THE HIGH COURT

THE COMMERCIAL COURT

JUDICIAL REVIEW

[2023] IEHC 730

Record Number: 2019/768JR

BETWEEN/

KIARAN BROPHY AND PETER SWEETMAN

APPLICANTS

- AND-

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

- AND -

PINEWOOD WIND LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 19th day of December, 2023

1. On 3 September 2019 the first respondent (*"the Board"*) granted two planning permissions in favour of the Notice Party (*"Pinewood"*). Put in general terms, these permissions allowed Pinewood to develop a wind farm together with site access tracks, underground electricity and communications, cabling and site drainage on lands in Co. Laois

and Co. Kilkenny. The applicants commenced proceedings by way of judicial review seeking orders quashing the grant of these permissions, and a variety of other reliefs.

2. Initially, Ireland and the Attorney General were joined as respondents to the proceedings. At some point in time in advance of the hearing of the action, the applicants decided they would no longer proceed against the State respondents. Accordingly, Ireland and the Attorney General were released from the proceedings.

3. In addition, the very broad reliefs sought (and the grounds on which these reliefs were said to be based) were, by the time of the delivery of the written submissions of the applicants, significantly reduced. In those written legal submissions, five issues were identified as been alive in the proceedings. These were:

> "(a) In assessing the impact of the proposed development on bats, the inspector and the board itself relied on a document known as TIN051 Bats and On Shore Wind Turbines – Interim Guidance (2nd Edition) 2012 Natural England. At the time the inspector prepared her reports the 2012 Guidance was still the current authority; however, by the time the board made its decision (almost two years after the Inspectors Report) the 2012 "Interim" Guidance had been replaced by the document Bats and On Shore Wind Turbines – Survey, Assessment and Mitigation, January 2019, Scottish National Heritage, Natural England and others. The applicants contend that the 2019 guidance differs from the 2012 guidance in a manner which is relevant to this development in a material way. This is relevant both to the EIA Directive and the *"strict system of protection"* which applies to bats under Articles 12-16 of the Habitats Directive.
>
> (b) In the course of the process before Laois County Council, the Developer amended the proposal to include 14 permanent surface water ponds across the

wind farm site. The applicants contend that these were not properly assessed for the purposes of the EIA Directive and Habitats Directive – failing to assess whether, for example, the ponds would attract species such as the Kingfisher and bats ? these into conflict with the turbines or whether, for example the desilting proposals for these ponds would pose a risk to the Freshwater Pearl Mussel and/or other species; and failed to consider the effect of operating the ponds post-decommissioning of the wind farm. The applicants contend that there was no scientific information at all before the First Respondent in relation to the ecological role an ecological effects of the 14 ponds and none was sought from the developer. Failure to properly consider the ponds had consequences from both the Appropriate Assessment Screening and Appropriate Assessment.

(c) The Respondent erred in law and acted contrary to Article 5(3)(d) and Annexe IV of Directive 2011/92/EU for failing to ensure that the notice party supplied information in relation to the environmental impact of both the chosen option and of all the main alternatives studied, together with the reasons for its choice, taking into account at least the environmental effects, even if such an alternative was rejected at an early stage.

(d) In breach of the Habitats Directive, the respondent left certain matters over to future assessment by and approval of the Planning Authorities.

(e) The respondents failed to give adequate reasons regarding the environmental impact assessment and appropriate assessment it purported to have made."

4. While these issues were described as *"non exhaustive"* in the written submissions of the applicants, their counsel confirmed at the start of the hearing that this was a comprehensive list of the issues for the court to resolve, at least as the applicants saw it. Counsel for the Board and for Pinewood agreed with this position.

5. During the course of the four day hearing, various of these issues fell away as they were abandoned by the applicants.

6. At Day 2 of the hearing, p.65 of the transcript, counsel for the applicants said:

> *"Just having had a look at the material from the EIS on the inspector overnight, I am not convinced that I am likely to succeed in [the consideration of alternatives] and I think there is probably enough in the case – although at that stage I thought there was a bit more in the case."*

7. Counsel went on to clarify that issue (c) was *"gone now"*.

8. With regard to issue (b), on Day 3 of the hearing (at p.98 of the transcript), and during the course of the submissions of counsel for the Board, counsel for the applicants stated:

> *"You can put a line through (b)."*

9. Counsel then clarified:

> *"I mean, so that the habitats point is now down to (d), leaving certain matters over to future assessment by an approval of the planning authority."*

10. With regard to (d), the leaving over of matters for future assessment and approval of planning authorities, during the same exchange, I asked counsel for the applicants (at p.99 of the transcript):-

"As I understand the argument with regard to (d), it is two-pronged: one is that in leaving over the question of the steps to be taken to prevent damage to the mussels, that that is something that was wrong on the part of the Board;

and, secondly, there is an associated reasons argument, that they never gave reasons to why they were doing that."

11. Counsel for the applicants confirmed that that was correct.

12. However, the two elements of issue (d) did not survive the following day's hearing. On Day 4, at p.121 of the transcript, counsel for the applicants made this statement:

"Now, Judge, I am going to say that in relation to the issue of leaving over the post consent measures, I am having to acknowledge that there are a number of difficulties ahead of me in that regard: first, the issue of Mr. O'Donnell's affidavit, in whatever form it come in; there is also the difficulty that [counsel for the Board] said I was relying on ***Sliabh Luchra****. I wasn't really relying on them, I was attempting to distinguish them. But I think in relation to Mr. O'Donnell's affidavit and the flow, I acknowledge that I have a problem there and I can't proceed in relation to that particular argument."*

13. Shortly, I will describe the issue with regard to Mr. O'Donnell's affidavit. The reference to *"the flow"* relates to a submission by counsel for the applicants that the Board had failed to consider the flow of water from the development for which planning permission was granted, and that it could accordingly be an adverse effect on the habitat of the freshwater pearl mussel. The upshot of this, it was argued on behalf of the applicants, was that the flow of water was not something that could properly be addressed in any subsequent agreement with the local planning authority.

14. However, towards the commencement of his reply, counsel for the applicant stated unequivocally that he was not proceeding with this argument. Having set out this position, he further elaborated upon it as follows (at pages 122 and 123 of Day 4):

> *"One of the problems I am acknowledging in relation to the flow issue is [counsel for Pinewood] said I didn't raise that and I think I have to concede that. I mean, we needn't get into arguments about that, because I am not proceeding with the flow issue. But 26(ix) itself is still there and what's left, I suppose, is the reason."*

15. 26(ix) of the grounds upon which the applicants seek relief reads:

> *"(ix) In leaving over to future assessments by and approval of the Planning Authorities the mitigation measures outlined in the preliminary CENP and the preliminary SWMP, the first named respondent erred in failing to ensure that the assessment purportedly carried out under Article 6(3) of the Habitats Directive did not have lacunae and contained complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the work proposed on the protected site concerned."*

16. I asked counsel for the applicant to clarify his position (again at p.123 of the Transcript, Day 4)

> *"But 26(ix) remains in play by reference to the reasons issue?*
>
> *The answer was "Yes".*

It will be immediately apparent that 26(ix) does not refer to reasons at all. There is a ground advanced – at 28(i) – which does:

> *(i) the first respondent erred in law and acted contrary to fair procedures by failing to give adequate reasons for its decision."*

17. In considering the substance of what is left of Issue (d), I will consider whether or not the outstanding argument is, in fact, one that is pleaded at all. Before turning to what remains of the issues in the proceedings, I should describe the position with regard to Mr. O'Donnell's affidavit and, indeed, a further affidavit of Mr. Sweetman (the second applicant) delivered at around the same time.

18. Following the admission of these proceedings into the Commercial List, directions were given as to the delivery of affidavits and the delivery of written submissions. The last step in that process was to be concluded a fortnight before the hearing was scheduled to begin.

19. Some 10 days before the hearing was due to commence, affidavits were sworn by Mr. Sweetman and by Mr. O'Donnell, an engineer. Mr. O'Donnell's affidavit was designed to give expert technical evidence on the surface water management plan and a preliminary construction environmental management plan. That evidence included tests made about the flow of water from the development and the constituents of that flow, including nutrients and solid content in as much as the mussel habitat was concerned; para. 11 of Mr. O'Donnell's affidavit.

20. There was no provision in any Directions Order for the delivery of these affidavits. No application was made for liberty to deliver them, or for the provision (by the Board or Pinewood) of affidavits in response.

21. At the conclusion of the first day's hearing, counsel for the applicants asked for liberty to deliver an affidavit in support of the admission of the late affidavits of Mr. Sweetman and Mr. O'Donnell. He was given until 2 p.m. on the second day of the hearing to do this. At 1 p.m. on the second day of the hearing, counsel informed me that one of his solicitors was

detained at a hearing in the Criminal Courts of Justice building, and that there was a problem with the Wi fi in that building. As a result, no affidavit would be available by 2 p.m.

22. At 2 p.m., I asked counsel for the applicants when he would have an affidavit in place to ground an application to have the two late affidavits admitted. The court was then told that:

> *"I don't think I am going to be in a position to swear an affidavit, Judge, about it."*

23. This is at p.81 of the transcript of Day 2.

24. Counsel then asked to be able to rely upon certain materials in the two affidavits and he was allowed to do so. At p.95 of Day 2 I ruled as follows:

> *"The information, at [counsel for the applicants] request, that I am allowing to go in is, firstly, the 2009 Bat Guidelines – there is no real resistance to that and I can understand why that stance was taken by the Board or by Pinewood – at paras. 10 and 11 of the affidavit of Mr. O'Donnell and "only" those portions of their affidavits. They refer to a standard."*

25. Counsel for the applicant confirmed that these were the only portions of the late affidavits upon which he wished to rely. They were therefore admitted de bene esse for the purpose of the hearing.

26. Ultimately, as I have described, the applicants did not revive their application to have any portion of the late affidavits submitted. Instead, and for a variety of reasons, the applicants abandoned the issue to which either of these affidavits were relevant, namely the potential harm to the Fresh Water Pearl Mussel arising from a lack of clarity in the matters left over to local planning authorities by the Board.

27. I will therefore deal with the remaining issues in the case in the following sequence:

I. The leaving over of matters to the local planning authorities – what remains of Issue (d) in the original list of issues;

II. The failure to give adequate reasons regarding the Environmental Impact Assessment and appropriate assessment – Issue (e) of the original list of issues.

III. The failure to refer to the 2019 Bats and On Shore Wind Turbines Guidance Paper – Item (a) of the original list of issues.

I. The leaving over of matters to local planning authorities.

28. This much reduced ground advanced by the applicants can be summarised as follows. The applicants do not dispute that the Board can leave matters over to be addressed after the grant of planning permission. That is what it did in this case. For example, Condition 6 of the Kilkenny permission requires the following:

"6. Prior to the commencement of works on site, a surface water management plan shall be submitted to and agreed in writing with a Planning Authority and should also have the detailed measures to be undertaken to protect water quality during tree harvesting, construction and operation phase, as well as the schedule for water quality monitoring. Works of a potential to result in pollution and siltation of water sources shall be supervised by an onsite Clerk of Works who will report on compliance with the relevant mitigating measures. The Clerk of Works shall be impowered to halt works where he/she considers that continuation of the works would be likely to result in a significant pollution or siltation incident. In the event of a water pollution incident, or of damage to a river, these reports will be made available to the relevant

statutory authorities and onsite works will cease until authorised to consider by the Planning Authority.

Reason: to prevent water pollution*"*

29. This condition is to be found in identical terms at Condition 10 of the Laois permission. Equally, at Condition 8 of the Kilkenny permission and Condition 21 of the Laois permission require *"a detailed Construction Management Plan, including a monitoring regime…"* to be put in place prior to commencement of development.

30. There are a number of other matters to be agreed with the local Planning Authority prior to any work commencing on foot of the permission granted by the Board.

31. In substance, it is accepted that these types of conditions can be imposed by the Board by reference to *Boland v. An Bord Pleanála*, [1996] 3 IR 435, *Houlihan v. An Bord Pleanála* (Case C-461/17) and *Sliebh Luachra v. An Bord Pleanála* [2019] IEHC 888. There is therefore no issue before me as to whether or not the Board was right in this case to fix these conditions with regard to a range of matters running from surface water to the protection of bats. The only issue is whether or not the Board provided sufficient reasons for leaving it to the local Planning Authority to agree these matters with the developer. Counsel for the applicants put it this way, in his reply (Day 4, at p. 125):

"So again, why leave it over to the Planning Authority? There might be a good reason for doing it, but you won't find it in the decision. Again, it might be because maybe local knowledge is felt to be the best knowledge here. But again, if that's the case, why not say so."

32. It is not immediately clear as to whether the submission now made on behalf of the applicants is (a) that the Board should give reasons for leaving over agreement with regard to certain matters, or (b) that the Board should give reasons to why matters which have been left for agreement have been left over for agreement by the Local Authority as opposed to by any other entity. Giving the constantly shifting case made by the applicants on a number of fronts, this is unfortunate. I have approached the issue on the basis that both of these arguments are now being advanced.

33. It is worth, in considering this ground, to outline its evolution in the case brought by the applicants. That is of particular relevance giving the submission made both by the Board and by Pinewood that this is not a pleaded point.

34. As already noted, Ground 26(ix) says nothing whatsoever about reasons. Instead, this ground contends that the Board had not ensured that the measures outlined in the preliminary CEMP and the preliminary SWNP *"did not have lacunae and contained complete, precise and definitive findings or conclusions capable of removing all reasonable scientific doubt as to the effects of works proposed on a protected site concerned."* This argument was not, at the end of the day, pursued by the applicants. Ground 26(ix) therefore does not avail of the applicant in their submission that they have pleaded that the Board is required to give reasons for leaving over certain matters to the local Planning Authorities.

35. Ground 28(i) does refer to reasons. I have set out this ground at para. 16 of this judgment. The ground is put in broad terms, but ultimately refers back to a failure to give adequate reasons for the Board's *"decision"*.

36. Neither Mr. Brophy nor Mr. Sweetman in their affidavits refer to a potential issue of the Board's failure to give reasons as to why it has left over matters for agreement with local planning authorities. This is despite the fact that, from paras. 35 onwards of his first

affidavit, Mr. Sweetman expressly addresses in some considerable detail the preliminary CEMP and preliminary SWMP documentation. Importantly, at para. 42 of his first affidavit, Mr. Sweetman swears:

> *"42. I say and believe that the preliminary CEMP (and the SWMP which it contains within its appendixes) did not contain information to enable the first respondent to be certain, in leaving over the approval of the final surface water management design to the Planning Authority, that the development consent established the conditions that are strict enough to guarantee that the CEMP and the SWMP proposals will not adversely affect the integrity of Natura 2000 sites.*

37. This paragraph is significant as it refers expressly to the decision to leave over to the local Planning Authority the approval of the final SWMP, but nowhere raises a possible obligation on the part of the Board to give reasons as to why it had decided to do so. Instead, the complaint about the decision of the Board to leave these matters over to a Local Authority is not that is the local authority which is agreeing these measures, or that these measures are been left over at all for subsequent agreement, but rather that the local authority is not been given sufficient precise and watertight directions to ensure that there will be no adverse effect on the integrity of Natura 2000 sites. If the ground currently put forward by the applicants was part of the case made by them, this section of the evidence is where that could have been made clear. It should be said that Mr. Sweetman's grounding affidavit runs to some 84 paragraphs, and in it he does not resist the temptation to make arguments as well as to give evidence. In that way, Mr. Sweetman is in no way unique. However, if it were truly part of the applicant's case that the challenge to the leaving over of matters was not confined to certain aspects of Ground 26 and instead also embraced the general *"reasons"* pleading to be found at Ground 28(i), he would have said so.

38. Even more revealing of the issues actually in the case are the written submissions of the applicants. It will be remembered that this was the document which, very helpfully, set out the five issues which (at that time) these proceedings required to be addressed. It paraphrased the *"reasons"* ground at (e), which is set out at para. 3 of this judgment. However, it will be recalled that issue with (e), as formulated by the applicant's own counsel, simply referred to a failure to give reasons *"regarding the environmental impact assessment and appropriate assessment it purported to have made"*. It did not say that a failure to give reasons with regard to the leaving over of matters was in any way an issue in these proceedings.

39. Lest it be thought, as was suggested by counsel for the applicants, that the failure to give reasons for the leaving over of matters was to be found within one or the other issues put forward by counsel for the applicants in their written submissions, it is worth recalling the precise terms of the only other potentially relevant issue – Issue (d). Again, the text of this issue is set out at para. 3 of this judgment. In summary, it stated that the leaving over of certain matters for future assessment by and approval of the Planning Authorities was *"in breach of the Habitats Directive…"*. However, as already observed in this judgment, counsel for the applicants accepted - albeit it in his reply - that it was perfectly lawful for matters to be left over for future assessment by and approval of the Local Planning Authority.

40. It is plain, therefore, that in formulating the issues which they said the Court has to decide, the applicant's own counsel did not include the question as to whether or not the Board had to give reasons for the leaving over of matters to the Local Planning Authorities.

In the body of the submissions, counsel refer (at para. 22) to a failure to give reasons *"relying on or preferring outdated bat guidance…"*. They go on (at para. 31) to refer to a failure to give proper reasons *"in relation to the assessment of impacts on fauna"* by reference to the questions whether or not an appropriate EIA has been carried out. Strikingly, when dealing (at para. 37*et seq)* with the leaving over of matters to the Planning Authority it is not stated at any point that there is a legal obligation on the part of

the Board to give reasons as to why these matters are been left over to the Planning Authority. This is despite the fact that, at para. 41 of the written submissions, counsel for the applicants state:

> *"The surface water management plan is now to be dealt with by the Planning Authority not the Board – but it is the Board which on the appeal is the competent authority."*

41. This submission is made in the context of the previous paragraph, referring to *Houlihan* and in particular the requirement that conditions *"that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site"* are fixed by the Planning Authority. Again, it is not stated that the Board is under an obligation to give reasons for its decision to leave these matters over to the Local Planning Authority. Instead, the focus of this relevant part of the written submission is that the Board had no detailed measures before it (with regard to surface water management) and that therefore there was *"no indication as to why the Board conclude that what it was doing was within the parameters of Houlihan"*. Again, this submission agitates the question of whether or not the Board had laid down sufficiently strict criteria for any subsequent decision. It does not advance an argument that the Board was obliged to give reasons about this specific issue and failed to do so.

42. The rest of the submissions contain two further references to reasons. These are at paras. 52 and 56 and relate solely to appropriate assessment.

43. The first reference to an alleged obligation on the part of the Bord to give reasons as to why it is deferring matters for subsequent agreement with the Local Planning Authority was at 3.45 p.m. on the second day of the hearing. At this stage, this particular issue advanced by the applicants had shrunk to two aspects (which I note at para. 10 of this judgment). As noted, one of these two was abandoned before the hearing had ended.

44. Given the focus elsewhere in the Statement of Grounds on the leaving over of matters by the Bord, I do not think that the general wording of Ground 28(1) is sufficient to import into these proceedings a specific ground to the effect that the Bord is required to give reasons as to why it has left over certain matters for subsequent agreement. That view is supported by the fact that nowhere in the affidavits filed on behalf of the applicants is any such contention advanced, the fact that the written submissions of the applicants are, in fact, at variance that the idea that this argument was part of the applicants' case, and that it was only late in the hearing that this specific proposition about reasons was ever put forward on behalf of the applicants.

45. Counsel for Pinewood submitted to me that I should follow the approach of Barniville J. (as he then was) in *Eoin* Kelly *v. An Bord Pleanála* [2019] IEHC 84. At para. 141 of his judgment, Barniville J. sets out the terms of O.84, r.20(3) of the Rules of the Superior Courts as follows:

> *"It shall not be sufficient for an applicant to give as any of his grounds for the purpose 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."*

46. At para. 125, Barniville J. observes that this provision was inserted by way of an amendment to O. 84 of the Rules to give effect to the views expressed by Murray C.J. in in *AP v. DPP* [2011] 1 IR 729. At para. 5 of *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".

47. Barniville J. went on to quote extensively from a subsequent portion of the judgment of Murray C.J. This portion included (at para. 9 of the judgment in *AP*) the following:

"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 such seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an 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 if goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear…'

48. The Board and Pinewood were perfectly clear in their objection to this ground being advanced, as it was not pleaded. In addition, no application was made on behalf of the applicants to permit this ground to be argued.

49. In *Eoin Kelly*, Barniville J. proceeded (at para. 127) to refer to the judgment of Haughton J. in *Alen-Buckley* [2017] IEHC 541;

"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."

50. As is noted by Barniville J., in *Alen-Buckley* Haughton J. mirrored the approach taking by Murray CJ in *AP* and said:

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

51. Barniville J. concluded (at para. 128):

> *"In my view, the applicant has not complied with the provisions of O. 84, r. 20(3) RSC in relation to the manner in which this ground has been pleaded. While the applicant has pleaded in general terms that there was improper reliance in the screening report and by the Board's inspector on mitigation measures, the applicant did not provide particulars of what those alleged mitigation measures were and did not identify in respect of this ground of challenge the facts or matters relied upon by him as supporting the ground. All of this was required by O. 84, r. 20(3) RSC. I was not provided with any convincing reason as to why the applicant did not provide such particulars and evidence of the matters relied upon in support of this ground of challenge until this was done very belatedly and in very laconic terms in Mr. Downey's affidavit. In my view, not only did the applicant not comply with the provisions of O. 84, r. 20(3) RSC but he also failed to comply with the strictures set out by Murray C.J. in AP."*

52. Whilst, as counsel for Pinewood observed, Barnville J. did permit the disputed grounds to be argued in the specific circumstances of that case, this was because he was satisfied that neither the Bord nor the Notice Party had been prejudiced. However, it is clear from the balance of para. 127 of the judgment in *Eoin Kelly* that the Notice Party had been able *"to guess what the applicant was referring to…"* and deal with the un-pleaded case on affidavit. That is not the case here. This specific ground was, as already noted, first raised half-way

through the hearing, and immediately identified by the Bord and Pinewood as one which had not been pleaded, and which they had not come to meet. Ultimately, none of the parties addressed the question of prejudice.

53. It is clear from the authorities that I have a discretion to permit the applicants to argue this ground. The possibility of prejudice to the Bord and the Notice Party is not the only factor; on the basis of the approach taking by Barniville J., if such prejudice can be established beyond pleaded grounds will not be permitted to be advanced. However, even in the absence, I must consider whether or not applicants should be allowed to advance a ground which is either not pleaded at all (or not pleaded properly) in circumstances where this ground is put forward at virtually the last possible moment – namely towards the conclusion of oral submissions which have ranged over a two-day period. This is particularly so where the applicants seek to do something which Haughton J. (in *Alen-Buckley*) has expressly described as not permissible, namely *"linking new matters back to generally pleaded grounds…"*.

54. In my view, the appropriate exercise of discretion would be to refuse to allow such grounds to be advanced. They are simply put forward too late. That is especially so in the context of a Case Managed List. Where it possible for parties in judicial review proceedings (where leave of the Court is required) to add grounds halfway through a trial of an action, this would wreak havoc with the running of any list, whether or not a specific prejudice is caused to the opposing parties. This is a proper consideration to take into account in determining how the court's discretion should be exercised.

55. However, the current situation should be considered from even more fundamental perspective. As I have said, counsel for Pinewood opened extensively the judgment of Barniville J. in *Eoin Kelly*. While he did not open the observations of Murray C.J. in *AP* to

the effect that the appropriate course of action for an applicant to take is to seek an order *"permitting any extended or new grounds to be argued"*, that passage is to be found in the judgment of Barniville J and is in any event well known. Counsel also opened the observation of Haughton J. in *Alan - Buckley* requiring the pleadings to be amended so as to include *"new arguments or evidence…"*.

56. In his reply, counsel for the applicants did not take issue with the principles set out by Barniville J., Haughton J. and Murray C.J. in the authorities opened by counsel for Pinewood. The gist of counsel's reply was that this issue had been pleaded, albeit it *"in somewhat general form"* (p.124 of Day 4). Importantly, counsel did not seek either the sort of order contemplated by Murray C.J. or of an amendment to the pleadings as stipulated by Haughton J. It was, of course, open to counsel for the applicants to supplement his argument that this issue was already pleaded by seeking (as a fallback) an amendment to the pleadings. This was not done. As I have already observed, had such an application been made my inclination would have been to exercise my discretion in a manner that led to its refusal, most notably because of the lateness of any such application.

57. I therefore find that the ground concerning reasons which the applicants seek to advance (in respect of the decision by the Bord to defer matters for later agreement) goes outside the pleadings. No application was made to amend the pleadings. Had such an application been made, I would have refused it in the exercise of my discretion.

58. I therefore decided Issue (d) against the applicants, on the basis that, as it evolved, this issue was not pleaded. I should say that, had I come to determine the issue, I would have done so in favour of the Bord and Pinewood. Apart altogether from a lack of direct authority, no convincing case has been made to me on behalf of the applicants to the affect that there is a requirement to give reasons in these circumstances. It should be kept in mind that in

Houlihan the Court of Justice of the European Union has found that there is no violation of the Habitats Directive where, in appropriate circumstances, matters are left over. Those circumstances are summarised at para. 47 of *Houlihan*, as follows:

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

59. In the current case there is no continuing challenge to any of the conditions of either permission which require matters to be agreed at a later stage. In the concluding passage of his judgment in Connolly v An Bord Pleanala [2018] IESC 31, Clarke C.J. summarised the purpose of requiring the Board to give reasons in particular circumstances (at paragraph 14.1). The reasons given must be "adequate to enable any interested party to know why the Decision…went the way it did and to consider whether there was any legitimate basis for seeking to mount a challenge." In this case, the claim that leaving over matters for subsequent agreement has been made and abandoned; the decision to do so can therefore only be treated as lawful. With regard to the second possible version of this argument, namely that leaving over matters to the local authorities as opposed to the Board must be explained, there is no real submission made as to why this form of deferred agreement would give rise to any risk to any interests (protected by either the Habitats Directive or by any

other piece of cited legislation) such as would require reasons for this specific decision to be provided.

60. On the arguments made to me, therefore, I would have found against the applicants on this ground here they permitted to advance it.

II The failure to give reasons regarding the environmental impact assessment and appropriate assessment

61. Both the Bord and Pinewood resisted the advancing of this ground, on the basis that it had not been pleaded. I need not to go into the pleadings in the same detail I have with regard to the first topic. The general ground – 28(i) - asserts a failure on the part of the Baord to give *"adequate reasons for its decision"*. The Bord's decision, in the context of these proceedings, is set out at D1 and D2 of the Statement of Grounds. D1 reads:

> *"An Order of Certiorari by way of application for judicial review quashing the decision made by the first respondent on or about 03 September 2019 to grant planning permission to the Notice Party for the development and operation of a wind farm…on lands…at County Laois."*

62. D2 reads:

> *"2. An Order of Certiorari by way of application for judicial review quashing the decision made by the first respondent on or about 03 September 2019 to grant planning permission to the Notice Party for the development…at Crutt, ?, Co. Kilkenny."*

63. The only decision referenced in the Statement, therefore, is the decision to grant permission. Elsewhere in the Statement, there are particular complaints in respect of the Appropriate Assessment, and the Environmental Impact Assessment.

64. Nowhere in the Statement is it expressly stated that the Bord failed to give reasons in respect of its conclusion on the Appropriate Assessment.

65. There is also no mention of an alleged failure of the Bord to give reasons in respect of the appropriate assessment in the grounding affidavit of Mr. Brophy, the grounding affidavit of Mr. Sweetman, the supplemental affidavit of Mr. Sweetman or the affidavit of Mr. O'Donnell.

66. The first time this issue was raised was in the written submissions of the applicants. These were delivered about a fortnight before the hearing commenced.

67. I have already indicated the portion of the written submission where this topic was raised. I will now set out the terms in which this is done.

68. At para. 52 of their written submissions, counsel for the applicants' state:

> *"52. 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 the reasons giving for the Bord's determination in an appropriate assessment must include the complete, precise and definitive findings and conclusions relied upon by the Bord as the basis for its determination. They must also include the main rationale or reason of which the Bord considered those findings and conclusions capable of removing all scientific doubt as to the effects of a proposed development on the European site concerned in the light of the its (sic) 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. Eamon (Ted) Kelly v. An Bord Pleanála & Ors.* [2014] IEHC 400*."*

69. As is plain, this is a statement of a general proposition as opposed to a submission which engages the particular facts of this case. Likewise, at para. 56 counsel for the applicants say:

> *"56. In relation to the obligation to give reasons regarding the AA conclusion, the Supreme Court in Connolly found that it is not sufficient that the decision reaches the appropriate conclusion in respect of the AA. That must be found either in the decision itself or 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."*

70. In their written submissions, counsel for the Board referred to this argument and stated (at para. 7.2):

> *"7.2. This objection was not raised in the Statement of Grounds and cannot now be raised. The please at paras E(28)(1) states that the Bord erred in law and acted contrary to fair procedures by failing to give adequate reasons for its decision. No reference was made to inadequate reasons in the context of AA."*

71. Notwithstanding this, the Bord advances the general proposition that it complied with the test in *Connolly v. An Bord Pleanála* [2018] IESC 31.

72. In their submissions, counsel for Pinewood submit:

> *"99. Instead, the applicants have pleaded an entirely new argument in relation to the adequacy of the reasons provided by the Bord for its AA determination. The applicant does raise the issue as to the adequacy of reasons in another single sentence argument:*

"The first respondent erred in law and acted contrary to fair procedures by failing to give adequate reasons for its decision."

However, that is not an argument advanced in respect of the Bord's AA which is criticised extensively by the applicants themselves were in the Statement of Grounds."

73. Counsel for Pinewood go on to argue that the first time this point was raised was in the written submissions of the applicants, that this was contrary to the obligations on the applicants pursuant to O.84, r.20(3) RSC, and that, if necessary, Pinewood would adopt the submissions of the Bord in this regard.

74. The oral submission made on behalf of the applicants with regard to Issue (e) was limited. I have already referred to the fact that, in the context of Issue (d), the question of the failure to give reasons was first raised towards the end of the second day of the hearing. Counsel submitted (at p.147 of Day 2):

"The Bord has not said why it was appropriate to leave these matters over. What they have done is they've adopted (in carrying out the appropriate assessment) they have adopted the report of the inspector, and said – this is just my phrase, it's the Bord's phrase but I think this is the effect that the appropriate assessment done by the inspector effectively becomes the appropriate assessment. That's fine. That is legitimate in itself. There is nothing wrong with that approach if the Board is happy with the appropriate assessment done by the Inspector. Sometimes they might say we have adopted certain bits of the appropriate assessment done by the Inspector but would come to a different conclusion ourselves in relation to the effect on the fresh water Twaite or the Shad or something like that. But the inspector, when the inspector was coming to the idea that certain matters be left over to the Planning Authority, she,

of course, did not know the benefit of the Houlihan decision which was used during her report in October, September, October (sic) 2017."

75. When asked, some minutes later, to explain under what headings various arguments fell, counsel said (at p. 149):

"..What I have just been talking about…relates to (d) and (e), insofar as (e) refers to the Appropriate Assessment."

76. This was the only submission made about the failure to give reasons in respect of the appropriate assessment. No submission was made in respect of failure to give reasons in respect of the Environmental Impact Assessment.

77. In her submissions, counsel for the Bord dealt with this topic by firstly complaining about its late arrival and secondly making the following submissions (Day 4 at p.40):

"And, of course, the fact that the point wasn't pleaded or expressed in the submissions means that we haven't dealt with it in those terms – in fact, we took the view that the Bord in this case had a very detailed Inspector's Report, two in fact between the two developments, and it then gave a very detailed decision in which it addressed expressly the EIA requirements. Can I address expressly the Appropriate Assessment requirements, it gave reasons for its decision and then it imposed conditions and gave reasons for those conditions and that it was difficult to see how there was ***any*** *real case to be made if there was a shortfall in the reasoning requirement"*

78. This submission by counsel for the Board was intermingled with submissions about Issue (d), understandably since they had been run together in the presentation of the case by counsel for the applicants. However, it effectively threw down the gauntlet to counsel for the applicants to explain exactly what was wrong with the reasoning of the Bord in respect

neither of the Environmental Impact Assessment or the Appropriate Assessment. As counsel for the Bord correctly observed, *Connolly* was a case where the Bord had not accepted in its entirety the report of the Inspector. That is not the case here. Counsel for the Bord maintained in the submission which I have quoted that the two reports of the Inspector, accepted and adopted by the Bord, gave detailed reasons in respect of EIA and the AA.

79. In his reply, counsel for the applicants simply did not dispute this. There was a reference (at p.125 of Day 4 of the transcript) to *"authority"... "in the form of Connolly" about the importance of doing reasons in the context of appropriate assessment."* However, that reference is made by counsel when dealing with the lack of any specific authority requiring the Bord to give reasons as to why it was leaving matters over for subsequent agreement, as opposed to Issue (e).

80. The position with regard to this issue is therefore:

(i) The specific issue as set out at (e) of the applicants' written submissions, was not properly pleaded by them.

(ii) The assertions contained in the written submissions of the Bord and the written submissions of Pinewood were not the subject of any real engagement by counsel for the applicants.

(iii) No application was made to amend the grounds in order to advance the specific issue as regard to reasons in respect of EIA or the AA.

(iv) The submission by counsel for the Bord that the Inspectors Report (adopted by the Bord) was one in which the relevant reasons were to be found was not addressed by counsel for the applicants, and still less disputed by him.

(v) No specific inadequacy in the reports of the Inspector, or the adoption of those reports by the Bord, was identified on behalf of the applicants at any time.

(vi) The reports of the Inspector do propose conclusions in respect of the AA and EIA and, in that regard, their adoption by the Bord means that it is possible to identify sufficient reasons as required by the judgment of Clarke C.J. in *Connolly*.

81. I have therefore decided that the ground is not properly pleaded, and that as no application has been made to amend the pleadings it is not one which I need to decide. Had such an application been made to amend, and for the reasons set out with regard to the previous issue, I would have hesitated to allow such an amendment. The only material difference between the first issue and this issue is that the ground in this case is advanced somewhat earlier (with the delivery of the written submissions) but nonetheless quite late in the day. In any event, the applicants have not put up any meaningful case that the Bord has not giving reasons in respect of either the EIA or the AA. For that reason, I would decide the issue against the applicants.

III The Failure to refer to the 2019 Bats and Onshore Wind Turbines Guidance Paper

This issue arises from Ground 25(i) of the Statement of Grounds, which reads as follows:

"(i) In deciding not to uphold the position of Laois County Council to refuse proposed wind farm for its effect on bats and hedgerow, the first named defendant erred in failing to apply best scientific knowledge in the assessment of bats. The first respondent knew or ought to have known that the Natural England bat guidance relied on by the Notice Party and the Inspector was

> updated significantly in January 2019. The Board of the first respondent failed to use this updated guidance to properly assess the impact to bats including the Leisler bat for which the guidance no longer relies on buffer distances for protection and for which additional mitigation measures must be assessed, and the Common Pipistrelle and Soprano Pipistrelle who are now both regarded as being at high risk from wind turbines rather than the medium risk allocation used by the developer when relying on the 2009 guidance."

82. The applicants have taken upon themselves the burden of showing that the earlier Natural England Bat Guidance, as understood by the Inspector and the Board, was in 2019 *"updated significantly"* or, to put it another way, varied in a way that was both relevant and material to the Board's decisions. In the event that it was, there is then a question as to whether or not the Board was under an obligation to familiarise itself with this updated guidance. This ground was not argued in respect of the Common Pipistrelle or the Soprano Pipistrelle.

83. On the first of these two questions, it is submitted in opposition to the applicants' case that the applicants should have led expert evidence to enable the court to assess whether or not the 2019 Natural England Guidelines represented a significant or material change from the earlier guidelines or from the approach taken by the Board or its Inspector. It is also submitted that, even if such evidence is not necessary, the change in wording is not such as to render the Board's decision unlawful.

84. While this entire issue could be decided on the first of these propositions, it is necessary to set out what evidence was available to the Board when it was making its decision.

85. It is, however, helpful at this stage to note how counsel for the applicants described the revision to the Natural England Guidelines. The Inspector, in her report, had recommended that there would be a bat buffer zone set back of 62.5 metres between the turbines and the hedgerows. The Inspector had also made it plain, that even with such a set back,: -

> *"Risk of Leisler's bat collision with turbine rotors cannot be eliminated."* - para. 7.6.9 of the Inspectors report.

86. The 2019 Guidelines, recommending a similar buffer distance, state that for Leisler's bats *"this form of mitigation is unlikely to be effective…"*; para. 7.1.2 of the 2019 Guidelines.

87. On coming to the relevant part of the new guidelines, counsel observed: -

> "Now, it may be Judge, that's not quite the 'ta-dah' moment that I had been hoping for. Because in fairness, as I say, the developer and the inspector had indicated that they might not work. It may go a little bit further in so far as it says that it is *unlikely* to be effective."

88. In setting out the relevant materials, I will in the main follow the sequence adopted by counsel for the applicants in opening the case.

89. The first document which sets out information about the Leisner's bat is the *"non-technical summary"* to the Environmental Impact Statement. At heading 4 *"Flora and Fauna"* the following is stated: -

> "The ecology assessment has also not identified any likely significant impacts on terrestrial animals, bats, terrestrial macro invertebrates, fisheries or aquatic ecology."

The specific section of the EIS dealing in detail with bats is Chapter 4, of Flora and Fauna. The summary set out in paragraph 89 of this judgment relates to Chapter 4.

90. A lengthy section of the chapter begins at 4.3.3.2, dealing exclusively with the question of bats. Having noted that *"existing bat records"* had previously recorded the presence of Leister bats within the two 10 kilometre grid squares covering the proposed development, the report went on to say that: -

> *"The important issue here is that the site is not located in an area which a 'core' area for any bat species."*

In doing so, it referred to the National Biodiversity Data Centre's *"Habitat Suitability"* Index which sets out a range (from zero to one hundred) which defines the suitability of the study area for the bat species involved. Zero is the least favourable; one hundred the most favourable. On that index, the suitability of the development site for the Leisler's bat was given at 30 to 37 which the study indicated was *"also considered to be relatively low."*

91. The EIS went on to record that detailed bat habitat and activity surveys were undertaken during the months of June, July, August, September and October 2014. These studies updated surveys completed during 2012. One persistent theme during the course of the opening of this case by counsel for the applicants was that the 2012 survey had shown that the Leisler's bat was seen most in May, but the 2014 survey had not carried out any monitoring during May of that year. The point which counsel appeared to be driving at was that there had been a deliberate attempt to downplay the presence of the Leisler's bat on the site, by omitting from the 2014 survey the month in which the Leisler's bat was most likely to be spotted. However, it is nowhere pleaded in this case that the behaviour of Pinewood, the Inspector or the Board is in any way unsatisfactory because the bat survey of 2014 did

not include the month of May. On one of the occasions when counsel for the applicants was asked where this point led, he answered: -

> *"Well, Judge, I'm trying desperately to answer your question in a fair way that doesn't lead me into the transgression of the fact that I haven't pleaded that point."*

Instead, counsel for the applicant fell back on the fact that both the Board and Pinewood had argued that (for the purpose of these proceedings) the court should look in the round at the information available in respect of the Leisler's bat. However, taking all relevant information into account is done in the context of the complaints made in the pleadings, and not for the purpose of some roving enquiry into how the planning process was managed with a view to standing up some fresh or unpleaded complaint.

92. To return to the EIS, having set out the near threatened status of Leisler's bat in Ireland, the study went on to say of that species that: -

> *"Leisler's bats are at risk from wind turbines due to their high flying height. Only 1-2 individual Leisler's bats were recorded during on (sic) any given evening/night during the course of the current surveys which were carried out during ideal weather conditions. It is noted that levels of activity were much lower than recorded in the 2012 survey. Despite being a species that emerges early, it was up to an hour after dusk when Leisler's bats were recorded which shows that they were not roosting on the site. This conclusion is supported by the consideration of the poverty of the habitat on the site for the species. The general countryside to the west of the site will be far more suitable for this species, and indeed other bat species.*
>
> *Most of the recorded Pipistrelle bat activity was associated with the forest edge and hedgerows. The Leisler's bats were recorded most often in the middle of the site,*

and at the southwestern part of the site. Bats at the site were recorded both feeding and commuting, and the area of young commercial forestry was found to yield significant insect production. Forestry edges and hedgerows are the most important features for bats on the site, acting as foraging/commuting(?) vectors.

Leisler's bats are of significant conservation importance in Ireland and as they are a high flying species they are at risk from wind turbines. There is a difficulty in mitigating for Leisler's bats as they fly high and don't generally follow linear features. The proposed development site, however, was not found to be particularly important for Leisler's bats owing to the infrequency with which it is overflown and the lack of suitable roosting habitats. What few Leisler's bats are on site will therefore be occasional and erratic visitors. There will be Leisler's bats over any part of the countryside in this part of Ireland during the summer months, and other areas of adjoining countryside are far more suitable for this and other bat species. It is possible that the previous 2012 survey overestimated the number of bats using the site, by counting multiple passes of the same bat for example."

93. The low activity of the Leisler's bat on site in the 2014 survey is then set out. There follows an account, in the EIS, of the five individual dates on which the survey was taken. On the first of these (3rd June, 2014) *"a single Leisler's bat… [was] recorded over an area of scrub to the west of turbine one."*.

94. On the second survey (24th July, 2014) *"a single Leisler's bat was also recorded around midnight. This bat foraged briefly over fields to the west of turbine eleven. A Leisler's bat was also detected over a field to the north of turbine seven."*

95. On the third survey (14th August, 2014) the table in the EIS suggests that there was some low Leisler's bat activity. On the final two days (17th September, 2014 and 16th October, 2014) no Leisler's bat activity was noted.

96. At para. 4.3.3.5, the key ecological receptors identified in the EIS were set out. As far as bats were concerned, it is stated that they were recorded within the study area, and that *"Leisler's bat… within the Pinewood's wind farm site are evaluated as being of high local importance."*

97. At 4.4.3.5, the EIS considers potential impacts affecting fauna. With regard to the construction phase, and having again noted that the Leisler's bat had been found on the proposed development site, the EIS finds: -

> *"Overall, the species diversity of bats is found to be low and bat activity levels were considered low."*
>
> *"No loose sites were recorded from the proposed development site and the proposed development would not incur any direct impacts on bat roosts."*
>
> *"The proposed development site is regarded as poor in terms of insect production and therefore bat foraging due to the dominance of habitats of low ecological value, and unimportant with respect to bat roosting in consideration of the lack of buildings and lack of mature native trees. Overall, the proposed development site is suboptimal for bats."*
>
> *"Direct impact from bats are assessed as none."*
>
> See pages 4 - 60 and 4 - 61 of the EIS.

98. With regard to the impact of the proposed development on bats when the wind farm is operating, the study finds: -

> *"Research in the US and in other European countries indicate that wind turbines have a detrimental effect on some bat species such as tree roosting bats, aerial feeding bats and particularly migratory bat species (Natural England Technical Information Note: TIN 051, Rev. 2)."*

The Natural England Guidelines are those which were revised in 2019, and upon which the entirety of this aspect of the applicants' case rests. Leisler's bats are aerial feeding bats, and therefore fall within the species in respect of which wind turbines have a detrimental effect.

99. This is elaborated upon on the following page, page 4-65 of the EIS. It reads: -

> *"Some species of bats, particularly those with strong echo location calls, will exploit open habitats and are more likely to be at risk from collision with turbines. The only species of bat in Ireland with such a strong echo location call is a Leisler's bat. Small numbers of this species are known to use the proposed development site but this usage is characterised as occasional, opportunistic and erratic visits rather than the concentrated, sustained and frequent flights associated with roost and prey rich environments. This bat emits frequencies in the range of 21 kHz to 36 kHz. These relatively low frequencies (resulting in longer waves) allow increased transmission of sound and hence this bat can detect prey at greater distances than other bat species in Ireland. Leisler's bats usually fly ten to seventy metres above ground level (Russ, 1999). Since Leisler's bats regularly fly at turbine rotor heights, they are therefore potentially at risk from direct collision and barotrauma. Bat echo location and collision mortality studies suggests that only a small fraction of detected bat passes near turbines results in collisions (Johnson et al, 2002). Jaen and McCarthy*

(1978) have shown that captive hoary bats are able to avoid colliding with moving objects more successfully than stationary ones. Overall, the impact of the proposed development on Leisler's bats is evaluated as slight-moderate negative in the long term taking account of the above literature and low level and type of Leisler's bat activity at the site during optimal conditions for surveying during the summer of 2014."

100. At 4.4.5, the report sets out the *"impact assessment for the key ecological receptor."* With regard to bats generally the operational impacts are described as:-

"Overall, operational impact affecting bats are slight negative."

With regard to ecological significance, the report finds: -

"In the absence of mitigation measures impacts affecting bats are evaluated as potentially being slight negative."

That broad conclusion is repeated at p. 4 - 79 of the report which reads: -

"Impacts on bats will be slightly negative during the construction phase, due to disturbance. With recounting to promote bat commuting, and insulation of bat boxes, as part of the HSMP, the value of proposed development site would improve for feeding and commuting/foraging bats. The risk of Leisler's bat collision with turbine rotors cannot be eliminated. Overall, the residual impact at operational stage is assessed as neutral."

101. It is this finding, namely that the risk of Leisler's bat collision with turbine rotors *"cannot be eliminated"* that the applicants set up in juxtaposition to the guidance contained in the 2019 Guidelines (to the effect that mitigation measures are *"unlikely to be effective"*).

102. In advance of this conclusion, which appears in the section of the report headed "Residual Impact", the EIS deals with mitigation measures under the heading "Mitigation and Monitoring Measures". The relevant section is under the heading "Fauna" and the subheading "Mitigation Measures During Construction Phase". With regard to bats, the EIS refers to the *Natural England Interim Guidance on Bats* (2009). This, as is apparent from the earlier part of this judgment, is a precursor to the 2019 guidance. The EIS reads: -

> *"The Natural England Guidance suggests that the following formula is used in order to ensure that a distance of 50 metres or more can be ensured between the blade tip and the potential feeding feature at the nearest point: [the formula is then given]."*

A figure depicting the formula in action is then given. This section concludes: -

> *"The above mitigation measures, including recommended distances between turbines and linear features will be set out in the HSMP. Progress on the implementation for the measures for bats will be reported to MPWS. Post construction monitoring of bats will be required in order to establish the effectiveness of the measures that have been put in place."*

103. It is important to note that these mitigation measures, which relate to the construction phrase, are designed to mitigate the overall impact of the turbines on the bat population. They are not specific to the Leisler's bat. It is nowhere suggested in this section of the EIS that following the Natural England 2009 Guidance will be effective in mitigating the impact of the development on the Leisler's bat. As already noted, the conclusion of the EIS with regard to the residual impact of the development is that the risk of collision by the Leisler bat with the rotors *"cannot be eliminated"*.

104. The Natural England Guidelines featured in the EIS discussion of mitigation measures during the construction phase. With regard to mitigation measures during the operational phase, the following is stated (at pp. 4-76 and 4-77): -

> *"Site specific mitigation will be provided at detailed design phase for implementation during the operational phase of the proposed development. A review of the ecological mitigation measures may be required during the operational phase, where further measures are identified with respect to formal conservation measures required."*

The EIS has, as an appendix, a very detailed bat survey and impact assessment (running to some 83 pages). This was prepared in respect of an earlier planning application which was not prosecuted. That application involved a configuration of the turbines which was different to the application which was ultimately successful before the Board. Having opened portions of this document, counsel for the applicants concluded (at p. 83 of Day 2): -

> *"So that's the 2012 monitoring. As I say, I do accept, judge, that the turbine layout is different, so that certainly is relevant. But I think what is particularly important is that the highest evidence they found, are the most frequent activity of Leisler's bat that they found occurred in May."*

The relevance of the level of bat activity in May 2012 is already dealt with in this judgment.

105. For the purpose of the planning application to Laois County Council, the planning department of that local authority commissioned Dr. Fiona McGowan, Consulting Ecologist, to produce a report. The relevant section of the report is headed "Review of the Further Information Provided for the NIS for Proposed Pinewood's Wind Farm, Ballinakill, County

Laois". It describes a buffer zone of at least 50 metres from the turbine. It replicates the formula and figure to be found in the Natural England Guidelines both in 2009 and 2012. Applying this approach, Dr. McGowan concludes: -

> *"For the Pinewood's Wind Farm site I have calculated the bat buffer zone to be 62.47 metres …"*

There is no specific reference to the Leisler's bat. It is not suggested by Dr. McGowan that this buffer provides any particular level of protection to that species.

106. The Inspector's report provided to Laois County Council recommends that the application be refused for a number of reasons. The reason relevant to these proceedings is Reason (1): -

> *"The Planning Authority is not satisfied, on the basis of the information submitted with the application, in particular the construction environmental management plan ..,. having regard to the precautionary principle, that the proposed development would not have a significant adverse effect on the maintenance of the favourable conservation status of bats … in the vicinity of the proposed turbines due to uncertainty in relation to the amount of hedgerow required to be removed during construction and what the extent of associated impact on the foraging habits of bats on the site. The proposed development would, therefore be contrary to the proper planning and sustainable development of the area."*

The word *"habits"* may well be *"habitats"* but this is unclear because of the fact that the Inspector's report, somewhat oddly, is amended in handwriting which is difficult to read.

107. The planning application was refused by Laois County Council on grounds including the ground relating to bats generally. There was no specific reference to or concern about the Leisler's bat.

108. In its appeal, Pinewood referred to the scientific evidence in the EIS which, it observed, *"is not disputed by the Planning Authority…"*; p. 7 of the appeal document.

109. Pinewood also refer to the Natural England Guidelines. It stated the following: -

> "It is noted that the Planning Authority appear to have based their rationale for refusing the proposed development in respect of its purported impact on bats due to uncertainty in relation to the amount of hedgerow required to be removed. The EIS and preliminarily CEMP are clear that the required set back distances to hedgerows in accordance with the *Natural England Guidelines* is calculated as 36 metres and there is no ambiguity on that matter. However, Ms. McGowan, on behalf of the Planning Authority, arrives at a different calculation and puts the required set back distance at 62.5 metres, this (is on ?) more recent advice from Carlin, Mitchell and Jones (2012). The applicants carried out an analysis of the affected hedgerow together with the felling area for commercial forestry using both the 36 metre set back as included in the EIS submitted, and a 62.5 metre set back as suggested by Ms. McGowan… It should be noted that the figures outlined in table 2 may be subject to change due to the micrositing of the wind turbine. These changes may bring about a minor increase or minor decrease in the level of hedgerow replacement and forestry felling required, however, any changes will be immaterial and will not impact upon the substantive findings of the EIS."

Pinewood go on to say that they would accept the 62.5 metre buffer zone suggested by Dr. McGowan.

110. Again, nowhere in the appeal document is it suggested that the 62.5 metre set back will avoid the development having an adverse impact on the Leisner's bat. The position remains as outlined in the EIS, namely that adverse impact on that endangered species of bat cannot be excluded.

111. I now come to the Inspector's report to the Board. At para. 7.67, the Inspector notes that the site *"is of no particular importance for mammals including badgers and bats."*.

112. At para. 7.8.9, she states: -

> "Impacts on bats would be slight negative during construction however the value of the site would improve for feeding, commuting, foraging bats through replanting, installation of bat boxes. Risk of Leisler's bat collision with turbine rotors cannot be eliminated."

In that regard, she is following the (uncontradicted) findings of the EIS. In coming to that conclusion, the EIS did not rely upon the original versions of the Natural England Guidelines.

113. The Inspector's recommendation is to be found at para. 8.6 of her report: -

> "Having considered the contents of the application, the decision of the Planning Authority, the provisions of the development plan, national policy as set out in the Wind Farm Development Guidelines issued by the Department of Environment, Heritage and Local Government, the grounds of appeal on third party submissions, my site visit and assessment of the planning issues, I conclude that subject to the stated mitigation the proposed development will not have an adverse impact on the integrity of the adjacent European Sites, would not seriously injury the amenities of the area or of property in the vicinity and will be acceptable in terms of traffic impact.

> Accordingly, I recommend permission subject to the following schedule of conditions …"

114. Condition 6 reads: -

> "6. Detailed measures in relation to protection of bats shall be submitted to and agreed in writing with the Planning Authority prior to the commencement of development. Bat buffer zones set back to 62.5 metres shall be provided and replacement set back linear hedgerow should be provided where not feasible."

Again, this is a general bat protection measure. Clearly further measures in protection of each species of bat will have to be considered and agreed before the development is permitted to commence. I have already described how the applicants eventually dropped any objection to this form of condition.

115. As was the case in all of the documentation relied upon by the parties in this case, the Inspector's report does not suggest that a full level of protection will be provided to the Leisler's bat by the 62.5 metre set back. Indeed, the sole reference linking that set back with the Leisler's bat is to be found in the bat survey and impact assessment (prepared for the earlier planning application with a different layout) appended to the EIS. However, when looked at closely the formula and figure contained in the early versions of the Natural England Guidelines (set out at 5.2.1 of the bat survey and impact assessment document) are recommended to be applied not solely with regard to the Leisler's bat but also the Pipistrelle bat. The Pipistrelle bat is not a high flying species, and therefore does not share the specific risk profile of the Leisler bat.

116. In its Direction of the 27th August, 2019, and in a section heavily emphasised by counsel for the applicants, the Board found: -

"The Board considered that the main significant direct and indirect effects of the proposed development on the environment are, and will be mitigated as follows:

- Landscapes and Visual Impacts have been mitigated to the extent possible by reason of appropriate siting, scale and design of a wind farm in accordance with published guidelines.
- Biodiversity impacts on bats which will be mitigated by detailed protection measures including the provision of a bat buffer zone set back of 62.5 metres between the rotors of the planned turbine and the nearest vegetation and set back of linear hedgerows where this is not feasible, and the installation of bat boxes.
- Traffic impacts during construction and decommissioning will be mitigated by the implementation of the recommended measures in the road safety audit and the Traffic Impact Assessment."

The Board directed that a condition be imposed (at Condition 7) which is virtually identical to Condition 6 as suggested by the Inspector.

117. It is clear that, in making its determination, the Board was not operating on the basis that the 62.5 metre set back would eliminate harm to the Leisler's bat, in particular the harm caused by Leisler bats colliding with the rotor blades of the turbines. That risk is expressly recognised in the EIS and in the Inspector's report. It is a risk which is calculated by reference to the site specific details of the development site, and the particular behaviour of the Leisler's bat on the site. In imposing the 62.5 metre set back, as I have observed on a number of occasions, the Board was following guidance designed to provide a mitigation of risk to all bats. In both EIS and the Inspector's report the particular level of risk to the Leisler's bat was isolated and identified.

118. Against that background, it cannot be said that the wording of the 2019 guidance document *"significantly"* varies the view expressed by the Inspector with regard to Leisler's bats on this specific site. Indeed, the EIS makes it plain that there are problems in mitigating for Leisler's bats, and sets out the reason why that is so (they fly high and do not follow linear features). Emphasising the difficulty in mitigating for the species, and then not offering any particular way in which harm to the species could be effectively mitigated, leads inexorably to the conclusion that no specific proposed form of mitigation is likely to be effective as far as the Leisler's bat is concerned. The difficulty in mitigating for the species (identified in the EIS, and carried through into the Inspector's report) is not set against a form of mitigation which it is said will work. Instead, the difficulty in mitigating for the Leisler's bat is balanced against other factors, such as the unsuitability of the site for Leisler's bats, the limited presence of the Leisler's bat on or close to the site, and the infrequency with which the site is overflown (not least because *"other areas of adjoining countryside are far more suitable for this and other bat species"*).

119. A central part of the applicants' case is, in my view, the fundamentally mistaken belief that the 62.5 metre set back (produced by the application of the formula and figure contained in the original version of the Natural England Guidelines) would provide an effective form of protection for the Leisler's bat. Nowhere is that said, either by the Inspector or by the Board or, indeed, in the body of the EIS. Juxtaposing the language of the Inspector (the risk to Leisler's bat *"cannot be eliminated"*) with the language used in the 2019 version of the Natural England Guidelines (the set back is *"unlikely to be effective"* as far as the Leisler's bat is concerned) is superficially attractive but ultimately inappropriate. The Inspector, informed by the contents of the EIS, has reported taking into account the specific facts relating to this individual development site. In doing so, she has identified the very factor emphasised in the 2019 guidelines, namely that the Leisler's bat is a high flying creature.

In those circumstances, I believe the correct layman's view is that the general advice contained in the 2019 guidelines is not materially or significantly different from the factors already considered by the Inspector in coming to her view, and by the Board in coming to its decision.

120. Counsel for the applicants has urged the court to decide this matter on the basis of the court's determination as to the significance of the new wording in the 2019 Guidelines. If that is the correct approach, I would find against the applicants. However, there remains another factor for me to consider. This is whether or not, in a fairly technical area, the court can decide that the 2019 Guidelines constituted a significant or material change to the earlier Guidelines and to the approach taken by the Inspector that harm to the Leisler bat "cannot be eliminated." Towards the end of his oral submission, counsel for Pinewood argued (at p. 106, day 4): -

> "Materiality is crucial. And establishing materiality requires evidence. So what evidence is there? The answer, in our respectful submission, once again is none. It is clear from all the guidance documents that what is principally required is a site specific investigation and assessment. Guidance documents can and do inform that process, for the context of a challenge to the ultimate decision what must be determined is that the assessment that was carried out, possibly because it followed out of date guidance, was materially deficient and this was carried through to the decision. But in the present case, judge, no person possessing relevant expertise has given any such evidence. And we say that as fatal to the applicants' case on this issue. How, without expert evidence, can the court be asked to say that there is a material difference between the guidance promulgated in the UK in 2019 and the approach actually taken by the developer and the Board?"

This succinct submission by counsel for Pinewood was not addressed by counsel for the applicants in his reply. Were it necessary to do so, I would agree with the submission made by counsel for Pinewood. This is, as I have said, a highly technical area. The difference in wording between the position taken by the Inspector and the advice contained in the 2019 Guidelines is subtle. In order to satisfy the court that the new wording in the 2019 Guidelines was material in a relevant way to the Board's decision, having regard to the specifics of the application for planning permission, it was necessary for the applicants to lead the appropriate technical evidence. They did not do so. Bald statements by Mr. Sweetman, who in any event does not have the relevant qualifications, do not constitute a sufficient evidential base on which the court can safely act.

121. I have therefore concluded that, whether one approaches this issue by reference to a layman's understanding or on the basis of relevant expert evidence, that the applicants have failed to establish that the extra wording introduced into the Natural England Guidelines of 2019 constituted relevant and material information which the Board was obliged to take into account in the circumstances of this case.

122. In light of this finding, it is unnecessary for me to consider whether (if the 2019 Guidelines were relevant and material) there was an obligation on the Board to seek out such updated guidelines either as a matter of European or domestic law.

123. There was one specific legal argument made by the applicants which I should consider separately. This is an argument grounded on the decision of the House of Lords in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014. This argument, as summarised at para. 17 of the applicants' written submissions, relies upon the speech of Lord Diplock (at pp. 1064 - 1065 of the Report): -

> "It was the for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters upon which the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider; see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, *per* Lord Greene MR at p. 229, or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer correctly?"

124. No argument is maintained to the effect that the Board asked itself the wrong question, or took into account irrelevant matters. The gist of the submission, on this front, is that the court failed to take into account the 2019 guidance. As I have already found, and if the matter is to be decided by a layman's analysis alone, the Board took into account the fact that mitigating the harm which could be caused to the Leisler's bat was problematic as it flew high and with a non-linear flight path, that no specific form of mitigation for the Leisler's bat was proposed, and that harm to the Leisler's bat could therefore not be excluded. As this is on all fours the 2019 Guidelines, the failure to consider those guidelines does not involve a failure to consider relevant documentation.

Conclusion

125. For the reasons which I have set out at some length in this judgment, I will dismiss these proceedings, as notified to the parties some time ago by my Decision.

126. In conclusion, I should record my appreciation for the focused way in which the case was argued by counsel. I have referred extensively to the submissions, both written and oral, made to me. I have done so because the scope of the issues which I have had to decide was reduced as the hearing progressed. This realistic approach by all counsel, in particular counsel for the applicants, was very helpful.