set out at section 3.5. Those results were stated to be consistent with the results of the winter bird surveys at the site. The results were summarised (at s. 3.5) as follows: -

"• *There was no evidence of breeding golden plover on any of the sites.*

• *All sightings were in flight; where the flight height was recorded, it was above turbine tip-height.*

• *All recorded sightings were of very small to small flocks low numbers.*

• *Any sightings are considered to be birds of the over-wintering population."*

A summary of the observations from those other bird surveys in the region was set out in table 3.

173. Section 5 of the golden plover report contained an assessment of the potentially significant effects of the development to the golden plover. That section of the report dealt with disturbance effects, barrier effects to movement, collision risk and natural flight paths. Most significantly for present purposes, s. 5.3 addressed the question of collision risk (being the concern expressed by the inspector). The report concluded that there would be "*no significant collision risk to golden plover*" arising from the operation of the proposed wind farm, either alone or in combination with other projects. That section of the report contained the assessment of collision risk based on scientific evidence from the results of the bird surveys conducted at the site itself as well as at other wind farms in the area and on "*relevant scientific literature"* (s. 5.3). The report continued: -

"*There is no evidence of breeding golden plover at the site, or the region, thus the risk of collision to breeding golden plover from the Cnoc Raithní wind farm is low and will not result in a significant population level impact, either alone or in combination with other wind farm projects… Golden plover exhibit high site fidelity and currently breed at the Connemara Bog Complex SPA and the continued use of the SPA as a breeding site is not expected to change.*

There is no recorded golden plover traditional over-wintering or feeding areas at, or in the vicinity of the site. There is no traditional over-wintering for golden plover recorded within the region as evidenced from other bird surveys and there is little evidence of feeding golden plover within the region…

Cnoc Raithní wind farm consists of 11 turbines laid out in a cluster arrangement and turbines are widely spaced like the other wind farms that make up the Galway Wind Park. Ample flight corridors exist between turbines and between each wind farm… All golden plover evidenced at wind farm sites in the region were of few, very small to small, flocks in flight and where the flight height was recorded, it was above turbine tip-height. The potential for interaction between over-wintering golden plover and Cnoc Raithní Wind Farm is low. A review of collision assessments drawn from European wide studies revealed much lower golden plover collision records than for other species for which data were included (Hötker et al. 2006 cited in McGuinness et al. 2015). Golden plover are high fliers with soaring flight habits; the species use aerial foraging and engages in

display flights in breeding season (Nairn and Partridge, 2013). The recent paper by Douglas et al (2011) revealed that the installation of wind farms had no observable effect on populations or distributions of breeding golden plover up to three years after the completion and operation of turbines. Similarly, a study by Pearce-Higgins et al, (2012) concluded that any increase in mortality through collision with operating turbines, or other changes associated with wind farm operation, has little effect on local populations. Furthermore, the avoidance rate recommended by SNH for the species is very high at 98%, estimating the proportion of times that birds will act to avoid collision with turbines. Therefore, the risk of collision to feeding golden plover from the Cnoc Raithní Wind Farm is low and will not result in significant population level impact, either alone or in combination with other wind farm projects."

174. Section 5.4 of the golden plover report dealt with natural flight plans and stated that there was no "*reasonable scientific evidence*" to suggest that the natural flight plans of golden plover would be impeded by the proposed wind farm and set out the following reasons for that conclusion: -

"• *Low potential for disturbance risk exists as the site is not currently, or likely to be, used by breeding golden plover.*

• *No likely occurrence of barrier effects to movement of breeding golden plover as the site is not currently, or likely to be, used by breeding golden plover. No likely occurrence of barrier effects to movement of over-wintering birds as the site is at a considerable distance from traditional wintering grounds, coupled with the fact that few, very small to small, flocks were observed in the region and these were transiting over the area at high altitude.*

• *Potential for collision risk for breeding birds is low to none. Potential for collision risk to over-wintering birds is low due to their typical high altitude flight patterns, and overall low population numbers of over-wintering birds using the site and region."*

175. Section 6 of the golden plover report contained an assessment of the effect of the proposed development on the integrity of the European sites relevant to the golden plover. Section 8 (pp. 20-22) contained the conclusion of the authors of the golden plover report. In that section, reference was again made to the use of "*best scientific knowledge in the field*" in informing the assessment as to the degree of certainty in relation to the absence of adverse impacts on the relevant European sites and on the golden plover. A summary of the results of the various surveys was set out and conclusions were expressed in relation to the absence of the potential for disturbance to breeding golden plover and on the likelihood of the occurrence of barrier effects. The conclusion reiterated the findings of the authors of the report that (a) the potential for collision risk for breeding birds was "*low to none*" and (b) the potential for collision risk for over-wintering was "*low due to their typical high altitude flight patterns, and overall low population numbers of over-wintering birds using the site and region*" (s. 8, p. 21 of the report). The report then continued: -

"The natural flight path of a bird is considered to be influenced by disturbance effects, barrier effects to movements and collision risk, all of which are assessed in turn in the previous sections. Based on the assessment of potentially significant effects to golden plover, there is no reasonable scientific evidence to suggest that their natural flight paths would be significantly affected by the proposed Cnoc Raithní wind farm, either alone or in-combination with other projects or activities. The assessment is based on scientific evidence from the results of bird surveys conducted at the Cnoc Raithní site, as well as from the Galway Wind Park, together with relevant scientific literature as discussed hereunder

The ecological structure or functioning of Natura 2000 sites, including Connemara Bog Complex SPA, Lough Corrib SPA and Inner Galway Bay SPA, will not be significantly impacted by the project, and the coherence or wholeness of the network will not be adversely affected. The project will not affect the ecological structure or functioning of any of the Natura 2000 sites considered in the Natura Impact Statement and thus will not adversely affect the integrity of these individual sites, or the network as a whole.

In conclusion, it is considered that the best scientific knowledge in the field was used to inform the assessment on which it was determined, with a sufficient degree of certainty, that there will be no adverse impacts on Natura 2000 sites."

176. As noted earlier, the essential findings and conclusions in the golden plover report were reproduced in the revised NIS. A review of this material demonstrates clearly that the revised NIS and the golden plover report contained information and material which was not before the inspector such as the additional bird survey data and findings contained in relevant academic and scientific papers as well as the findings and conclusions expressed in the revised NIS itself and in the golden plover report. These were not before the inspector. To the extent, therefore, that the applicants argued that there was no relevant additional information before the Board which was not before the inspector, they were wrong.

177. Having obtained the revised NIS and golden plover report, the Board invited and received submissions and observations from interested parties and observers (including the applicants and some of the notice parties). It is fair to say that there was very little reference in those submissions and observations to the potential adverse impact of the proposed development on the golden plover (such references as there were to the golden plover were fleeting). It is certainly the case that no expert evidence was furnished to the Board in those submissions and observations to contradict or question what was contained in the revised NIS and in the golden plover report in relation to the impact of the proposed development on the golden plover or on the relevant European sites with respect to that species.

178. As is clear from the Board Order, and from the affidavit evidence on behalf of the Board, the Board considered the revised NIS (which had attached the golden plover report) in relation to the potential impact of the proposed development on the golden plover, as well as the submissions and observations made (and all of the other documents referred to in its decision including the inspector's report and the s. 132 request). The Board was satisfied that the information contained in the revised NIS and the further information provided was *"comprehensive, thorough and robust and had employed the best available scientific expertise in relation to research the collection of survey data and the analysis of same"*. It then summarised in bullet point form, the conclusions of the revised NIS (which have been reproduced earlier in this judgment). I am satisfied that the summary of the conclusions of the revised NIS (and the golden plover report) set out in the Board Order accurately reflects the conclusions expressed by the authors of those documents which the Board was satisfied to accept. The Board decision also noted the absence of "*any substantive issue or concern"* or any *"substantive scientific evidence that would cast doubt on the findings and the conclusions*" of the revised NIS in the submissions and observations received by it. The Board Order recorded that the Board accepted the findings and conclusions contained in the revised NIS. Having done so, the Board concluded that it was "*satisfied that it could be concluded beyond reasonable scientific doubt that the proposed development including grid connection, either individually or in combination with other plans and projects, would not adversely affect the integrity of"* the relevant European sites in view of those sites' conservation objectives during the construction or operation phase of the development.

179. In my view, the AA carried out by the Board does comply with the substantive requirements for a valid AA under EU law as recently discussed and applied by the Supreme Court in *Connelly*. This is so, notwithstanding that the decision of the Board in this case was made before the Supreme Court delivered its judgment in *Connelly*. It is clear from the inspector's report and from the record of the Board's decision itself that the Board was aware of the requirements for a valid AA set out by Finlay Geoghegan J. in the High Court in *Kelly*. I am satisfied that, with reference to the particular issues raised in relation to the golden plover and the potential adverse impacts on the golden plover by the operation of the proposed wind farm, the Board complied with the requirements for a valid AA which was a pre-condition to its decision to grant planning permission.

180. Dealing with each of the four distinct requirements for a valid AA as summarised by the Supreme Court in *Connelly* (at para. 8.16 of its judgment), I am satisfied that the AA carried out by the Board (which was contained in a separate section of the Board's decision and expressly referred to and incorporated the inspector's report, the revised NIS (and attached golden plover report) and the submissions and observations received by the Board in relation to that information) did identify, in light of the best scientific knowledge in the field, the aspects of the development which could, by itself or in combination with other plans or projects, affect the golden plover and the relevant European sites in light of their conservation objectives.

181. I am further satisfied that the Board made complete, precise and definitive findings and conclusions regarding the potential effects on the golden plover and on the relevant European sites which had previously been identified at the stage I screening stage. In addition, I am satisfied that, on the basis of those findings and conclusions, the Board was able to determine (and did so determine) that no scientific doubt remained as to the absence of the identified potential effects on the golden plover and on the relevant sites. Finally, having been satisfied of those requirements, I have concluded that it was open to the Board to determine that the proposed development would not adversely affect any of the relevant European sites, with particular reference to the golden plover. It was a matter for the Board, being familiar with and applying the required test for AA under EU law, to form its view as to whether the test (which it had correctly described) had been complied with on the evidence before it (see, for example, *Sweetman v. An Bord Pleanála* [2016] IEHC 277 (McDermott J.)).

182. Although, as noted, the Board's decision pre-dated the judgment of the Supreme Court in *Connelly*, the Board in this case did make clear in the document recording its decision that part of the document which related to the AA carried out by it. This was contained in a separate section of the record of the decision contained in the Board Order and carefully distinguished between the stage I screening stage and the stage II AA stage. It seems to me that the Board did comply with what the Supreme Court subsequently stated in *Connelly* was required, namely, that a "*reasonable observer*" had to be "*able to understand with reasonable clarity what the Board was deciding and why*". In my view, this requirement was satisfied in the present case in relation to the manner in which the Board carried out an AA concerning the potential impacts of the proposed development on the golden plover and the relevant European sites.

183. I am also satisfied that in carrying out and recording its determination on AA in its decision, it was open to the Board to refer to and rely, in support of its AA determination, on other materials provided it made clear that it was doing so. The Board did make clear in its decision that it agreed with the inspector's conclusions, including those expressed in relation to the potential impact on the golden plover, was satisfied with the information contained in the revised NIS and further information and accepted the findings and conclusions contained therein.

184. I am satisfied that in so proceeding, the Board was acting in a manner which was subsequently endorsed by the Supreme Court in *Connelly* (at para. 13.6). I am further satisfied that the conclusion reached by the Board in reaching its AA determination in relation to the golden plover was underpinned by the findings made by the Board in its decision. The Board clearly accepted and was satisfied with the findings and conclusions contained in the revised NIS. It accurately summarised the pertinent conclusions in the revised NIS in relation to the golden plover. The Board set out its findings in its decision. Even if the summary by the Board of the conclusions of the revised NIS, which the Board stated it accepted, were not to be regarded as a sufficient statement of the Board's findings (and I do not accept that that is the case), the Board was clearly referring to and accepting the full extent of the findings made on the basis of the evidence set out in the

revised NIS and in the attached golden plover report. In my view, the Board's decision did comply with the requirements for a valid AA under EU law as set out by the Supreme Court in *Connelly*. As indicated earlier, I do not believe that the recent judgment of the CJEU in *Holohan* adds in any way to those requirements.

185. While there are some similarities between the facts of the present case and those at issue in *Connelly*, there are significant differences which, in my view, explain why I have reached a different conclusion on the facts of this case to that reached by the Supreme Court in *Connelly*. In both cases, the inspector recommended that the Board refuse to grant permission. It appears, however, that in *Connelly*, there was no NIS before the inspector. Having received the inspector's report in *Connelly*, the Board requested revisions to the proposed development and further information, including an NIS. The revisions were made and an NIS was provided. This was not provided to the inspector for a further report. In the present case, an NIS was provided to the inspector. She recommended that permission be refused on the basis of a particular deficiency in the information contained in the NIS. In *Connelly*, the Board was satisfied with the NIS submitted to it and the revisions made and decided to grant permission for the relevant development. The Board did not feel it necessary to refer the NIS to inspector for a further report or for an addendum to the report. In the present case, the Board was satisfied with the revised NIS and further information and similarly did not feel it necessary to refer those back to the inspector for a further report. I am satisfied that there was no obligation on the Board to do so. There were no revisions to the proposed development in the present case, as there were in *Connelly*.

186. The real difference, however, between the two cases is the manner in which the Board reached its determination on AA and recorded that determination in its decision. It appears that it did not do so by way of a separate section dealing with AA in its decision in *Connelly*. The Board's decision in the present case contains a separate section dealing with AA. In *Connelly*, the Board did not set out the scientific findings on foot of which it reached its conclusion on AA. It did not do what the Board did in the present case, namely, expressly refer to the relevant scientific findings and conclusions in the revised NIS based on the scientific evidence contained in that document and in the attached report. It seems to me that that is the principal difference between the present case and *Connelly*. Unlike the Supreme Court in *Connelly*, I am satisfied that the Board acted in compliance with the requirements for a valid AA under EU law for the reasons discussed above.

187. I should add that the present case is also significantly different from *Kelly* where the AA purportedly carried out by the Board in respect of each of the two relevant developments, or phases, consisted of a couple of sentences with some uncertainty as to how much of the inspector's report was accepted by the Board. There was no evidence in that case of an assessment conducted by the Board, or through its inspector, which met the required criteria for an AA under EU law. In my view, the present case is very different. The Board's decision recorded the stage I screening stage and the stage II AA, expressly agreed with the inspector's conclusions including her conclusions as to the deficiency in

the NIS, set out clearly that it was agreeing with the findings set out in the revised NIS and further information submitted and summarised those findings by reference to the conclusions from the surveys and scientific evidence contained in the revised NIS. This case is, in my view, completely different from *Kelly* for those reasons.

188. In conclusion, therefore, I reject the applicants' challenge to the Board's decision on the grounds of its alleged failure to satisfy the requirements for a valid AA under EU law with regard to the manner in which it dealt with the potential adverse impacts on the golden plover and on the three relevant European sites. I am satisfied that the Board did comply with those requirements and that the AA determination reached by the Board on this issue complied with the requirements of Article 6(3) of the Habitats Directive and s. 177V of the 2000 Act.

(c) The Marsh Fritillary butterfly

189. One of the alleged concerns or deficiencies in the information relating to AA which the applicants contended was identified by the inspector in her report concerned the treatment of the marsh fritillary butterfly. The applicants did not make that case in the amended statement of grounds. They did not plead in ground 3 that the treatment of the marsh fritillary was one of the *lacunae* or deficiencies identified by the inspector which the Board failed to address in the AA carried out by it. It was, however, referred to as one of the alleged deficiencies at para. 28 of the first applicant's affidavit. Consequently, it was not addressed by the Board or by the Developer in their respective statements of opposition but was addressed by both of them in their affidavit evidence concerning the AA part of the case. It was not addressed by any of the parties in the written submissions.

190. Notwithstanding that the point was not expressly pleaded in the amended statement of grounds, in breach of the requirements of O. 84, r. 20(3) and the principles in *AP* and in the other cases referred to earlier, I am satisfied that, as it was addressed in the affidavits exchanged between the parties and as the Board and the Developer were not in any way prejudiced by the failure to plead the point, it is appropriate that I address the substance of the argument advanced by the applicants.

191. The applicants relied on the inspector's consideration of the marsh fritillary butterfly in the AA part of her report which dealt with the potential disturbance or displacement of protected species during the construction of the proposed wind farm (s. 13.2.2 at p. 86 of 91). The inspector noted that the marsh fritillary (a protected species) was known to occur in one of the relevant European sites (the Connemara Bog Complex cSAC) and had the potential to breed within suitable habitat on the site of the proposed development. She noted, however, that no butterflies or nests were observed within the site, but that construction work on site could destroy breeding colonies. She further noted that the probability of such a "*significant short term impact*" was stated (in the NIS) to be "*unlikely*". She referred to the interactions which had taken place before the planning authority (the Council) in relation to this species and the Developer's response. She noted that response to be that, in over two years of site visits by ecologists, no observations

had been made of marsh fritillary adults. The inspector then expressed her opinion that it would be "*prudent, if the Board are minded to permit the proposal herein, prior to construction to undertake a survey of the habitat to be removed from this species and that works should be carried out outside of their breeding season*" (emphasis added). The applicants contended that this issue was not subsequently addressed by the Board in compliance with the requirements for a valid AA under EU law. They pointed to the Board's consideration of the issue as part of the stage II AA carried out by the Board. The Board expressly recorded in its decision that it had considered the inspector's suggestion in relation to the pre-construction survey for the marsh fritillary, but considered that the further survey work suggested by the inspector "*was not necessary having regard to the nature and extent of the survey work that had been carried out to date in respect of this species and its host habitat in connection with the proposed development*" (p. 12 of 33 of the Board Order). The Board did, however, accept the recommendation by the inspector that works should be carried out outside the breeding season for this species "*as a precautionary measure*". The Board included (at condition 6) a condition requiring that the removal of site vegetation be carried out outside the breeding season for the species. The applicants argued that this was not an appropriate way of carrying out an AA in respect of this species and that since the inspector had identified a concern in relation to the species, the Board had to be satisfied, to the requisite standard referred to by the Supreme Court in *Connelly*, that the absence of adverse effects on the species could be ruled out.

192. Both the Board and the Developer disagreed and disputed the applicants' contention that the inspector had identified a *lacuna* or deficiency in the information provided for the AA with respect to the marsh fritillary. They argued that it was clear from the inspector's recommendation that the recommended survey be carried out "*prior to construction*" and not prior to consent or permission for the development being granted and, that the inspector did not see this issue as requiring an adverse AA determination. It was accepted that if the inspector had recommended that the survey be carried out prior to any decision to grant permission for the development, the position might be different. However, that is not what the inspector recommended.

193. In considering this aspect of the applicants' case, it is, in my view, worth recalling evidence that was before the inspector (and the Board) in relation to the marsh fritillary. As explained in the affidavit sworn by Ken Fitzgerald on behalf of the Developer on 4th October, 2016, the Developer was requested by the Council in September, 2013 to undertake a further survey for marsh fritillary, as the previous survey had been undertaken in June with negative results. The Council had stated that the ideal time for carrying out such a survey was in September. The Developer was required to address that issue and to submit its response for consideration by the Council and by the National Parks and Wildlife Service (NPWS). Mr. Fitzgerald stated that having regard to the timing of this request (made in September, 2013), it was not possible to undertake the survey in September or within the timeframe permitted for the response to the request for further information made by the Council. For that reason, the Developer arranged for an ecological survey for devil's bit scabious, the plant food of the marsh fritillary, to be

conducted within the development site to assess the potential for the species to occupy the proposed site. Mr. Fitzgerald stated that no evidence of marsh fritillary was recorded during the survey and that it was noted that, over the course of two years of site visits and ecological related surveys at the site, there had been no observations of marsh fritillary adults, larvae or web structures and no evidence that the marsh fritillary species was using the site of the proposed development. Mr. Fitzgerald exhibited a report from Malachy Walsh & Partners entitled "*Marsh Fritillary Host Plant Succisa Pratensis Survey for Cnoc Raithní Wind farm Site*" dated 10th December, 2013. That evidence was not disputed by the applicants. It was referred to by the inspector at s. 13.2.2 (p. 86 of 91) of the report. There was no contrary evidence before the inspector. The inspector made the recommendation in relation to the pre-construction survey of habitat and in relation to the carrying out of works outside the breeding season (notwithstanding that there was no evidence of the species on the site). However, having made her recommendation, the inspector clearly did not regard this issue as relevant to the AA conclusion she subsequently expressed at s. 13.8 of the report. It was not one of the concerns referred to in that section of her report. It was not a factor which led to the inspector recommending that the Board should refuse permission for the development on AA grounds. It is, in my view, significant that the inspector recommended that a pre-construction survey be carried out in respect of this species, rather than recommending that the survey be carried out prior to the grant of consent or permission for the development. In my view, this clearly meant that the inspector did not see it as an AA issue which might preclude the Board from considering whether to grant permission for the development.

194. It is evident from the Board's decision that the Board was well aware of the requirements for a valid AA under EU law and referred to and applied that test in relation to the particular *lacuna* or deficiency identified by the inspector in relation to the information provided for the purposes of the AA to be carried out by it, namely, the information provided in relation to the potential for adverse impacts on the golden plover. In circumstances where the inspector did not regard the treatment of the marsh fritillary as a *lacuna* or deficiency in the information provided and phrased her recommendation in terms of the further survey work to be undertaken pre-construction rather than pre-consent, I do not believe that the Board was required to treat the issue concerning the marsh fritillary as a *lacuna* or deficiency in the materials supplied such as to require it to reach an adverse AA determination. The Board being clearly aware of the legal test for AA and having regard to the terms of the inspector's recommendation with respect to the marsh fritillary, I do not believe that there is any basis for the applicants' complaint in relation to the manner in which the Board treated the marsh fritillary butterfly in its decision. I am satisfied that, having considered the inspector's suggestion and the basis for it, it was open to the Board, on the basis of the evidence before it, to take the view that further survey work was not required having regard to the survey work carried out up to that point in relation to the marsh fritillary.

195. I have referred earlier to the evidence before the inspector and the Board in relation to the survey work which had been carried out in relation to that species and to the results

of that survey work. Over the course of a number of surveys over two years of site visits, there was no evidence of the marsh fritillary species on the site of the proposed development with no observations of marsh fritillary adults, larvae or web structures and no evidence that the species was using the proposed site. In light of that evidence, it was, in my view, clearly open to the Board to reach the conclusion it did on the need for further survey evidence. Having regard to the terms of the inspector's recommendation and the evidence which was before the Board, I am satisfied that it was open to the Board to reach the conclusion it did. The Board did accept the inspector's recommendation to include a condition requiring the construction works to be carried out outside the breeding season. It was open to the Board to include a condition to that effect (condition 6) as a precautionary measure. The Board was persuaded on the basis of the evidence before it that the requirements for a valid AA under EU law were satisfied. It was not and could not have been successfully argued by the applicants, on the basis of the evidence, that the Board's conclusions in relation to the marsh fritillary were unreasonable or irrational in the sense of those terms in *O'Keeffe v. An Bord Pleanála* [1992] 1 IR 39 (see: *Sweetman v. An Bord Pleanála* [2016] IEHC 277).

196. For these reasons, I reject the applicants' challenge to the Board's decision in relation to that part of its AA determination concerning the marsh fritillary butterfly.

(3) Arguments on AA grounds not pleaded

197. At the hearing, the applicants sought to advance certain points in support of their challenge to the Board's decision on AA grounds which were not pleaded. They were not contained in their amended statement of grounds, in their affidavit evidence or in their written submissions. Notwithstanding all of this, the applicants sought to pursue the points at the hearing. Because of the fact that the points were raised for the first time at the hearing, it was somewhat difficult to get a complete handle on the precise nature and extent of the arguments which were actually being pursued by the applicants in those areas. I hope I am not doing an injustice to the applicants by attempting to summarise these additional arguments as being as follows: -

(a) The argument that the Board only sought a revised NIS and further information in relation to the golden plover whereas the concerns of the inspector and of the Board were not just related to the golden plover but to other protected bird species;

(b) The argument that the inspector failed to identify other *lacunae* or deficiencies in the NIS before her and that, consequently, the Board failed to advert to those other *lacunae* or deficiencies in carrying out its AA. This argument focused on issues of peat stability, hydrology and water quality.

198. None of these issues were pleaded by the applicants. There is no reference to any of them in the AA part of the case set out in the amended statement of grounds or in the applicants' affidavit evidence or in their written submissions. As regards (a), insofar as the applicants made a case in relation to the golden plover, it was confined to that species

and was not made in relation to any other protected species. As regards, the issues referred to at (b), the applicants' attempt to raise these issues represented a complete shift in the applicants' case. Apart from the general pleas referred to at grounds 1 and 2 of the amended statement of grounds, which I have already concluded were far too broad, vague and general to constitute standalone grounds, the entirety of the applicants' AA case (leaving aside its arguments in relation to in-combination effects and the Ardderroo application) was that the inspector had identified particular defects and deficiencies in her report which were not properly dealt with by the Board in the AA which it carried out. The applicants' attempt to make a case that there were other alleged *lacunae* and deficiencies in the information before the inspector which were not identified by her represented a complete departure from the case originally made on the basis of which the applicants obtained leave to bring the proceedings. I deal briefly with each of these subheadings in turn:

(a) Other species

199. I have dealt earlier with the applicants' case in relation to the golden plover. Although not expressly referred to in the amended statement of grounds, the treatment of the golden plover was referred to in the applicants' affidavit evidence as one of the defects or deficiencies identified by the inspector in her report. That issue was then addressed by the opposing parties in their replying affidavits and featured prominently in the applicants' written submissions and in the responding submissions from the Board and the Developer. However, there was no suggestion in the pleadings, affidavits or submissions that the *lacuna* or deficiency identified by the inspector extended beyond the golden plover to other protected bird species. The first time that was raised was at the hearing. In my view, the applicants were not entitled to make that case and an attempt to do so amounted to a breach of O. 84, r. 20(3) and the principles identified in *AP* and in the other cases discussed earlier. It would not be fair to the opposing parties to permit that case to be made for the first time at the hearing.

200. Even if the applicants were entitled to make that case (and I am satisfied that they were not), there was in any event no merit or substance to the point. The inspector's concerns were explicitly directed to the golden plover and not to any other bird species. That is clear from s. 13.2.4 of the inspector's report (pp. 87 and 88 of 91). The concerns expressed there are confined to the golden plover. While reference is made in that section to the "*birds*", this was clearly a reference to the golden plover and not some other species. That was also clear from the AA conclusion contained in s. 13.8 of the inspector's report and from the conclusion expressed by her at section 14.1. The inspector did not express any concern or issue in relation to protected bird species other than the golden plover. In the recommended reasons and considerations for the Board set out at s. 14.2 of her report, the inspector referred to the potential adverse impacts on "*birds of special conservation interest known to traverse the site and the network of SPAs in the vicinity of the site, notably the golden plover*". However, it is clear from the context that this was a reference only to the golden plover and not to any other protected species. That recommendation must be read in the context of the concerns expressed earlier in the

report by the inspector. Further, the reference to "*notably the golden plover*", is, in my view, a reference to the golden plover itself and not to an example only of the types of birds affected. The same terminology was used by the Board in its s. 132 request dated 25th May, 2015 and, I believe, the same conclusions must be drawn. The concerns were expressed only in relation to the golden plover and not to any other bird species. I am satisfied, therefore, that even if the applicants were permitted to make a case based on the alleged potential adverse impacts of the development on protected bird species other than the golden plover (and I do not believe that the applicants should be so entitled), there is no merit or substance to that case.

(b) Peat stability and related issues

201. In their oral submissions, the applicants engaged in a detailed and extensive review of the inspector's report almost on a page by page basis. During the course of that review, from time to time, the applicants advanced submissions to the effect that the inspector ought to have identified, but failed to identify, *lacunae* and deficiencies in the information provided for the purposes of the AA and that the inspector ought to have concluded that permission should be refused on the basis that there were several other *lacunae* or deficiencies in the information provided such that the Developer could not satisfy the test for AA. Among the areas raised in this manner by the applicants were issues concerning peat stability and water quality. The applicants sought to criticise the manner in which the inspector dealt with this issue in the course of her report (including in s. 11.4 of the report). The applicants referred to the evidence before the inspector including the expert evidence adduced on behalf of the objectors and the inspector's analysis of that evidence. The applicants did so with a view to attempting to demonstrate that the inspector had not made findings or expressed conclusions in a manner which would comply with the AA requirements as discussed and applied by the Supreme Court in *Connelly*. The applicants sought to advance that case also on the basis of the inspector's analysis of the potential effects on peat stability and water quality in the context of the AA exercise carried out by her at s. 13.6.3 of the report.

202. The Board and the Developer resisted the applicants' attempt to rely on these issues, primarily on the basis that they represented a fundamental change in the applicants' case. They argued, without prejudice to that objection, that there was no basis for the applicants' complaints. In reply, the applicants accepted that these grounds had not been expressly pleaded but contended that it was not necessary for the applicants to do so as they were encompassed by the general complaints contained in grounds 1 and 2. It was contended on behalf of the applicants that it was unnecessary to seek any amendment to the amended statement of grounds to encompass these further arguments.

203. I do not agree with the applicants. In my view, the objection raised by the Board and by the Developer to the applicants advancing these arguments at the hearing was well founded. I do not accept that the general grounds contained in grounds 1 and 2 are sufficient to encompass this aspect of the case which the applicants sought to make at the hearing. Grounds 1 and 2 are too broad, vague and general to afford any springboard

for the applicants to advance complaints in relation to the inspector's report and the manner in which she addressed questions of peat stability, hydrology and water quality. That case is inconsistent with the case which the applicants pleaded in ground 3. As noted earlier, in that ground, the applicants asserted that the inspector had identified lacunae or deficiencies (specifically the "*probably/unlikely"* category in the methodology used in the NIS) and that these were not addressed by the Board in the AA carried out by it.

204. The case which the applicants sought to make in relation to these issues at the hearing was very different to that pleaded. Essentially, the applicants sought to argue that the inspector ought to have identified *lacunae* and deficiencies in relation to the consideration of peat stability, hydrology and water quality and would have done so had she properly complied with the requirements of EU law in relation to AA (as discussed and applied in *Connelly*). That is a totally different case to the case pleaded in ground 3 and cannot be shoe-horned into the general grounds pleaded at grounds 1 and 2 for the reasons previously outlined. In seeking to advance a case on these issues at the hearing, the applicants failed to comply with the requirements in O. 84, r. 20(3) and with the principles considered and applied by the Supreme Court in *AP* and in the other cases discussed earlier. It was not open to an applicant to "freestyle" through the documentation, including the inspector's report, and to extract points from the material which were nowhere to be found in the pleadings, dealt with in the affidavit evidence or addressed in the written submissions.

205. I consider that the course of action adopted by the applicants in relation to these issues was unacceptable and impermissible as a matter of principle and as a matter of fairness to the opposing parties. In the event that the applicants felt that there was a point to be made in relation to these various non-pleaded issues, the applicants ought to have considered whether it was necessary to seek to apply to amend the amended statement of grounds to include them as part of their claim. That application could then have been considered by the Board and the Developer and, if necessary, depending on their attitude, determined by the court. Rather than doing so, the applicants sought to rely on the general grounds pleaded in ground 1 and 2 of the amended statement of grounds. In my view, they were not entitled to do so. For these reasons, I do not believe that the applicants were entitled to pursue the case which they sought to pursue at the hearing in relation to peat stability, hydrology and water quality.

206. I should add, however, that even if the applicants were permitted to pursue those issues, I would not have been persuaded by the applicants that the inspector (or the Board) acted in breach of the requirements under EU law for an AA in relation to those issues. Notwithstanding my conclusions on the applicants' non-entitlement to raise these points at the hearing, I reviewed the inspector's report in relation to those issues and was satisfied that the inspector had dealt with them comprehensively and in considerable detail. She considered the competing evidence (including the opinions of the respective experts) and was satisfied that the issues were satisfactorily dealt with in the material provided by the Developer. She specifically addressed these issues insofar as the AA was concerned at s. 13.6.3 of her report and, notwithstanding her criticism of the "somewhat

confused" statement based on the use of the "*probably/unlikely*" category, the Inspector was satisfied with the evidence provided in the NIS in relation to peat stability and water quality. In particular, she agreed with the conclusions in the NIS that the risk of peat stability was not an issue in any of the identified European sites. She further agreed that the mitigation measures proposed in the development in relation to the potential adverse impacts due to water run-off were prudent and reasonable. She further noted that the potential impacts on the relevant European sites and the impacts on aquatic species in the relevant European sites were considered "*extremely unlikely which is pretty definitive*" (s. 13.6.3). In light of these conclusions, the inspector did not consider that there were *lacunae* or deficiencies in the information provided in the NIS in relation to peat stability, hydrology or water quality. They did not, therefore, feature in her adverse AA conclusion and recommendation. While I do not believe that there is any merit or substance in the applicants' complaint in relation to these issues, more fundamentally, I do not believe that the applicants were entitled to pursue them at the hearing in light of the case made on the pleadings and addressed in the affidavits and submissions.

(4) In-combination effects/Ardderroo development

207. In their amended statement of grounds, the applicants put forward two further (but related) grounds as part of their AA case. The first (ground 4) was that the Board failed to conduct a proper assessment of the in-combination effects of the proposed development with other permitted wind farm developments in the vicinity and that, although other plans and projects were identified by the inspector in her report, there was no substantive analysis or assessment of the in-combination effects of the development as required by Article 6 of the Habitats Directive and/or s. 177V of the 2000 Act. Apart from repeating almost verbatim what was said in ground 4 at para. 40 of the first applicant's affidavit, nothing further was said about this ground in the affidavit evidence provided on behalf of the applicants.

208. The related ground was set out in ground 5. There, the applicants contended that the revised NIS was fundamentally deficient as it did not refer to the Ardderroo application and that, as a consequence, the Board was unable to conduct an AA in light of the "*best scientific knowledge*" that was available or capable of being available. Again, apart from reproducing (almost verbatim) what was said in ground 5 at para. 42 of the first applicant's affidavit, nothing further was said in the applicants' affidavit evidence in relation to this ground.

209. The Board and the Developer responded to those two grounds in their respective statements of opposition (paras. 9 and 10 of the Board's statement of opposition and at paras. 8 to 10 of the Developer's statement of opposition) and in their respective affidavits (paras. 39 and 40 of the affidavit sworn by Chris Clarke on behalf of the Board and paras. 32 and 49 to 51 of the affidavit sworn by Ken Fitzgerald on behalf of the Developer). These two related points were the main focus of Mr. Walsh's affidavit. They did not feature at all in the written submissions of the applicants or in the written

submissions of the Board or the Developer. They did, however, feature prominently in Mr. Walsh's submissions and reiterated what he had said in his affidavit.

210. Curiously, these two points were not pursued with any vigour by the applicants in their oral submissions. Counsel for the applicants made a fleeting reference to grounds 4 and 5 at the very end of his oral submissions, but did not advance detailed submissions on the points. In contrast, Mr. Walsh's oral submissions focused entirely on these two points. In his oral submissions, Mr. Walsh contended that the AA carried out by the Board was deficient in that it did not assess the effects of the proposed wind farm in combination with other permitted and planned developments in the vicinity of the site. He was particularly critical of the Board's failure to assess the effects of the proposed development in combination with the development the subject of the Ardderroo application and referred to his correspondence with the Board in October, 2014 and to the two submissions he had made on 22nd October, 2015 following receipt of the Developer's response to the s. 132 request and the revised NIS. Mr. Walsh contended that, if permitted, the proposed wind farm would, when combined with other permitted wind farms in the vicinity, together constitute the fifth largest onshore wind farm in Europe and the largest development of its type on the island of Ireland. He submitted that the development the subject of the Ardderroo application was clearly relevant to the Board's assessment of the Developer's proposed development and that notwithstanding that the Board had conceded in its statement of opposition that the Ardderroo application was relevant, it was not explained why the Board had decided to refuse permission for that application but to grant permission for the development at issue in these proceedings. Mr. Walsh contended that no in-combination assessment had been carried out (and linked that submission to a contention that the Board had not assessed the cumulative effects of the proposed development). Mr. Walsh described the NIS (and the revised NIS) (as well as the EIS) as being "*myopic*" in focusing on the development at issue and not on its in-combination and cumulative effects.

211. The Board and the Developer rejected the case advanced by the applicants (and by Mr. Walsh on these points). They both contended that the evidence disclosed that the Board had assessed the in-combination effects of the proposed development with other permitted wind farms in the vicinity and pointed to evidence to that effect in the inspector's report, in the revised NIS and the golden plover report and in the record of the Board's decision. Both the Board and the Developer submitted that, while the Board was clearly aware of its own decision to refuse the application for that development some eleven days prior to its decision to grant permission for the present development, there were significant differences between that development and the present development. For the purposes of the required assessment of in-combination effects, there were no in-combination effects involving the Ardderroo application as it had been refused.

212. It is not in dispute between the parties that Article 6(3) of the Habitats Directive and part XAB of the 2000 Act require the competent authority to consider the effect of a plan or project not directly connected with or necessary to the management of a European site on such a site, either individually or in combination with other plans or projects. The

assessment of in-combination effects is expressly required under Article 6(3) and s. 177U at the stage I screening stage of AA. Assuming the outcome of the stage I screening stage is that it is necessary to proceed to the stage II AA stage, it is also the case that at that latter stage, the competent authority will have to take into account as part of the AA carried out by it, in accordance with the standard required by the CJEU and national case law such as *Connelly*, the adverse effects of the plan or project on the integrity of the relevant European site or sites in combination with other plans or projects. That follows from the nature and extent of the requirements for a valid AA under EU law and was expressly referred to in that context in the summary set out by the Supreme Court in *Connelly* (at para. 8.16 of the judgment) and later in the court's analysis of the requirements for a valid AA under EU law (at para. 13.7 of the judgment). The applicants pleaded, but did not pursue with any vigour at the hearing, the case that the Board did not carry out a valid AA in respect of the proposed development as it did not properly consider the effects of the proposed development on the relevant European sites in combination with other permitted wind farm developments in the vicinity. Mr. Walsh did pursue that point on affidavit and in his written and oral submissions.

213. Having considered the record of the Board's decision as contained in the Board Order and having reviewed the material before the Board and referred to in its decision, I have come to the conclusion, that the Board did consider the effects of the proposed development, in combination with other permitted developments in the vicinity, on the relevant European sites and that the applicants (with the support of Mr. Walsh) have not discharged the onus of establishing that it did not. I have concluded that irrespective of where the onus lies, the evidence before the court clearly establishes that the Board did consider the effects of the proposed development on the relevant European sites in combination with other permitted developments in the vicinity.

214. In the first place, it is necessary to refer to the relevant parts of the Board Order recording its decision. At the outset, the Board noted that in coming to its decision, it had regard to various matters including: -

> *"(e) the characteristics of the site and of the general vicinity,*
>
> *(f) the pattern of existing and permitted development in the area, including other wind farms,*
>
> *…*
>
> *(i) the planning history of the site and surrounding area, and*
>
> *(j) the submissions and observations made in connection with the planning application and the appeal, and the report of the Inspector."*

215. The Board's decision contains a separate AA section. The Board Order noted that the Board considered that the information before it, including the NIS and revised NIS, was adequate to allow it to carry out an AA and that it completed an AA. The Board Order

recorded the stage I screening exercise carried out by the Board. The Board screened out two of the sites for the various reasons set out on the grounds that, on the basis of the information available, including the inspector's report, the proposed development, either individually or in combination with other plans and projects, would not be likely to have a significant effect on either of those two European sites in view of their conservation objectives. It is clear from this (and from other parts of the Board Order) that the Board was aware of its obligations to consider the in-combination effects of the proposed development. The Board then proceeded to conduct the stage II AA exercise (which has been considered and reviewed in detail earlier in this judgment). It is clear that the Board was agreeing with the inspector's conclusions (including her concerns in relation to the golden plover) and with the information, findings and conclusions contained in the revised NIS (and further information provided). The Board expressed its satisfaction with the further information and revised NIS provided and found that the findings and conclusions in the revised NIS could be accepted. The Board concluded its AA determination by expressly stating that it was satisfied that it could be concluded: -

> *"Beyond reasonable scientific doubt that the proposed development including grid connection, either individually or in combination with other plans or projects, would not adversely affect the integrity of the European sites… in view of these site's (sic) conservation objectives, during the construction or operation phase of the wind farm development."* (emphasis added)

It is clear, therefore, that the Board was aware of its obligation to consider the in-combination effects of the proposed development with other plans and projects and purported to do so in its AA determination.

216. In addition to the record of the Board decision itself, the judgment of the Supreme Court in *Connelly* confirms that reference may be made to other materials referred to expressly or by necessary implication in the Board's decision. In the present case, those materials included the inspector's report, the revised NIS and the golden plover report, as well as other materials (including the submissions and observations made by interested parties and observers). It is clear from the inspector's report that she was aware of the obligation on the Board to consider the in-combination effects of the development as part of the AA process. She expressly referred to it at s. 13.1 of her report. She referred to the European sites likely to be affected by the proposed development (at s. 13.3) and identified the other plans or projects to be considered as part of the assessment of in-combination effects (at s. 13.5 of her report). She provided a table of the other extant permissions for wind farms within 15kms of the development (including those which were still in the planning process, such as the Ardderroo application). She provided detail in relation to the planning history of those other wind farm developments in s. 5.2 (p. 17 to 19) of her report. The concerns expressed by the inspector in the AA part of her report have already been discussed in detail in this judgment and it is unnecessary to do so again here. It is true that the concerns expressed by the inspector in relation to AA were not directed to the in-combination effects of the proposed development with other plans or projects in a general sense, but were directed to the specific issues in relation to the

golden plover. But that is because that is the issue which gave rise to the critical concern expressed by the inspector.

217. A more detailed consideration of the in-combination effects of the proposed development with other wind farm developments in the vicinity was contained in the revised NIS. Section 3.8 of the revised NIS (on p.50) covered the identification of other plans or projects. That section of the revised NIS considered the "*cumulative impact" arising from "incremental changes caused by other past, present or reasonably foreseeable actions together with the proposed wind farm development".* It expressly considered the other operational and permitted wind farms within 15kms of the development site. Table 1 in section 2.2.4 of the revised NIS listed those other wind farms and their status. Figure 3 in s. 3.8.1.1 showed those other wind farms relative to the development site. That section went on (on p. 52) to set out the evidence and findings in relation to the in-combination effects (referred to in the revised NIS as the "*cumulative impacts")* of the development with other wind farms in the vicinity as follows: -

> *"There are 103 turbines permitted within 15km of the site turbines. Approximately two-thirds of these turbines are located on commercial conifer plantation while the remaining third are located on a mix of blanket bog, heath and cutover bog habitats. The Knockranny turbines are mainly located in either heath or conifer plantation habitats. It is not expected that the additional habitat loss of high value habitats associated with the Cnoc Raithní Wind Farm will cause a significant adverse cumulative impact due to the relatively small amount of habitat loss, 7ha, and the abundance of this habitat within 10km of the site. The wind farms within 10km of the sites turbines, are widely spaced and an abundance of similar habitat exists in the surrounding landscape, therefore, it is not expected that the proposed development will result in a significant adverse cumulative impact to fauna. Uggool, Cloosh and Letterpeck wind farms along with certain turbines within Knockalough and Leitir Gungaid wind farms occur within the Owenaboliska catchment. Half of the Knockranny turbines (turbines 3, 6, 7, 9, 11 and 14) also drain into this catchment. The remaining turbines drain to the Lough Corrib catchment to the east. The design of the water quality control measures which is incorporated into the project design will prevent the occurrence of cumulative potentially significant impacts to water quality."* (s. 3.8.1.1, p. 52 of the revised NIS)

218. Section 3.8 of the revised NIS also addressed other aspects of the in-combination effects of the development in other areas such as forestry, farming and peat extraction. When considering the specific issues in relation to the golden plover, the revised NIS expressly addressed the potential impacts on that species from the development, either alone or in combination with other wind farm projects (see, for example, s. 3.9.6, p. 65).

219. The golden plover report also contained material relevant to the assessment of in-combination effects. The report referred to bird surveys which were carried out on a number of the other wind farms in the vicinity including Lettercraffroe, Cloosh and Seecon (ss. 3.2 to 3.5 of the golden plover report). Section 5 of that report (which contained an

assessment of potentially significant effects for the golden plover) considered the effects on the golden plover during the construction and operation of the proposed wind farm. For example, in s. 5.2 of the report (pp. 11-12), the authors expressed the view that there would be no significant barrier effects to movement of breeding or over-wintering golden plover arising from the operation of the proposed wind farm "*either alone or in combination with other projects".* The authors explained why that was so by reference to scientific evidence which was summarised. Later in that section of the report, the authors stated that it was not expected that the operation of the proposed wind farm *"either alone or in combination with other wind farms"* would significantly impede or block movement of over-wintering golden plover (s. 5.2, p. 12). Section 5.3 of the report dealt with collision risk and, again by reference to scientific evidence, the authors considered that there would be no significant collision risk to golden plover arising from the operation of the proposed wind farm either alone or in combination with other projects and specific reference was made to the bird survey evidence obtained from the Galway Wind Park. There were several references in that section of the golden plover report to the in-combination effects on the golden plover from the operation of the proposed wind farm, either alone or in combination with other wind farm projects (see. 5.3, pp. 13-14). Similar references were to be found in s. 6 of the golden plover report (which contained the assessment of effects on the integrity of the European sites) (pp.15-16). There were further references to the in-combination effects on the golden plover from the operation of the proposed wind farm either alone or in combination with other projects or activities in s. 8 of the report which set out the conclusions of the report (see, for example, p. 21).

220. The Board expressly agreed with and endorsed the findings and conclusions contained in the revised NIS (which included by way of an attachment, the golden plover report). From my review of the record of the Board decision contained in the Board Order and from the other materials referred to in the decision and discussed above, I am satisfied that the Board was aware of its obligations to consider and assess the in-combination effects of the proposed development on protected features of the relevant European sites which were identified to be at risk of being significantly affected by the proposed development, either alone or in combination with other relevant plans or projects, including the other wind farms within 15kms of the development site. Where it felt it necessary and relevant, the Board made findings and conclusions in relation to the potential in-combination effects of the proposed development on the relevant European sites in light of their conservation objectives. I am satisfied that there was ample evidence before the Board to enable it to reach the conclusions which it did in relation to in-combination effects. It is not for the court to assess the correctness or otherwise of the conclusions reached by the Board, provided that the Board approached its assessment of the in-combination effects in accordance with the correct legal test (and I am satisfied that it did) and provided that there was material to support the Board's conclusions (and I am satisfied that there was). The Board's conclusions in relation to in-combination effects were not unreasonable or irrational in the *O'Keeffe* sense. Accordingly, I reject the submissions advanced by the applicants (and by Mr. Walsh) to the effect that the Board's decision was invalid and should be quashed by reason of its alleged failure to consider the in-combination effects of the proposed development with other plans and projects.

221. The applicants advanced a further ground for impugning the Board's decision and were supported by Mr. Walsh on that ground. They contended that the Board's decision should be invalidated by reason of its failure to refer to the Ardderroo application and to take it into account in carrying out the AA in respect of the development. As noted earlier, although this point was pleaded by the applicants, it was not addressed in their written submissions or pursued with any vigour by them at the hearing. A fleeting reference was made to it towards the end of the applicants' counsel's submissions. The point was pursued more vigorously by Mr. Walsh in his affidavit and in his written and oral submissions. The response of the Board and of the Developer to this ground was that, once the Ardderroo application was refused by the Board, there was no application in being and there would be no development on foot of that application and so there would be no effects of such a development to be considered in combination with the proposed development in the AA assessment. The development the subject of the Ardderroo application was separately described by counsel for the Board and for the Developer as a "*dead development".*

222. While the applicants initially alleged (in their amended statement of grounds) that the Board's decision was unreasonable and irrational by reason of the fact that the Board refused to grant permission for the development sought in the Ardderroo application but granted permission for the development at issue in these proceedings a number of days later, wisely, that case was not pursued by the applicants at the hearing. The developments were different developments and each had to be considered on its own merits. It does not follow that because the Board refused permission for the development sought in the Ardderroo application, it was unreasonable or irrational for the Board to grant permission for the development, the subject of these proceedings. In any event, that case was not pursued by the applicants.

223. I am satisfied that there is no basis for the claim made by the applicants and strongly supported by Mr. Walsh that the AA carried out by the Board was deficient by reason of its failure to consider the potential effects of the development the subject of the Ardderroo application when considering the in-combination effects of the present development on the relevant European sites. In my view, this contention is simply unstateable. The Ardderroo application was considered and refused by the Board. The development the subject of that application would not, therefore, proceed, at least on foot of the application then in being. There would, therefore, be no effects of that development to be considered as part of the assessment of the in-combination effects of the development the subject of the proceedings. In those circumstances, there was no wrongful failure by the Board to consider the effects of the development the subject of the Ardderroo application when considering the development at issue in these proceedings. I agree that the development, the subject of the Ardderroo application, was a "*dead*" development. Accordingly, I reject the applicants' challenge to the Board's decision on the grounds of its failure to consider the effects of the Ardderroo application when carrying out the AA in respect of this development.

Environmental Impact Assessment

General

224. While the main thrust of the applicants' challenge to the Board's decision was on AA grounds, the applicants did also seek to challenge the decision on EIA grounds. Written submissions from all parties were directed to this aspect of the applicants' case and the applicants' counsel expressly adopted the applicants' written submissions at the hearing. However, very little time was spent at the hearing in dealing with the EIA part of case.

225. It was difficult to identify precisely the EIA grounds which the applicant wished to pursue in support of their challenge to the Board's decision. I referred earlier in this judgment to the EIA grounds set out in the amended statement of grounds and the arguments advanced by the applicants in their written submissions on that aspect of the case. Apart from the very general and non-particularised grounds advanced by the applicants in grounds 6, 7 and 8 of the amended statement of grounds (which, in my view, for the same reasons outlined earlier in respect of the very AA grounds were far too vague and general to support a challenge to the Board's decision without further particulars), the case which the applicants appeared to be making (and pursuing at the hearing) seemed to be the following: -

(1) The EIA purportedly carried out by the Board (and its inspector) failed to comply with the requirements for a valid EIA under EU law, as the Board and its inspector did not engage with the submissions and observations made by the interested parties and observers (including the applicants) and the Board (and its inspector) did not carry out an assessment of the environmental effects of the development and of the submissions and observations made to it, but rather assessed the EIS (and, by inference, also the revised EIS) submitted by the Developer.

(2) The Board failed to record the assessment carried out in breach of s. 172(1J) of the 2000 Act, in that the Board decision recorded that the Board was adopting the inspector's report on the EIS and not the assessment purportedly carried out by the inspector. Although not pleaded in the amended statement of grounds, the applicants' written submissions did advance the contention that the Board was in breach of s. 172(1J).

(3) The EIA purportedly carried out by the Board (and its inspector) did not deal with all of the required issues for an EIA, in particular, (a) the grid connection and (b) a cumulative assessment of the proposed development with other relevant developments. The applicants were strongly supported by Mr. Walsh in respect of this aspect of their challenge to the decision on EIA grounds.

Legislative and other requirements: EIA

226. It is, I believe, unnecessary for me to set out at length in this judgment the legal provisions governing the carrying out of an EIA by the Board under the EIA Directive and part X of the 2000 Act. They have been set out and considered in numerous previous cases and were summarised by the Supreme Court in *Connelly*. The relevant EIA Directive for the purposes of the development, the subject of these proceedings, was the codified Directive, Directive 2011/92/EU. The essential requirements of that Directive were set out

in part X of the 2000 Act which provided for EIAs. The relevant provisions of part X of the 2000 Act were set out by the Supreme Court at paras. 8.3 to 8.5 of the judgment in *Connelly*. As noted earlier, the Supreme Court also pointed to the fundamental difference between an EIA and an AA, with a valid AA being essential to confer jurisdiction on the Board to grant permission for a proposed development (approving the judgment of Finlay Geoghegan J. in the High Court in *Kelly* in that regard). The final point to note before addressing the applicants' case on EIA grounds is that it is well established that the onus of proving that the Board did not carry out an AA (when it stated in its decision that it had done) rests upon the applicant (see*: Lancefort Limited v. An Bord Pleanála,* unreported High Court (McGuinness J.), 12th March, 1998; *Harrington v. An Bord Pleanála* [2014] IEHC 232; *Aherne v. An Bord Pleanála* [2015] IEHC 606; and *O'Sullivan & ors v. An Bord Pleanála* [2017] IEHC 716). The onus, therefore, rests on the applicants in this case to establish that the Board did not carry out an EIA and, in particular, did not assess the relevant aspects of the proposed development including the grid connection and the cumulative effects of the development with other wind farm developments in the area, as alleged by the applicants and by Mr. Walsh.

The Board's decision

227. The starting point for a consideration of the applicants' case on EIA grounds is the decision of the Board itself as recorded in the Board Order. As set out earlier, the matters to which the Board had regard in making its decision which were set out in the decision under the heading "*Reasons and Considerations*" included: -

> *(f) the pattern of existing and permitted development in the area, including other wind farms*
>
> …
>
> *(j) the submissions and observations made in connection with the planning application and the appeal, and the report of the Inspector.*

228. The Board expressly stated that it considered the EIS and the revised and updated EIS and other material and *"completed an Environmental Impact Assessment… as documented below"* (p. 6 of 33 of the Board Order). As noted previously, the Board's decision contained separate sections for AA and EIA. For present purposes, we are concerned with the EIA section. The Board expressly recorded that it had considered the EIS, "*the submissions on file*" and the inspector's assessment of the environmental impacts of the proposed development at a meeting on 12th May, 2015, adopted the inspector's report on the EIS and concurred with the analysis and conclusions of the inspector including those relating to the impact of the proposed development on "*Annex 1 bird species*". The Board also noted that issues had arisen in relation to the grid connection as a consequence of the judgment in *O'Grianna*. The Board referred to the s. 132 request and to the response to that request received from the Developer, as well as to the fact that responses and comments had been received from a number of parties and observers including the applicants, Mr. Walsh and a number of the other notice parties. The Board stated that it had: -

"considered the further information received from the [Developer] including the revised Environmental Impact Statement together with the comments from observers."

The Board then stated: -

"The Board considered the Environmental Impact Statement (sic) and revised Environmental Statement submitted with the application, and other submissions on file, was adequate in identifying and describing the direct effects, indirect effects and cumulative effects in combination with other projects of the proposed development, including grid connection."

229. The Board was, therefore, expressly stating that the information provided to it in the form of the EIS and the revised EIS together with other submissions made to it was adequate for the purposes of identifying and describing, amongst other things, the *"cumulative effects*" of the proposed development "*in combination with other projects*", including the grid connection.

230. The Board then stated: -

"*The Board completed an Environmental Impact Assessment and concluded that the proposed development, subject to compliance with the mitigation measures proposed, and subject to compliance with the conditions set out below, would not have unacceptable impacts on the environment."* (p. 17 of 33 of the Board Order).

231. The Board expressly stated that it had adopted the inspector's report and concurred with its analysis. While noting that the revised EIS and other information provided by the Developer on foot of the s. 132 request was not referred back by the Board to the inspector for a further or addendum report, it will be recalled that the Board had adopted a similar course of action in *Connelly*. The applicants do not make the case that the Board was obliged to seek a further or addendum report from the inspector (nor, in my view, could such a case succeed, on the facts presented in this case in any event). Furthermore, the judgment of the Supreme Court in *Connelly* makes clear that the reasons for the Board's decision (including that part of its decision concerning the EIA carried out by it) can "*at a minimum*" be found in the inspector's report and in documents referred to either expressly in the report or by necessary implication, as well as in other information provided to it and in the final decision of the Board itself (para. 9.8). It will be necessary, therefore, to refer to some parts of the inspector's report when considering the contentions advanced by the applicants in respect of this part of their case.

EIA grounds of challenge

(1) Non-engagement by Board with submissions/observations made/assessment of EIS rather than of effects

232. The applicants contended that the Board (and its inspector) did not engage with the submissions and observations made to it and did not carry out an assessment of the environmental effects of the proposed development, but rather of the EIS (and revised

EIS submitted by the Developer). The Board and the Developer rejected this and pointed to the decision of the Board itself and to the inspector's report.

233. I am not satisfied that there is any substance or merit to this contention made by the applicants. The Board decision itself makes clear that, prior to making the s. 132 request, the Board considered the EIS, the submissions on file and "*the Inspector's assessment of the environmental impacts"* of the development, adopted the inspector's report on the EIS and concurred with its analysis and conclusions. It then requested further information and a revised EIS and NIS which were provided by the Developer. Having done so, and having sought and obtained observations and submissions from interested parties and observers, the Board decision records that it had considered all of that further information and that it was adequate to identify and describe the effects (direct, indirect and cumulative) of the development in combination with other projects and that the Board was in a position to complete an EIA in respect of the proposed development.

234. I am not satisfied that the applicants have discharged the onus of establishing that the Board did not do what it said it had done, including its consideration of the inspector's assessment of the environmental impacts of the proposed development and its consideration of the direct, indirect and cumulative effects of the development as well as the submissions and observations made to it. In any event, and irrespective of where the onus of proof rests, it is clear from a reading of the inspector's report that the inspector did engage with and fully consider the submissions and observations made in relation to the matters addressed in her report. It is unnecessary to quote extensively from the inspector's report. However, it is appropriate to observe that the inspector expressly stated (at p. 69 of her report under the heading *"Likely Significant Direct and Indirect Effects"*) as follows: -

> *"There is a large degree of commonality between the significant issues identified and assessed under the planning and appropriate assessments and the likely significant direct and indirect effects of the proposed development on the environment. The Environmental Impact Assessment as set out below should, therefore, be read in conjunction with the general planning assessment at section 11 above and the appropriate assessment at section 13 below."*

The inspector made clear, therefore, that she was carrying out an EIA (and did so in s. 12.0 of her report). However, she also made clear that it was necessary to read that part of her report and the assessment contained therein in conjunction with other parts of the report, including the general planning assessment in s. 11.0 and the AA in s. 13.0.

235. In s. 11.0 of her report, the inspector carried out a comprehensive assessment of a number of significant issues which arose relation to the development including issues concerning peat stability, water quality and surface water drainage. It is evident from that section of her report that the inspector did fully engage with the submissions and evidence provided on behalf of the various parties (including those who had appealed from the grant of permission by the Council) on those issues, including peat stability. The inspector considered the respective submissions made in a comprehensive fashion and set

out her conclusions in relation to the issues raised. I do not accept that there is any basis for criticising the inspector's engagement with the submissions made. That is similarly so in relation to the EIA carried out by the inspector at s. 12.0 of her report. It is true that the inspector referred at the outset of that section of her report to the EIS submitted and to the matters covered by the EIS including the potential impacts of the proposed development with other permitted wind farm developments in the vicinity (p. 68 of the inspector's report). The inspector's report then considered the environmental issues arising and set out her conclusion on the EIA carried out by her. She stated at p. 75) as follows: -

"I have considered the EIS and all submissions/observations received which are relevant to impacts on the environment, inspected the site, and have assessed the direct, indirect, and cumulative effects of the development on the environment. Having regard to the above, I am of the opinion that the direct and indirect effects on the environment of the proposed development have been identified and described. It is my view that, excepting my concerns in respect of the impact on an Annex 1 bird species which I outline in greater detail in the AA below, the potential impact of the proposed development can be adequately mitigated and is not likely to result in a significant impact on the environment."

236. As noted earlier, the Board considered the inspector's report in May, 2015 and made the s. 132 request which required the Developer to deal not only with the inspector's concerns in relation to the golden plover, but also with the grid connection issue. The Board then considered the revised EIS (which considered the grid connection issue) as well as the revised NIS and the submissions and observations made to it and carried out the EIA referred to above. I do not accept the submission made by the applicants that it was necessary for the Board to go further than it did or to engage in a more discursive analysis of the information provided on foot of the s. 132 request and the other submissions and observations made to it. I am satisfied that the EIA carried out by the Board was not in breach of any of the provisions of EIA Directive or of part X of the 2000 Act on the basis of this contention advanced by the applicants. The position here is quite different to that which arose in *Balz v. An Bord Pleanála* [2019] IESC 90 in which judgment was delivered after the present case was heard. I am satisfied that (as required by O'Donnell J. at para. 57) relevant submissions were addressed by the Board and its inspector and an explanation was given where they were not accepted (see also: The judgment of McDonald J. in *Sliabh Luachra* at para. 38).

(2) Alleged breach of s. 172(1J) of 2000 Act

237. The applicants' contention here is that the Board failed to comply with s. 172(1J) of the 2000 Act by not providing a record of its evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A. This contention is related to that addressed at (1) above. In essence, what the applicant appeared to be saying that the Board Order (which recorded the Board's decision) did not set out its

evaluation of the direct and indirect effects of the proposed development as required by section 172(1J). As noted earlier, that was not a point expressly pleaded by the applicants although it was referred to in their written submissions.

238. I do not accept the applicants' contention that the Board failed to comply with the provisions of s. 172(1J) in its decision for a number of reasons. First, I note and agree with what was stated by Haughton J. in the High Court in *Ratheniska Timahoe and Spink (RTS) Substation Action Group v. An Bord Pleanála* [2015] IEHC 18 where a similar argument was made to that now made by the applicants. The court in that case rejected the argument that the Board had failed to "*record*" an EIA in breach of section 172(1J). Haughton J. accepted that the Board was entitled to have regard to and adopt the report of its inspector under s. 172(1H) and that it was only obliged to state the main reasons and considerations for its decision. It seems to me that the Board has done so in the present case. Second, the judgment of the Supreme Court in *Connelly* makes clear that the reasons for the Board's decision (and for the EIA carried out by it) can be found not only in the Board's decision, but also in the report of its inspector and in other documents referred to expressly or by necessary implication in that report and in the decision, as well as in other information provided to the Board. The decision of the Board as recorded in the Board Order made clear the documents to which the Board had regard in carrying out the EIA. Those documents (including the inspector's report, the EIS and the revised EIS) did contain an extensive evaluation of the direct and indirect effects of the proposed development. In my view, therefore, there was no breach of the requirements of section 172(1J).

(3) EIA not deal with grid connection or cumulative assessment with other developments

239. The applicants maintained that the EIA did not deal with the issues of grid connection or assess the cumulative effect of the proposed development with other wind farm developments in the area. I will deal first with the issue of grid connection and then with the assessment of cumulative effects.

(a) Grid connection

240. The applicants were correct in stating that the inspector did not deal with the question of grid connection. However, they were incorrect in asserting that the Board did not carry out an EIA of the development including the grid connection. The Board describe that, in light of the decision of the High Court in *O'Grianna*, it was necessary for the Developer to submit a revised EIS to enable the Board to complete an EIA in relation to the overall proposal, including the grid connection. In the s. 132 request issued on 25th May, 2015, the Board explained why it was requesting that further material. The Board explained that, without detailed proposals for the connection to the national grid, it might not be possible for the Board to complete an assessment as required under the EIA Directive. That is why the Board sought details of the grid connection to enable it to carry out an EIA in accordance with the requirements of the EIA Directive. The Developer was requested to provide specific details in relation to the proposed connection. The Board

also stated (in the s. 132 request) that the EIA should consider the cumulative effects of the proposed wind farm and the proposed grid connection. The Developer did so in the revised EIS. The Board sought and obtained further observations and submissions and addressed the position in relation to the grid development in its decision. The Board was satisfied that the information provided was adequate in identifying and describing the direct, indirect and cumulative effects of the proposed development and completed an EIA. In my view, the applicants were incorrect in their contention that the Board did not carry out an EIA in respect of the proposed development incorporating the grid connection. The Board stated that it had done so, having requested additional information and a revised EIS in relation to the proposed development with the grid connection. The grid connection and the revised EIS (requested to take account of the grid connection) were expressly referred to in the decision. Other than making a bald assertion that the Board did not carry out an EIA of the development incorporating the grid connection, the applicants did not advance any other evidence or material in an attempt to persuade the court that no such EIA had been carried out by the Board. Further, no particular or specific environmental concerns were advanced by the applicants in relation to the grid connection. Despite the fact that the onus of proof was on the applicants to establish that, notwithstanding that the Board stated in its decision that it had carried out an EIA in respect of all aspects of the development, it did not, the applicants have failed to put forward any evidence, or anything other than mere assertion, to displace or dislodge the presumption arising from what was stated in the Board's decision that the Board had in fact carried out such an assessment. After all, that was the very purpose of requesting the revised EIS in the s. 132 request. I am satisfied, therefore, that there is no basis for this aspect of the applicants' claim and I reject it.

(b) Cumulative assessment with other wind farms

241. The applicants were supported in this aspect of their claim by Mr. Walsh. They argued that neither the inspector nor the Board carried out an assessment of the cumulative effects of the proposed development with other wind farms in the area. This argument was related to the argument advanced by the applicants (and supported by Mr. Walsh) that the Board failed to carry out an AA in respect of the potential adverse impacts of the development in combination with other wind farm developments in the area. I have addressed and rejected those arguments in the context of the AA part of the case. It seems to me that the arguments are equally unmeritorious in respect of this part of the case.

242. I say this for a number of reasons. First, the Board's decision (as recorded in the Board Order) expressly stated that it had regard to other permitted developments in the area, including other wind farms. The Board's decision also expressly stated that it had considered the cumulative effects of the proposed development in combination with other projects.

243. Second, the Board expressly adopted the inspector's report which clearly considered, as amended, the cumulative effects of the proposed development. The inspector's report is

replete with references to the consideration of the cumulative effects of the proposed development (including cumulative effects with other permitted wind farms in the vicinity). It is, I believe, again unnecessary to quote extensively from the inspector's report. However, I would refer by way of example to the following sections of the inspector's report (the references are not intended to be exhaustive): Section 11.5, p. 59 (where there is a reference to the "*cumulative view*" in terms of the impact on the wider environment); s. 11.5, p. 60 (where there is again a reference to the "*cumulative*" visual impact of the proposed development); s. 11.6.1, p. 62 (where there is a reference to the *"cumulative impact of the development with other wind farms in the area"*); s. 12.0 p. 68 (where the inspector referred to the EIS and, in particular, noted that the EIS took into account permitted wind farm developments in the vicinity of the site *"as part of the cumulative impact assessment*"); s. 12.0 p. 70 (where, in the context of ornithology, reference was made to the "*cumulative impacts*" by reason of the other permitted wind turbines within 10km of the proposed site); s. 12.0 p. 72 (where, in the context of noise and vibration, there is a reference to the "*cumulative impact*" of the development with other wind farms in the area); s. 12.0 p. 73 (where, in the context of land and visual impact, there was a reference to the cumulative impacts of the proposed development); s. 12.0 p. 73 (where there was a reference to the "*cumulative construction phase impact with the nearby Galway Wind Park"*); s. 12.0, p. 75 (where, in the conclusion section to the EIA part of the report, the inspector expressly stated that she had assessed the direct, indirect and "*cumulative effects*" of the development on the environment).

244. I agree with the submission advanced by the Board (and supported by the Developer) that it is only necessary to refer to cumulative effects of a proposed development where relevant. In any event, the inspector did consider and assess the cumulative effects of the proposed development on the environment, including the accumulation of effects between the proposed development and other proposed wind farms in the area. Since the Board was entitled to have regard to and adopt the inspector's report (s. 172(1H) of the 2000 Act) and since the judgment of the Supreme Court in *Connelly* makes clear that the reasons for the Board's decision can be found in the inspector's report, and since the Board expressly adopted the inspector's report and the EIA carried out by her, as well as carrying out its own assessment of the advised EIS and other information provided, it seems to me that there is no basis whatsoever for the contention by the applicants (and by Mr. Walsh) that the Board did not consider the cumulative effects of the development on the environment.

245. Finally, insofar as Mr. Walsh contended that the Board failed to take into account and assess the effects of the proposed development with the Ardderroo development and that, as a consequence, the EIA carried out by the Board was deficient, I would simply note here that since the Board refused permission for the Ardderroo application, there will be no effects from the development the subject of that application as no development was permitted on foot of the application.

Conclusions

246. In conclusion, for the reasons set out in some detail in this judgment, I have concluded that the applicants must fail in their challenge to the Board's decision on both AA and EIA grounds.

247. I have concluded that, insofar as the AA part of the case is concerned, the Board complied with its duties and obligations under the Habitats Directive, as interpreted and applied by the CJEU and of the Irish courts. In particular, I have concluded that the Board correctly identified and applied the test for a valid AA under EU law as set out and discussed by the Supreme Court in Connelly and that there is nothing in the recent judgment of the CJEU in *Holohan* which would persuade me to reach a different conclusion.

248. I have also concluded that the applicants have failed in their challenge to the Board's decision on EIA grounds. I am satisfied that the Board did fully comply with its obligations under the EIA Directive and under part X of the 2000 Act in relation to the EIA carried out by it in respect of the effects of the proposed development on the environment. In particular, I am satisfied that the Board did engage with the submissions and observations advanced by the observers and other parties and did assess the effects of the proposed development on the environment, rather than simply assessing the EIS (and revised EIS) provided by the Developer. I am further satisfied that the Board did not breach the provisions of s. 172(1J) of the 2000 Act in its decision. In addition, contrary to the submissions made by the applicants (and supported by Mr. Walsh), I am satisfied that the Board did carry out an EIA in respect of the grid connection and did assess the cumulative effects of the proposed development, including the cumulative effects with other permitted wind farms in the area.

249. In the circumstances, I reject the applicants' challenge to the Board's decision and refuse their application for judicial review.