THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 238 J.R.]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000 AND

IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT, 2016

BETWEEN

HIGHLANDS RESIDENTS ASSOCIATION AND PROTECT EAST MEATH LIMITED

APPLICANTS

AND

AN BORD PLEANÁLA, THE MINISTER FOR CULTURE HERITAGE AND THE GAELTACHT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

TRAILFORD LIMITED AND MEATH COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 2nd December, 2020

1. These proceedings relate to a decision made by the first named respondent (*"the Board"*) on 29th January, 2020 to grant planning permission to the first named notice party (*"Trailford"*) for the construction of a strategic housing development on lands on the outskirts of Drogheda, County Louth. The decision of the Board was made under the powers conferred upon it by the Planning and Development (Housing) and Residential Tenancies Act, 2016 (*"the 2016 Act"*) which provides a fast track planning procedure for substantial housing developments which fall within the ambit of the definition of *"strategic housing development"* in s. 3 of the 2016 Act. The housing development proposed by Trailford in this case is for the construction of 509 houses, 152 apartments together with a crèche, a shop and a café.

2. The location of the proposed development is described in the following terms by the inspector appointed by the Board in para. 2.1 of his report:

> *"The site is at the western edge of Drogheda, to the immediate east of the M1, south of the river Boyne and adjacent to the Meath/Louth county boundary. It is c. 2 km from Drogheda town centre and c. 3.5 km from the train station. The site has a stated area of 26.2 ha and is agricultural land. The northern part of the site is a wooded area that slopes sharply down to the level of the road along the riverbank. The rest of the site is arable land that has a gentle even slope down from south to north. Farm buildings stand in two places on the site. The M1 motorway runs along the western site boundary. The northern, eastern and southern site boundaries are along rural roads…. There is a pedestrian boardwalk along this stretch of the river that runs back to the town centre. The Riverbank estate is to the north east of the development site …. Construction has commenced on a residential development on land to the south-east of the site ….. Two existing detached houses stand on the other side of that road near the south-eastern corner of the site".*

3. According to the statement of grounds, the first named applicant (*"HRA"*) is an unincorporated association whose members live in The Highlands, a housing development adjacent to the site of Trailford's proposed development. The second named applicant (*"Protect East Meath")* is a not-for-profit company which was established for the purpose of ensuring that future development in East Meath should only take place *"with strong environmental protections".* The applicants challenge the legality of the decision of the Board on a number of grounds which can be summarised as follows:

(a) In the first place, it is alleged that the Board was precluded in this case from granting planning permission in circumstances where (so the applicants allege) the proposed development involves a material contravention of a zoning objective of

the Meath County Development Plan 2013-2019 (*"the Development Plan")*. In this context, s. 9 (6) (b) of the 2016 Act prohibits the Board from granting permission for a proposed development where the development (or a part of it) materially contravenes a development plan or local area plan relating to the area concerned "*in relation to the zoning of the land"*. It should be noted, in this context, that, in addition to contesting the merits of the applicants' case on this ground, the Board has, for reasons which are explained further below, raised an issue as to the applicants' standing to raise this issue;

(b) Secondly, the applicants make the case that the provisions of s. 9 (6) (a) and (c) of the 2016 Act (which permit the Board to grant permission for a proposed strategic housing development where there is a material contravention of a development plan or local area plan in respect of matters other than zoning) are inconsistent with the Strategic Environmental Assessment Directive (namely Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment) (*"the SEA directive").* However, the parties are agreed that this issue should only be addressed by the court in the event that the applicants do not succeed in relation to any of the other issues pursued by them in these proceedings;

(c) Thirdly, the applicants contend that the Board, in carrying out a screening exercise for the purposes of the Habitats Directive, failed to exclude the possibility of a significant effect on the surrounding Natura 2000 sites for the purposes of s. 177U of the Planning and Development Act, 2000 (*"the 2000 Act")* by reference to best scientific knowledge. In particular, the applicants make the case that the Board, in the absence of appropriate surveys, could not lawfully exclude *ex situ* effects on avi-fauna from the proposed development. While the inspector appointed by the

Board concluded that the application site does not support such *ex situ* habitats, the applicants allege that there was no basis for the inspector to make that finding in the absence of appropriate bird surveys;

(d) Fourthly, the applicants allege that the Board took mitigation measures into account for the purposes of the necessary screening assessment for the purposes of the Habitats Directive and that, in accordance with well-established case law, this constitutes an error of law which vitiates the Board's decision;

(e) The applicants also make a case in relation to the manner in which the Board addressed the impacts of the development on bats. In light of the strict protection available for bats under Article 12 and Annex 4 of the Habitats Directive, it is alleged that the survey work undertaken on behalf of Trailford was inadequate and that the matter has not been assessed in an appropriate manner as required by Article 3 of the EIA Directive. In addition, it is contended that the Board erred in law in identifying disturbance to bats as *"incidental"* and therefore not captured by Article 12 of the Habitats Directive.

(f) It is also contended by the applicants that there is no system of strict protection for the protection of bats in Ireland and, for that reason, it is alleged that there has been inadequate transposition of the requirements of EU law.

(g) Furthermore, in their written submissions, the applicants have also sought to attack the legality of a derogation licence issued under the Habitats Regulations (namely EC (Birds and Natural Habitats) Regulations 2011; S.I. No. 477 of 2011). It is alleged that, insofar as the Habitats Regulations allow derogation licences to be applied for and granted after the grant of development consent, they are not consistent with the requirements of the Habitats Directive. It should be noted that the State respondents have objected to this aspect of the applicant's case in

> circumstances where it is not addressed in the statement of grounds and no application has been made to amend the statement of grounds. In my view, this objection is entirely justified. As no case has been made in respect of this issue in the statement of grounds, it is clear, having regard to the decision of the Supreme Court in *A.P. v DPP* [2011] 1 I.R. 729, that this case cannot be pursued.

4. It seems to me that any issues in relation to transposition or in relation to the compatibility of the 2016 Act with the SEA Directive should only be addressed in the event that the applicants do not succeed in relation to any of the other issues ventilated by them in their statement of grounds. For that reason, I will defer any consideration of the grounds identified in para 3 (b) and 3 (f) above until after I have considered the other issues raised. Subject to that reservation and to the observations made in para. 3 (g), I will deal with each of the issues identified in para. 3 above in the same order as they appear in that paragraph. However, in relation to the zoning issue mentioned in para. 3 (a) above, I will address the objection in relation to standing before considering the merits of the issue.

The standing of the applicants to pursue the issue in relation to zoning

5. Insofar as the standing of the applicants in relation to the zoning issue is concerned, the Board highlights that the applicants in their submissions did not argue, in the course of the proceedings before the Board, that the Board was precluded from granting planning permission by virtue of s. 9 (6) (b) of the 2016 Act. In addition, the Board, in its statement of grounds and in its written submissions has argued that the applicants expressly accepted that the Board does have jurisdiction. In this context, the Board drew attention to the submission made by Protect East Meath to the Board. On p. 6 of that submission, the following was stated:

"While it is acknowledged that section 9 (6) (a) of the Planning and Development (Housing) and Residential Development Act, 2016 gives the Board powers to grant permission for a development that materially contravenes the development plan or local area plan relating to the area concerned, the power must nevertheless be exercised in a way that is compatible with EU law."

6. In response, counsel for the applicants contends that the statement in the submission made by Protect East Meath does not go so far as to accept the precise point which now arises in these proceedings in relation to s.9 (6) (b) and, in particular, the prohibition contained in that subsection precluding permission being granted for a development which would materially contravene a development plan in relation to zoning. In the alternative, counsel for the applicants submitted that HRA was not a party to the submission in question and therefore cannot be bound by it. Furthermore, insofar as Protect East Meath is concerned, counsel submitted that it is manifestly a body covered by s. 50A (3) (b) (ii) of the Planning and Development Act, 2000 *("the 2000 Act")* and accordingly has, by statute, sufficient interest to maintain the claim made in these proceedings. Counsel for the applicants also argued that, in circumstances where s. 9 (6) (b) goes to the jurisdiction of the Board to grant or refuse planning permission, it would be *"astonishing"* if the Board could rely on a standing point to defeat the case made.

7. With regard to the position of HRA, counsel for the Board highlighted that, although HRA did not make the same submission in relation to s. 9 (6) to the Board to that made by Protect East Meath, it had, in its submissions, referred to the County Development Plan but had not raised the issue now ventilated in these proceedings. In this regard, it should be noted that, at p. 9 of its submission to the Board, HRA drew attention to the County Development Plan and in particular to its objective to safeguard any future development in

terms of impact on the Boyne Valley together with the site of the Battle of the Boyne and the Brú na Bóinne world heritage site.

8. While there is a European dimension to the issue raised in relation to the compatibility of Irish law with the SEA Directive, the issue that arises in relation to s. 9 (6) (b) is purely concerned with national law. In those circumstances, it seems to me that the question whether the applicants have a sufficient interest to maintain this element of their claim falls to be determined by reference to the traditional Irish standing rules discussed in the decision of the Supreme Court in *Grace & Sweetman v. An Bord Pleanála* [2017] IESC 10 and the decision of MacGrath J. in *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929. *Grace & Sweetman* was concerned with the standing of the applicants to bring judicial review proceedings in respect of a decision of the Board in relation to a windfarm development in circumstances where the applicants had not themselves participated in the proceedings before the Board. The relevant principles applicable in a domestic context were described by Clarke C.J. in paras. 8.5 to 8.8 of his judgment. In those paragraphs, Clarke C.J. explained that participation in the planning process will *"undoubtedly confer standing"* in subsequent judicial review proceedings. On the other hand, he said that a failure to participate leaves the question of standing open to doubt particularly in the case of an applicant who cannot show either a physical proximity to or a more general established interest in the amenity value of the site of a proposed development which may potentially be impaired. While no explanation had been given in that case as to why neither of the applicants had participated in the proceedings before the Board, the Supreme Court came to the conclusion that Ms. Grace had standing in view of the fact that she lived in relatively close proximity to the proposed development. In those circumstances, the Supreme Court did not have to reach any final determination on the question of Mr. Sweetman's standing.

9. The decision in *Grace & Sweetman* was subsequently analysed by MacGrath J. in the *M28 Steering Group* case. In contrast to *Grace & Sweetman*, the applicant in those proceedings had participated in the proceedings before the Board but had not raised the issue which it sought to ventilate in the judicial review challenge before MacGrath J. Thus, there is a clear parallel between the circumstances of that case and the position of HRA here. In that case, it was argued on behalf of the respondent and the notice party that the decision in *Grace & Sweetman* does not detract from the proposition which emerges from the earlier decision of the Supreme Court in *Lancefort v. An Bord Pleanála* [1999] 2 I.R. 270 that the failure to advance an adequate excuse for not raising a point before the relevant planning authority should operate to bar an applicant from challenging, in judicial review proceedings, a decision of that authority on the basis of that very point. In response, the applicant in those proceedings submitted that, following the decision in *Grace & Sweetman* (where applicants who had not participated in the process under review were found to have standing to maintain a challenge to the Board's decision) it must follow that an applicant should also be regarded as having standing in circumstances where he or she has previously participated in the proceedings before the Board but did not raise the particular point subsequently ventilated in a judicial review challenge. Although there was a European law dimension to the issue which arose in that case, both counsel for the Board and counsel for the applicant relied on aspects of the judgment given by MacGrath J. Having considered *Grace & Sweetman* and also the decision of the CJEU in Case C-431/92 *Commission v. Germany* ECLI:EU:C:1995:260 MacGrath J. said, at para. 118 of his judgment:

> *"118. In my view this reinforces the proposition that, as a matter of law, there is no general rule that a prior participant who has not raised particular point before the Board is* ***automatically*** *precluded from raising such points in a court of review. To adopt such a stance might place a person who has not previously participated in a*

> *stronger position than someone who has. On the other hand, in my view, neither do the authorities establish an unrestricted right to raise new points. This is particularly so, as was recognised in the Commission v. Germany, where there is evidence of bad faith or a deliberate decision to withhold a point".* (emphasis in original)

10. At para. 119 of his judgment, MacGrath J. noted that, in *Grace & Sweetman,* the Supreme Court took the approach that a broad assessment should be made of whether the legitimate and established amenity or other interests of the challenger *"can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question".* He added that, although these comments were expressed in the context of general standing, as opposed to an objection based on the failure to raise a particular issue, he believed that:

> *"They must have relevance to the issue raised in this case. While each case must be dependent on its facts, bearing in mind the considerations alluded to in Grace and Sweetman, it seems appropriate in determining the locus standi of the applicants in this case, to give consideration to the nature of the illegality or infringement alleged, the consequences of a decision either way, any explanation that is advanced for the failure to raise the issue, and the overall obligations imposed as a matter of European law with regard to a particular process and to the requirement for broad access to justice".*

11. Having reviewed the issues and the evidence in that case, MacGrath J. came to the conclusion that the applicant had a sufficient interest to maintain the proceedings. At para. 124 of his judgment he said:

> *"124. The overall project is a significant one. The applicant is an NGO and enjoys, as a matter of law, a general right of standing. The road project, in its entirety involves matters of European significance and importance. While the quarry is not a European site, there is a European site dimension to it, in view of the reclassification of the … stream to bring it within the Cork Harbour SPA, which is a European site. I am also satisfied that there is no evidence that the applicant sought to deliberately withhold points from the hearing. Also, although the applicant is an NGO, the court nevertheless takes into account the fact that a number of its members reside in the immediate vicinity of the quarry. The decision of the court on this issue must be viewed and confined to the particular circumstances of this case and should not be interpreted as a 'freewheeling competence on the part of judicial review applicants to raise points not raised before the decision maker', something which was rejected by Barrett J. in An Taisce v. An Bord Pleanala … [2018] IEHC 640".*

12. It seems to me that the approach taken by MacGrath J. in the *M28* case is of considerable assistance in relation to the issue of standing which has been raised in these proceedings. In this case, no explanation has been offered on affidavit by either Protect East Meath or HRA as to why the issue now raised by them in these proceedings was not raised before the Board. Nonetheless, there is equally no evidence before the court (nor was any such suggestion made by any party to the proceedings) that the applicants had deliberately refrained from raising the point in the course of the proceedings before the Board. It is also of particular importance in this case that, as noted in para. E1 of the statement of grounds, HRA comprises an association whose members live in the Highlands estate which is adjacent to the proposed site of the development in issue. The residents of the Highlands estate therefore have a direct and immediate interest in anything which is constructed on the adjoining lands and this is particularly so in light of the sheer scale of the development which

is proposed to be constructed here. The proximity of a development to the residence of a challenger was a significant factor in the approach taken by the Supreme Court in *Grace & Sweetman.* It is also clear from para. 124 of his judgment in *M28 Steering Group* that proximity to the proposed development was also a significant factor in the judgment of MacGrath J. in that case. He also took account of the significance of the proposed project. In contrast, the applicant in *Lancefort* could not point to any property or economic interest which was affected by the relevant decision. While Keane J. (as he then was) was at pains to make clear (at p. 317 of the report) that the lack of any such interest did not necessarily deprive the applicant in that case of standing, the corollary is that, had the applicant there had such an interest, the court may well have readily accepted that it had the necessary standing.

13. In all of these circumstances, it seems to me that HRA should be regarded as having a sufficient interest to maintain this ground of challenge notwithstanding that it did not raise the zoning issue in the course of the proceedings before the Board. Accordingly, it seems to me to be unnecessary to consider the position of Protect East Meath. Once one of the applicants has the necessary standing to pursue this ground, it is entirely academic as to whether the remaining applicant could be said to have the same standing. In these circumstances, I will now proceed to consider the zoning issue.

14. It is nonetheless crucially important to record that the most appropriate time to raise issues of relevance to a proposed decision of a planning authority is during the course of the process before that authority. A key aspect of the rationale for public participation in the planning process is to allow members of the public to bring to the attention of a planning authority all relevant issues which might bear on the decision to be taken by the planning authority in order that the authority can take a correct and fully informed decision. In such circumstances, it seems to me that, at least in cases concerned with standing to pursue points

of domestic law, a full explanation should be required as to why an issue sought to be ventilated in judicial review proceedings was not previously raised by the applicant in the course of the proceedings before the relevant planning authority. I am concerned that no explanation has been given in the present case as to why HRA did not raise the zoning issue in the course of the proceedings before the Board. In my view, the lack of an explanation is manifestly unsatisfactory. Nonetheless, in light of the approach taken in *Grace & Sweetman,* it seems to me that, having regard to the immediate proximity of the proposed development to the members of HRA, the failure to raise the zoning issue by HRA in the course of the proceedings before the Board does not debar HRA from ventilating the issue in these judicial review proceedings.

The zoning issue

15. The County Development Plan was adopted on 17th December, 2012 and came into effect on 22nd January, 2013. It is intended to apply for the years 2013 to 2019. The County Development Plan includes, for the first time, a Core Strategy which outlines the preferred development strategy for the county together with future population and housing growth targets over the plan period. The requirement to include such a strategy arises from statutory amendments made to s. 10 of the 2000 Act.

16. On 19th May, 2014 a variation was adopted namely Variation No. 2 which is explained in the introduction and explanatory document issued by the County Council as involving the following:

> *"1. Introducing development objectives (including land use zoning objectives) … for 29… existing urban centres which presently have Local Area Plans ….*

2. Introducing land use zoning objectives and an Order of Priority … for the release of residential and employment lands for five of the centres which will retain their Local Area Plans (namely Ashbourne, Drogheda (Southern Environs), Dunboyne/Clonee/Pace, Dunshaughlin and Ratoath);

3. Ensuring that only the quantum of land required to meet the household projections as set out in Table 2.4 for each centre is identified for release during the lifetime of the… County Development Plan …. This will ensure consistency with the Core Strategy ….

4. ….

5. Applying the land use zoning objectives contained in the Core Strategy….to the land use zoning objectives maps which are being incorporated into the … County Development Plan…".

17. Consistent with para. 5 of the explanation quoted in para. 16 above, volume 5 of the County Development Plan now contains a book of maps. Among the maps contained in volume 5 is the map for Drogheda Southern Environs Land Use Zoning Objectives Map. This is a colour coded map. The colour coding refers to the individual land use zoning objectives. A deep yellow code is used to designate residential use in the following terms:

"to provide for new residential communities with ancillary community facilities, neighbourhood facilities and employment uses as considered appropriate for the status of the centre in the Settlement Hierarchy".

18. However, some of the areas on the map shaded in yellow are also shown with hatched diagonal black lines. These are explained in the key to the map under the heading *"Specific Objectives"* in the following terms: *"Residential Phase II (Post 2019)".* A significant portion of the site of the proposed development by Trailford is on lands which are shaded in

yellow and hatched in this way. On this basis (and on the basis of the further materials discussed below) the applicants make the case that the lands were not zoned residential at the time the Board made its decision in 2019 and would not become so zoned until after 2019. In those circumstances, the applicants make the case that the Board was precluded by s. 9 (5) (b) from granting permission for the proposed development. In the alternative, even if it could be said that the *"Residential Phase II (Post 2019)"* objective does not constitute a zoning objective as such, the applicants submit that the objective is, at minimum, *"in relation to zoning"* and it therefore falls within the express words of s. 9 (5) (b) with the result that, in those circumstances, the Board was precluded by statute from granting permission for the proposed development.

19. In support of their case, the applicants draw attention to the statement made in para. 2.0 of the introduction & explanatory document to Variation No. 2 to the effect that the Core Strategy of the County Development Plan required the realisation of a number of stated objectives within specified periods. Among the objectives which are identified is Objective CS OBJ 5 which is in the following terms:

> *"to ensure that the review of Town Plans and Local Area Plans achieve consistency with the core strategy of the … County Development Plan … by only identifying for release during the lifetime of the … County Development Plan … the quantity of land required to meet household projections as set out in Table 2.4."*

20. The introduction and explanatory document then explains that the stated objectives were designed to ensure that the development frameworks and land use zoning objectives of individual centres adhered to the settlement strategy and the Core Strategy in particular. The introduction states:

> *"This required a review of the existing land use zoning objectives to ensure compliance with the new land use zoning objectives contained in the County*

Development Plan and to ensure that the quantum of lands identified for residential development adheres to the household allocation for each centre….".

21. In para. 3.3 of the introduction and explanatory document, it is stated that Table 2.4 contained in the Core Strategy of the original version of the County Development Plan:

"…demonstrates that there is presently an excess of residentially zoned land contained in most of the towns and villages in Meath for which Local Area Plans had been prepared. The County Development Plan, as varied by Variation No. 2, presents a strategy to deal with the excess of residentially zoned land as it applies to the urban centre. In order to address the level of over provision of zoned residential lands, phasing of land in the form of an Order of Priority is detailed in the accompanying written statements and land use zoning objectives maps which are incorporated into the Development Plan Volume 5.

It should be noted that the inclusion of lands in Phase II which is indicated as being required beyond the life of the present County Development Plan post 2019, does infer a prior commitment on the part of Meath County Council regarding their future zoning for residential or employment purposes during the review of the present plan and preparation of a new County Development Plan expected to occur during the 2017-2019 period…".

22. Variation No. 2, insofar as it affects Drogheda Southern Environs is set out in Volume 5. At p. 380 of Volume 5, the relevant strategic policy (described as *"SP1"*) is set out. This is in the following terms:

"*To operate an Order of Priority for the release of residential lands in compliance with the requirements of CS OBJ 6 of the County Development Plan as follows:*

(i) *The lands identified with an A2 'New Residential' land use zoning objective corresponds with the requirements of Table 2.4 … and are available for residential development within the life of this Development Plan.*

(ii) *The lands identified with an A2 'New Residential' land use zoning objective but qualified as 'Residential Phase II (Post 2019)'* ***are not available for residential development within the life of this Development Plan'***. (emphasis added).

23. Counsel for the applicants, in the course of his submissions, stressed the words emphasised in bold print in the above extract from SP1. He submitted that this demonstrates very clearly that the development site cannot be regarded as zoned for residential purposes during the lifetime of the County Development Plan and that any suggestion to the contrary is completely lacking in reality. Counsel also relied, in this context, on the terms of Objective CS OPJ5 (quoted in para. 19 above) and on the extracts from the introduction and explanatory document quoted in paras. 20 and 21 above. He submitted that, when these documents are read together, they illustrate that, under the terms of the County Development Plan, no residential use can be made of the subject lands. He also referred to Table 5 which, in the context of the Drogheda Southern Environs Local Area Plan, contains an evaluation of the residential land required in this area of County Louth. According to Table 5, the quantity of residential zoned land required is 19.9 hectares. The table reveals that the available land originally zoned for residential use amounted to 157.2 hectares such that there was an excess of zoned land of 139.1 hectares. The variation states:

"It is clear … that there was a significant excess of residentially zoned land contained in the Local Area Plan for the Southern Environs of Drogheda as adopted in 2009 in comparison to that now required to satisfy the household allocation provided for in the … County Development Plan ….

The amended land use zoning objectives map has identified the lands required to accommodate the household allocation of 857 units provided for under the Core Strategy. It should be noted that there is headroom included in the household allocations of 50% and thus there is no justification for the release of any additional lands over and above those specified … and illustrated on the land use zoning objectives map for Drogheda Southern Environs …

The requirement for any further release of residential zoned land in the Southern Environs of Drogheda will be assessed following the making of the next County Development Plan in line with the population projections contained therein…".

24. Thereafter, volume 5 records the evaluation exercise carried out in relation to the residential sites within the area of the Southern Environs of Drogheda. In the course of the hearing, I was informed that the lands, the subject matter of the decision of the Board in this case were described as *"site 9"* in this evaluation exercise. While part of site 9 was evaluated as falling within Phase 1, the bulk of site 9 was classified within Phase II. Thus, in accordance with the map discussed in paras. 16 and 17 above, it fell into the category *"Residential Phase II (Post 2019)".*

25. There is no dispute between the applicant and the Board that, in considering the terms of the County Development, the correct approach to its interpretation is that identified by McCarthy J. in the Supreme Court in *Re. XJS Investments Ltd* [1986] I.R. 750 (as reiterated in the more recent decision of the Supreme Court in *Lanigan v. Barry* [2019] 1 I.R. 656) – namely that planning documents are to be construed in the way in which they would be understood by ordinary and reasonably informed members of the public without legal training as well as by developers and their agents. It is also clear from the case law (including the decision of the Supreme Court in *Lanigan v. Barry* and the decision of the Court of Appeal in

Camiveo Ltd v. Dunnes Stores [2019] IECA 138) that planning documents of this kind are to be read objectively and construed as a whole. Furthermore, it is clear from the decision of Simons J. in *Redmond v. An Bord Pleanála* [2020] IEHC 151 that, in the context of development plans, the labels adopted by a planning authority are not to be treated by the court as conclusive. The court will consider the substance of the relevant development plan policy or objective in order to determine its true nature. At paras. 64 to 67 of his judgment in *Redmond,* Simons J. said:

> "*64. …I have determined that whereas the label 'zoning objective' as employed under a development plan will usually coincide with the legal concept of a zoning objective, the label cannot be conclusive. The concept of a zoning objective is a term of art under the planning legislation. The concept is introduced under section 10(2)(a) ….*
>
> *65. A zoning objective enjoys an enhanced status over that of other policies and objectives under a development plan. This is most immediately apparent from the provisions of section 9(6)(b) …. A zoning objective also has a particular significance in the context of statutory compensation under Part XII ….*
>
> *66. …*
>
> *67. The question of whether a particular development represents a material contravention of a zoning objective thus has a special importance both to landowners and to the local planning authority (as the entity liable to pay statutory compensation). It would be unsatisfactory were the label that the planning authority attached to an objective in the development plan to be conclusive of whether the objective was a zoning objective. Put otherwise, the fact that a development plan mistakenly describes a particular policy as a 'zoning objective' cannot defeat a claim for compensation. It is clear from the case law that the courts will consider*

the substance of the relevant development plan policy or objective in order to determine whether or not it operates to exclude compensation. …".

26. Before attempting to construe the effect of the County Development Plan in this case, it may be helpful, in the first instance, to identify the relevant provisions of the Planning Acts in relation to zoning. A number of these provisions were considered by Simons J. in *Redmond* at paras. 64-65. In para. 64 of his judgment, Simons J. explained that the concept of a zoning objective is a term of art under the Planning Acts. The concept is introduced under s. 10 (2) (a) of the 2000 Act in the following terms:

"(2) Without prejudice to the generality of subsection (1), a development plan shall include objectives for—

(a) the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses), where and to such extent as the proper planning and sustainable development of the area, in the opinion of the planning authority, requires the uses to be indicated".

27. As Simons J. explained in para. 65 of his judgment, a zoning objective enjoys an enhanced status over that of other policies and objectives under a development plan. As noted above, he highlighted that this is immediately apparent from the provisions of s. 9 (6) (b) of the 2016 Act which, as outlined previously, make clear that the Board is precluded from granting planning permission where the development contravenes materially the relevant development plan in relation to the zoning of the land. Simons J. further explained, in the same paragraph of his judgment, that a zoning objective also has a particular significance in the context of statutory compensation under Part XII of the 2000 Act. There will be no entitlement to compensation where planning permission is refused on the grounds that a development would materially contravene a development objective indicated in a

development plan for the zoning of land. This is the effect of para. 20 of Schedule 5 of the 2000 Act.

28. Section 10 (2) should be seen in context. It is found in Chapter 1 of Part II of the 2000 Act dealing with development plans and guidelines. The relevant obligation imposed on a planning authority to make a development plan is contained in s. 9 of the 2000 Act. Under s. 9 (1), a planning authority is required to make a development plan every six years. In turn, s. 10, (1) provides that a development plan must set out: *"an overall strategy for the proper planning and sustainable development of the area of the development plan"* and that it must indicate the development objectives for the area in question. In addition, under s. 10 (1A), the development plan must include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and with certain other guidance which is not immediately relevant. Counsel for the applicant characterised the requirements of s. 10 (1A) as being *"further up the hierarchy"* than s. 10 (2). More importantly, he submitted that the objectives set out in s. 10 (2) must be seen against the backdrop of the requirement in s. 10 (1) that a development plan must indicate the development objectives for the area in question.

29. Section 10 (2) is not concerned solely with zoning. It identifies a large number of objectives that must be addressed in a development plan including transport, energy and communication facilities, water supply and wastewater services, the conservation and protection of the environment, the preservation of the character of the landscape, the protection of structures which are of special interest, the provision of accommodation for travellers and a wide range of other objectives.

30. Under s. 10 (2A) the core strategy of a development plan must address a number of matters including the following set out in para. (d) of the subsection:

"(d) in respect of the area in the development plan proposed to be zoned for residential use or a mixture of residential and other uses, [a core strategy shall] provide details of —

(i) the size of the area in hectares,

(ii) how the zoning proposals accord with national policy that development of land shall take place on a phased basis".

31. Furthermore, s. 10 (3) provides that, in addition to the mandatory objectives that must be included in a development plan under s. 10 (2), there are a range of objectives that a planning authority may also include in the plan. These are all set out in the First Schedule to the 2000 Act. Part 1 of the First Schedule is concerned with *"Location and Pattern of Development".* Paragraph 1 of Part 1 permits a planning authority to include an objective:

"Reserving or allocating any particular land, or all land in any particular area, for development of a specified class or classes, or prohibiting or restricting, either permanently or temporarily, development on any specified land".

32. Counsel for the Board emphasised that the concept of zoning is not defined in the 2000 Act. He submitted that zoning relates to the use for which lands are designated. He drew attention, in this context, to the provisions of the Fourth Schedule to the 2000 Act which, in the context of claims for compensation arising from a refusal of an application for planning permission, set out reasons on which planning permission may be refused without exposing the planning authority to any requirement to pay compensation to the disappointed applicant. Counsel for the Board highlighted the difference between para. 3 of the Fourth Schedule and para. 20 of the same Schedule. While para. 20 expressly addresses zoning of lands for a particular use, para. 3, quite separately and discretely, addresses development which would be premature. He argued that the *"Residential Phase II (Post 2019)"* designation in Variation No. 2 to the County Development Plan related to the order of

priority while the land use zoning objectives (including the designation of areas in deep yellow on the zoning objectives map) was concerned with zoning, properly so called. The relevant zoning objectives map has previously been described in paras. 17-18 above.

33. Paragraph 20 of the Fourth Schedule provides as follows:

> *"20. The development would contravene materially a development objective indicated in the development plan for the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise or a mixture of such uses)".*

34. Counsel for the Board submitted that the language used in para. 20 of the Fourth Schedule is very similar to the language used in s. 10 (2) (a) quoted in para. 26 above. In contrast, para. 3 of the Fourth Schedule is very clearly concerned with the order of priority in which development should take place and counsel for the Board submitted that this is consistent with the provisions of Variation No. 2 to the County Development Plan which envisaged that the lands would not be available for residential development until after 2019. Paragraph 3 of the Fourth Schedule provides as follows:

> *"3. Development of the kind proposed would be premature by reference to the order of priority, if any, for development indicated in the development plan or pending the adoption of a local area plan in accordance with the development plan".*

35. Counsel for the Board submitted that this was consistent with SP 1 set out in Volume 5 of Variation No. 2 (quoted in para. 22 above) which expressly provides for the operation of *"an Order of Priority for the release of residential lands…"* and in particular provides that the lands identified with a "*New Residential"* land use zoning objective *"but qualified as 'Residential Phase II (Post 2019)' are not available for residential development within the life of this Development Plan".* Counsel for the Board argued that the objective of the

County Development Plan was to create an order of priority which, he submitted, is a separate and distinct concept from the zoning for residential use.

36. In response, counsel for the applicant argued that when one looks at the substance of SP1 (quoted in para. 22 above) it is clear that use of the subject lands for residential purposes is suspended for the duration of the County Development Plan. Accordingly, residential development in that area cannot be carried out in a manner consistent with the Plan. Counsel submitted that, to say that residential use can be made of the lands during the currency of the plan lacks reality in circumstances where such use is very clearly suspended under Variation No. 2 for the remaining lifetime of the Plan. Council for the applicant submitted that the ordinary and reasonably informed member of the public would construe the substance of the Plan in that way.

37. In my view, counsel for the Board was correct in his submission that zoning relates to the use for which lands are designated. This seems to me to follow from the terms of s. 10 (2) (a) of the 2000 Act which expressly refers to the zoning of land *"**for the use** solely or primarily of particular areas for particular purposes…"* (emphasis added). That language is also reflected in para. 20 of the Fourth Schedule to the 2000 Act. It seems to me that the language of s. 10 (2) very clearly establishes that zoning of land means the designation of that land for a particular use. It is therefore necessary to consider whether, under the terms of the County Development Plan (as varied by Variation No. 2) the subject lands are zoned for residential use. Having regard to the decision of Simons J. in *Redmond*, the labels used by the planning authority are not conclusive in this context. I must therefore consider the substance of the relevant objectives of the County Development Plan (as varied) in order to determine its true nature. Furthermore, having regard to the case law cited in para. 25 above, I must also consider the terms of the County Development Plan (as varied) objectively and construe them by reference to the way in which they would be understood by ordinary

reasonably informed members of the public without legal training as well as by developers and their agents.

38. As noted in para. 34 above, counsel for the Board argued that the *"Residential Phase II (Post 2019)"* designation in Variation No. 2 to the County Development Plan related to the order of priority at development rather than to land use zoning objective. He argued that the lands in issue are nonetheless zoned for residential use as the deep yellow shading on the relevant zoning objectives map in Volume 5 makes clear. At first sight, that argument seems plausible. However, in my view, the relevant map must be read in context. In particular, it must be read in the context of Variation No. 2 as a whole and in the explanatory document issued by the planning authority in respect of that variation. The legislative backdrop of Chapter 1 of Part II of the 2000 Act must also be kept in mind.

39. As outlined in the introduction and explanatory document issued by the planning authority in respect of Variation No. 2, one of the purposes of the variation was to ensure that only the quantum of land required to meet the household projections as set out in Table 2.4 for *(inter alia*) Drogheda (Southern Environs) should be identified *"for release during the lifetime of the … County Development Plan 2013-20-19".* A further purpose was to ensure that the land use zoning objectives contained in the Core Strategy of the County Development Plan should be achieved. An aspect of the Core Strategy is contained in Objective CS OBJ 5 (quoted in para. 19 above) which expressly refers to the need to only identify for release, during the lifetime of the county development plan, *"the quantity of land required to meet household projections as set out in Table 2.4".* The importance of a core strategy of this nature is reinforced by the provisions of s. 10 (1A) of the 2000 Act which is clearly designed to ensure that the development objectives in a development plan are consistent, as far as practicable, with national and regional development objectives.

40. Paragraph 3.3 of the introduction and explanatory document explains very clearly that the purpose of Table 2.4 is to identify, in respect of each town and village in County Meath, a household allocation or target to be delivered over the period of the plan together with the available zoned land which is available to achieve the relevant household allocation and also the excess or shortfall (as the case might be) of appropriately zoned land required to meet the relevant household allocation. Importantly, the same document records that Table 2.4 *"demonstrates that there is presently an excess of residentially zoned land contained in most of the towns and villages in Meath for which Local Area Plans had been prepared. The County Development Plan, as varied by Variation No. 2, presents a strategy to deal with the excess of residentially zoned land as it applies to the urban centre. In order to address the level of over provision of zoned residential lands, phasing of land in the form of an Order of Priority is detailed in the accompanying written statements and land use zoning objectives maps which are incorporated into the Development Plan in Volume 5".*

41. While this paragraph refers to the *"phasing of land in the form of an Order of Priority",* it is clear from the paragraph, read as a whole, that the purpose of Variation No. 2 was to present a strategy to deal with the excess of residentially zoned land as identified in Table 2.4.

42. The language in para. 3.3 of the introduction and explanatory document is repeated in the terms of the relevant part of Variation No. 2 namely SP 1. The terms of SP 1 have already been quoted at para. 22 above. As noted in para. 23, counsel for the applicants, stressed the use of the words in para. (ii) of SP 1 namely that the lands now qualified by the *"Residential Phase II (Post 2019)"* designation *"**are not available** for residential development **within the life** of this Development Plan"* (emphasis added). Those words must, in my view, be read against the relevant legislative backdrop. It is clear from s. 9 of the 2000 Act that a development plan is intended to have a limited lifetime. Section 9 (1) requires

every planning authority to make a development plan every six years. Furthermore, under s. 11 (1) (a), a planning authority, not later than four years after the making of a development plan, must give notice of its intention to review its existing development plan and to prepare a new development plan for its area. Thus, when para. (ii) of SP 1 speaks of land not being available for residential development *"within the life"* of the County Development Plan, that seems to me to plainly prohibit the use of such lands for residential development for the duration of the Plan and I believe that this is the way in which the words used would be read by the ordinary and reasonably informed member of the public. This conclusion is strongly reinforced by a consideration of the terms of Variation No. 2 quoted in para. 23 above. The language used is unequivocal. It plainly states that there is *"no justification for the release of any additional lands over and above those specified in Table 8 and illustrated on the land use zoning objectives map for Drogheda Southern Environs".* The same paragraph also states that: *"the requirement for any further release of residential zoned land in the Southern Environs of Drogheda will be assessed following the making of the* ***next County Development Plan*** *in line with the population projections contained therein"* (emphasis added). In my view, this makes very clear that the lands which are hatched with diagonal lines on the land use zoning objectives map for Drogheda Southern Environs are not available during the currency of the current County Development Plan for residential use. The variation effected by Variation No. 2 has, in substance, put those lands beyond use for residential purposes for the duration of the Development Plan. I believe that this is the conclusion which an ordinary and reasonably informed member of the public would reach on an objective consideration of the terms of the County Development Plan (as varied). I believe that such a person would discount the notion that the lands in question have been zoned for residential use but that such use has simply been postponed, by reference to an order of priority. That conclusion might well make sense if the development plan was

intended to subsist for more than six years and in particular was intended to subsist beyond 2019. That is, however, plainly not the case. The final year of the duration of the current Development Plan is 2019. Thus, the designation on the land use zoning objectives map of *"Residential Phase II (Post 2019)"* means, in substance, that the lands cannot be used for residential purposes during the currency of the 2013-2019 Plan. This is stated in stark terms in the passage quoted above which makes it clear that any further release of land for residential purposes will be assessed following the making of the next County Development Plan. Furthermore, while para. 3.3 of the introduction and explanatory document states that the inclusion of lands in Phase II *"does infer a prior commitment … regarding their future zoning … during the preparation of a new … Plan…",* any new development plan would have to undergo the procedures outlined in ss. 11 and 12 of the 2000 Act and would have to comply with the requirements of s. 10 of that Act. Thus, there is no guarantee that Phase II would allow residential use in the future once the 2013-2019 Plan expires.

43. In light of the considerations outlined in para. 42 above, I have come to the conclusion that, in substance, the lands in issue could not be said to have been zoned for recreational use at the time the Board made its decision granting planning permission for the proposed development by Trailford. Thus, the distinction made on the land use zoning objectives map for Drogheda Southern Environs between *"land use zoning objectives"* on the one hand and *"specific objectives",* on the other, does not seem to me to be material. As Simons J. in *Redmond* made clear, the labels used by a planning authority are not determinative. The court, in considering an issue of this kind, is entitled to form its own view based on the substance of the terms of the relevant county development plan. Accordingly, in circumstances where the lands were not all zoned for residential purposes at the time of the decision made by the Board, I am of the view that the Board was precluded by s. 9 (6) of the

2016 Act from granting planning permission in this case for the proposed development by Trailford.

44. It follows that it is unnecessary to consider the fall-back argument advanced by counsel for the applicants by reference to the use of the words *"in relation to"* in s. 9 (6) of the 2016 Act. As noted above, counsel for the applicant submitted that those words were sufficiently wide to capture the *"Residential Phase II (Post 2019)"* designation on the zoning objectives map even if that designation was not itself a zoning objective. I will confine myself to observing that the words *"in relation to"*, in the absence of some indication to the contrary in the relevant statutory provision, are generally regarded as wide words. Thus, for example, Twohey and Gummow J.J. in the High Court of Australia in *PMT Partners Pty Ltd (in liquidation) v. Australian National Parks and Wildlife Service* (1995) 184 CLR 301 p. 328 observed, in the context of an arbitration provision:

> *"It is apparent that the words 'in or in relation to' are particularly wide. .... Cases concerning the interpretation of this phrase in other statutory contexts are of limited assistance. However, the cases do show that the words are prima facie broad and designed to catch things which have sufficient nexus to the subject. The question of sufficiency of nexus is, of course, dependent on the statutory context. ...".*.

45. Similarly, in Ireland, Murphy J., in *Eccles Hall Ltd Bank of Nova Scotia* (High Court, unreported, 3rd February, 1995) at p. 16, observed that the somewhat similar phrase "*in connection with"* used in s. 60 of the Companies Act, 1963 are *"of wide import".* The choice of such wide words by the Oireachtas is striking. It would have been an easy matter for the Oireachtas to provide that the Board shall not grant permission where a proposed development contravenes a zoning objective of a development plan. Instead the Oireachtas chose to use much wider language namely *"in relation to the zoning of the land".* Thus, it would appear that there is some substance to the suggestion made by counsel for the

applicant that, even if the *"Residential Phase II (Post 2019)"* designation was not itself a zoning objective, it nonetheless fell within the wider ambit of the words *"in relation to the zoning of the land"*. For this purpose, it is clear from the land use zoning objectives map that the designation was used to qualify the previous zoning of the land as residential in the unvaried version of the 2019 plan and the designation could, accordingly, be legitimately viewed as being related to the zoning of the land. In such circumstances, even if the designation falls short of a zoning objective *per se*, there would appear to be a proper basis to conclude that the decision of the Board materially contravened the County Development Plan in relation to the zoning of the land. However, I stress that this observation is *obiter* and the matter might well require more significant debate in the event that the issue is ever to arise in any future proceedings.

The balance of the applicants' case

46. In light of the finding reached by me in relation to the application of s. 9 (6) (b) of the 2016 Act, it is, strictly speaking, unnecessary to consider the additional grounds of challenge advanced by the applicants in relation to the Habitats Directive. Nonetheless, lest the matter goes further, I propose to address the issues identified in para. 3 (c), (d) and (e) above. It would, however, not be appropriate to consider the additional cases made as against the State respondents identified in para. 3 (b) and (f). As outlined in para. 4 above, I am of the view that any issues in relation to transposition or in relation to compatibility of the 2016 Act with the SEA Directive should only be addressed in the event that the applicants do not succeed in relation to any of the other issues ventilated by them in their statement of grounds. In circumstances where the applicants have succeeded on the basis of the claim advanced in relation to s. 9 (6) (b) of the 2016 Act, it would therefore be inappropriate for me to address any of the grounds of challenge advanced against the State respondents.

***Ex situ* effects**

47. The first issue which falls to be considered, in the context of the Habitats Directive, is the complaint made by the applicant in relation to *ex situ* effects. As explained in para. 65 of the written submissions delivered on behalf of the applicants, their case, under this heading, is that the Board was not in a position exclude, at the screening stage, *ex situ* effects on avi-fauna arising from the proposed development. They contend that it is common case that the Board had no survey or any other information before it upon which it could properly have determined that such effects could be excluded at the screening stage. The applicants rely in this context on the provisions of s. 177U of the 2000 Act which, with the intention of implementing the requirements of the Habitats Directive, set out the steps which a competent authority should take in carrying out a screening for appropriate assessment. Section 177U (1) requires that such a screening should be carried out in order to assess *"in view of the best scientific knowledge, if … [the] proposed development, individually or in combination with another plan or project is likely to have a significant effect on a European site".* Under s. 177U (4) the authority is required to determine that an appropriate assessment of the proposed development must take place if *"it cannot be excluded, on the basis of objective information, that the … proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site".*

48. In order to understand this aspect of the applicant's complaint, it is necessary to note that two special protection areas (*"SPAs"*) for birds are in proximity to the development site. According to para. 10.1.2 of the report of the inspector appointed by the Board in this case, the River Boyne and River Blackwater SPA extends along the River Boyne westwards from the M1 motorway bridge approximately 120 metres to the north west of the site of the proposed development. The conservation objective for the SPA is to maintain or restore the favourable conservation condition of the Kingfisher.

49. The Boyne Estuary SPA is also close to the site. Although para. 10.1.4 of the inspector's report suggests that it is located as close as 4.5 metres east of the development site, it appears from para. 5.3.2 of Volume 1 of the Environmental Impact Assessment Report (*"EIAR")* that the Boyne Estuary SPA is located approximately 4.4 km from the site. It has been designated for a range of wetland bird species. In the National Parks & Wildlife Service (*"NPWS")* supporting document published in December 2012 in respect of the conservation objectives for the Boyne Estuary SPA, it is noted that the wetlands of northwest Europe are a vital resource for millions of northern and boreal nesting waterbird species that overwinter on such wetlands or visit them when migrating further south. According to para. 2.1 of the supporting document, the Boyne Estuary SPA regularly supports 1% or more of the all-Ireland population of the Golden Plover, the Knot, the Black-tailed Godwit and the Turnstone. In addition, it regularly supports 1% or more of the all-Ireland population, over the winter period, of the Shelduck, the Oystercatcher, the Grey Plover, the Lapwing, and the Redshank. In addition, the SPA supports a breeding population of the Little Tern. The supporting document also makes clear that the wetland habitats contained within the SPA are identified as being of conservation importance for these overwintering migratory waterbirds.

50. In para. 3.1 of the supporting document, the conservation objectives for the Boyne Estuary SPA are set out. These are to maintain the favourable conservation condition of the species for which the SPA is listed and to maintain the favourable conservation condition of the wetland habitat of the SPA as a resource for the migratory waterbirds that utilise it. The same paragraph also identifies factors that can adversely affect the achievement of these objectives. In the context of the objective to maintain the favourable conservation condition of the waterbird species, paragraph 3.1 explains that anthropogenic disturbance is one of the factors that adversely affect the objectives. As I understand it, anthropogenic disturbance relates to human activities. Paragraph 3.1 states that such disturbance that occurs in or near

the SPA (whether singular or cumulative in nature) could result in the displacement of one or more of the listed waterbird species from areas within the SPA and/or a reduction in their numbers. In addition, the same paragraph also addresses *ex situ* factors in the following terms:

> *"… several of the listed waterbird species may at times use habitats situated within the immediate hinterland of the SPA or in areas ecologically connected to it. The reliance on these habitats will vary from species to species and from site to site. Significant habitat change or increased levels of disturbance within these areas could result in the displacement of one or more of the listed waterbird species from areas within the SPA, and/or a reduction in their numbers …".*

51. Further information on the topic of *ex situ* impacts is addressed in Table 5.2 of the supporting document. According to Table 5.2, a number of the birds for which the SPA is designated are considered to be reliant on the site of the SPA itself but *"highly likely to utilise alternative habitats at certain times, for example, at high tide. These include the Golden Plover, the Black-tailed Godwit, the Turnstone, the Oystercatcher, the Lapwing and the Redshank".*

52. It is further explained in para. 5.1 of the report that, although some waterbird species will be faithful to specific habitats within the SPA, many will, at times, also use habitats situated within the immediate hinterland of the SPA or in areas ecologically connected to it. Such areas may be used as alternative high tide roosts, as a foraging resource or for overflight purposes. This paragraph also states:

> *"For example, while the majority of wading birds forage across exposed tidal flats, species such as Lapwing and Golden Plover are considered to be 'terrestrial waders', typically foraging across grassland and using tidal flats mainly for roosting. When*

tidal flats are covered at high water, intertidally-foraging waterbirds are excluded and ***many will move to nearby fields to feed****."* (emphasis added).

53. Paragraph 5.1 of the supporting document concludes by stating:

"Thus the area designated as a SPA can represent a variable portion of the overall range of the listed waterbird species. To this end, data on waterbird use of areas adjacent to or ecologically connected to the SPA are often collected. Indeed, for some species a mix of site-related and wider countryside measures are needed to ensure their effective conservation management … Furthermore, it is recommended that assessments that are examining factors that have the potential to affect the achievement of the site's conservation objectives should also consider the use of these 'ex-situ' habitats, and their significance to the listed bird species".

54. Notwithstanding the guidance given in the NPWS supporting document with regard to the potential use of surrounding lands as *ex situ* habitats of bird species for which the SPAs are designated, there is nothing in the EIAR to suggest that a survey was carried out specifically with a view to identifying whether any part of the subject lands were used from time to time by the bird species for which the SPAs have been designated. In para. 5.2.5 of the EIAR it is stated that habitats within the subject lands were surveyed on 25th September, 2018 by Ms. Laura Higgins and Mr. Colm Clarke of Scott Cawley and that a follow-up habitat survey was carried out on 26th March, 2019. However, it is clear from the summary that the latter was a limited survey to consider a portion of the lands that may be affected as a result of the road upgrade proposed as part of the project. In para. 5.2.6, it is confirmed that no dedicated breeding bird surveys were carried out as part of the assessment. Counsel for the Board placed some emphasis upon this. However, it is nowhere suggested in the EIAR that a non-breeding bird survey was carried out in respect of the species in issue. Nonetheless, the report, in para. 5.3.4 confirms that, in the course of both the September 2018

survey and in the subsequent walk-over survey of March 2019, a range of common garden bird species were encountered within the lands. These included the Chiffchaff, Goldfinch, the Pheasant, the Woodpigeon and the Buzzard. In addition, a number of amber-listed species were recorded including the Swallow, the Robin, the Blackbird and the Greenfinch. In the same paragraph, the authors state that the habitats within the development site are *"considered to be suitable for nesting and overwintering birds, particularly dry meadows and grassy verges, hedgerows, tree lines, and woodland".* Counsel for the applicant submitted that this was significant in light of the contents of the NPWS supporting document. However, counsel for the Board submitted that this was not focused on the protected species and that it should be read in conjunction with the preceding paragraph which addressed the common garden bird species which were encountered on the land. I am not sure, however, that this necessarily follows. The common garden bird species which were identified in the preceding paragraph are not overwintering birds. Most of the birds identified there spend the entire year in Ireland with the exception of the Swallow which migrates to warmer regions for the winter.

55. In para. 5.5.1 of the EIAR, the authors conclude that there is no risk of loss of *ex situ* habitats arising from the project. The basis for this conclusion is stated in quite terse terms as follows:

> *"There is no possibility of any other significant effects on European sites in light of the distance and large estuarine and marine water buffer separating the project from designated sites. The lands do not contain habitats for which European sites … in the zone of influence have been designated, and therefore there is no risk of loss of ex situ habitats arising from the project. No qualifying interest or special conservation intra species for which any European sites have been designated or known to occur within*

the subject lands, and they are not considered to be an ex situ site with respect to any European sites".

56. As I read that passage, the following grounds are relied on in support of the conclusion that there is no risk of loss of *ex situ* habitats:

(a) In the first place, reference is made to the estuarine and water buffer separating the project from designated sites. This is clearly not relevant to the birds for which the Boyne Estuary SPA has been designated. They are all capable of flight and therefore the estuary does not create a buffer insofar as they are concerned;

(b) A further reason advanced is the distance from the designated sites. However, the River Boyne and River Blackwater SPA is adjacent to the development lands. In so far as the Boyne Estuary SPA is concerned, it is 4.4 or 4.5 km from the development lands. But there is no information in the EIAR to establish that this distance is sufficient to rule out the use of the development lands by any of the species for which the SPA has been designated;

(c) The next reason advanced is that the lands do not contain habitats for which the European sites have been designated. This appears to be advanced as the principal reason why the authors have concluded that there is no risk of loss of *ex situ* habitats. However, the NPWS supporting document clearly explains that, when tidal flats are covered at high water, some species will move to nearby fields to feed. Furthermore, Table 5.2 of the supporting document also very clearly explains that a number of the designated species have the ability to utilise alternative habitats (i.e. habitats for which the SPA has not been designated) including agricultural land;

(d) Finally, it is stated that no relevant species for which the European sites have been designated are known to occur within the subject lands. However, as noted above, there is nothing in the document to suggest that any survey was carried out with the specific intention of assessing whether any of the designated species in fact make use of the land. Again, it should be recalled that the NPWS supporting document expressly recommends that assessments that examine factors that have the potential to affect the achievement of the SPA's conservation objectives should consider the use of *ex situ* habitats and their significance to the relevant bird species.

57. The material contained in the EIAR is mirrored in the terms of the screening report and Natura Impact Statement (*"NIS")* prepared by Scott Cawley on behalf of Trailford. In para. 3.1 it is noted that the Boyne Estuary SPA is located 4.4 km from the development site. However, it is stated that none of the bird species for which the SPA has been designated *"are known to utilise any of the habitats present in the subject lands and none of these species (or signs of them) were noted within the subject lands during field surveys undertaken in September 2018 or March 2019."* Nonetheless, at para. 4.1 of the NIS, the authors acknowledge that the zone of influence of the proposed development is considered to extend to four European sites including both the Boyne Estuary SPA and the River Boyne and River Blackwater SPA. The NIS also notes that it is often considered appropriate to examine all European sites within 15 km as a starting point. However, the authors record that there are no sites outside of the Boyne River and Estuary which are considered to be within the zone of influence of the development. As explained in more detail below, the NIS also proceeds on the assumption that a full appropriate assessment will be required in this case. In para. 2.1, the authors state that the information comprised in the NIS *"will assist the competent authority to conduct both the* ***required*** *Stage 1 Screening* ***and*** *Stage 2 Appropriate*

Assessments …" (emphasis added). This is reinforced by the statement in para. 4.3 of the report to the effect that, in the professional opinion of the authors, it is not possible to exclude, on the basis of objective information, that the proposed development either individually or in combination with other plans or projects will have a likely significant effect on *(inter alia)* the two SPAs. For the purposes of carrying out an appropriate assessment, the NIS provides the Board with information in relation to a bird species for which the SPAs have been designated. However, it is not based on data collected in any surveys carried out by the authors but instead, insofar as the Boyne Estuary SPA is concerned, is based on material published by the NPWS in 2013 relating to distribution of the designated bird species in the 2011/2012 season.

58. In the submission made to the Board by Protect East Meath, it was contended that the information relating to birds was insufficient. Complaint was made that there was no survey using recognised methodology of the extent of the use of the site for roosting and feeding by the designated species for either SPA. The submission also highlighted that the site visit took place during a period that *"is not suitable for winter bird surveys"*. It should be recalled, in this context, that the habitat surveys by Scott Cawley were carried out in September and March respectively both of which are borderline on the shoulder season for over-wintering birds. It was also specifically alleged that there had been a failure to provide any evidence, in particular, in respect of *ex situ* factors relevant to the Boyne Estuary SPA. Furthermore, the submission specifically referred to the NPWS Supporting Document published in relation to the Boyne Estuary SPA.

59. Concern was also expressed about the lack of surveys by the Heritage Office of Meath County Council. The concerns of the Heritage Officer are replicated in the report furnished to the Board by the County Council as follows:

*"**Birds***

It is stated that the habitats 'within the subject lands are considered to be suitable for nesting and overwintering birds'…. However, no survey was undertaken therefore I am not satisfied that there has been sufficient survey effort to adequately address the likely impact on such species of conservation interests".

60. Curiously, the report of the County Council states, in paras. 7.12.1, that the Heritage Officer had not raised any issue in relation to the efficacy of the AA Screening. Those two statements appear to me to be mutually inconsistent. Nonetheless, the report does raise an issue about the adequacy of the survey work undertaken on behalf of Trailford. For completeness, it should also be noted that the report records that no issues were raised by NPWS in relation to wildlife conservation and that the comments submitted by NPWS *"pertain to archaeology".*

61. The screening issue was subsequently addressed by the inspector in paras. 10.1.1 to 10.1.11 of his report. In para. 10.1.2, the inspector referred to the conservation objective of the River Boyne and River Blackwater SPA. In para. 10.1.4, the inspector described the conservation objectives of the Boyne Estuary SPA. The inspector then continued as follows in para. 10.1.5 to 10.1.6:

"*10.1.5. The application site does not contain any of the habitats which are the subject of the conservation objectives of the SACs or SPAs, as is set out in the submitted … NIS and the EIAR. The application site does not contain habitats that would support any of the species which are the subject of the conservation objectives of the SACs and SPAs, including birds species, as is clear from the information submitted in the NIS and EIAR. It is therefore concluded that the proposed development would not have the potential to have any direct effect on any Natura 2000 site.*

10.1.6. The application site does not provide ex situ habitats that support populations or species in the adjacent or other Natura 2000 sites which are the subject of the conservation objectives of those sites, as is evident from the information submitted in the NIS and EIAR which is consistent with the observations of the site at the time of inspection. The assertions to the contrary in some of the submissions are not well founded and are not accepted. As the application site does not provide such ex situ habitats, the compilation of seasonal bird surveys would not provide useful information for appropriate assessment and is not required to complete screening".

62. The approach taken by the inspector in these paragraphs was the subject of criticism in the submissions made by counsel for the applicants. It was suggested that the approach taken by the inspector (i.e. that the application site does not support *ex situ* habitats such that bird surveys are not required) is *"to turn logic on its head."* Counsel submitted that the purpose of the surveys was to establish whether the site is used by these species. In the absence of such surveys, it was contended that it is impossible to know whether the site does or does not serve as an *ex situ* habitat. It was further submitted that the Board, accordingly, had no information before it in relation to whether the site is or is not used by qualifying avi-fauna. It was further submitted that the Board cannot lawfully screen out the possibility of significant effects (including anthropogenic disturbance or *ex situ* effects) when no survey work was undertaken to establish whether, when and to what intensity, the site is utilised by any of the protected species. In such circumstances, it was argued that the approach taken did not involve the application of best scientific knowledge as required by s. 177U (1) of the 2000 Act.

63. Counsel for the applicants also addressed the case made in the Board's statement of opposition to the effect that the inspector had made a factual conclusion which he was entitled to reach and which the Board was entitled to adopt. Counsel submitted that the

difficulty with this argument is that there was no information before the Board upon which the inspector could reasonably have reached that conclusion. Counsel also submitted that, conspicuously, the Board has not identified any such information anywhere in the application documents or provided any explanation as to how the inspector could have arrived at such a conclusion.

64. In response, counsel for the Board maintained the position that the inspector was entitled to reach a factual conclusion of that kind. In addition, counsel for the Board highlighted that the inspector had himself carried out a site inspection on 12 January, 2020 and was therefore in a position to evaluate for himself the suitability of the habitat as a roosting and/or foraging habitat for any of the qualifying interests of the relevant European sites including the Boyne Estuary SPA. Counsel for the Board also drew attention to the fact that the surveys which had been undertaken identified a number of bird species and furthermore regard was had to NPWS records for bird species in the locality. In addition, it was submitted that there is no legal authority for the proposition that bird surveys are required to be carried out especially in circumstances where the inspector had concluded, on the basis of the information provided in para. 4.1 of the NIS, that they were not required.

65. Counsel for the Board also submitted that there was no evidence put before the Board or before the court by the applicants to establish that any of the designated species made use of the development site. He submitted that there was ample material available to support the conclusion reached by the inspector. In particular, he drew attention to Table 5.2 of the NPWS supporting document which described the principal supporting habitat of each of the designated species as *"intertidal mud and sand flats"* and he contrasted that with the information contained at pp. 66-67 of the EIAR where the relevant habitats were described as horticultural land, dry meadows and grassy verges of no more than local importance to birds.

Counsel for the Board also highlighted that the NPWS had not made any submission expressing concern.

66. Counsel for the Board also relied on the approach taken by Barniville J. in *Kelly v. An Bord Pleanála* [2019] IEHC 84. In that case, Barniville J., at para. 116, observed as follows:

> *"I am satisfied that … there is no basis for his [the applicant's] assertion that the screening report contains gaps or lacunae, whether in relation to concrete or sediment run-off during construction or otherwise. First, I agree that it is primarily a matter for the Board or its inspector to determine whether it has sufficient information before it in order to carry out its functions at the stage 1 screening stage. The … inspector expressly stated in her report … that she had sufficient information on the file (including the screening report) to enable her to carry out a screening determination. In my view, the … inspector was entitled to reach that conclusion on the basis of the evidence before her. The position is somewhat analogous to that which existed in People Over Wind … albeit that in that case the court was considering the information before the Board at the stage 2 appropriate assessment stage. I also agree that a finding that the inspector has adequate information before her in order to issue a screening determination is one which can be challenged on the grounds set out in O'Keeffe. It would be open to an applicant to point to obvious deficiencies in the information before the Board in mounting a challenge on those grounds. However, in my view, there were no such deficiencies in the present case and no basis for impugning the inspector's conclusion that she had sufficient information before her to carry out a screening determination".*

67. At para. 117 of his judgment, Barniville J. confirmed that, having reviewed the screening report and the inspector's conclusions in that case in detail, he was satisfied that there were no gaps or lacunae in the report. At para. 119, Barniville J. also highlighted that

the applicant in those proceedings had not put forward any evidence *"whether from an expert or otherwise, to contradict the findings contained in the screening report or the evidence of Mr. Fogarty…".*

68. I confirm that I entirely agree with the observation made by Barniville J. that it is primarily a matter for the Board (either by itself or through its inspector) to determine whether it has sufficient information before it in order to carry out its functions in relation to a stage 1 screening exercise. Where the Board or its inspector has made a finding that sufficient information is available to enable a screening exercise to be carried out, the court will not intervene unless it is clear, either on the basis of evidence placed before the court by the applicant in the proceedings or on the basis of some objective material, that there is a gap or *lacunae* in the information before the Board. As Barniville J. emphasised, there may be cases where there are obvious deficiencies in the information before the Board which would allow an applicant to mount a challenge to the sufficiency of a screening exercise.

69. In the present case, the applicants have not placed any evidence of their own or of an expert before the court. Nonetheless, I am satisfied there is objective material before the court which was not addressed in the report of the inspector and which has not been sufficiently addressed in the EIAR or NIS. This relates to the information contained in the NPWS supporting document discussed above which very clearly identifies that, in the case of a number of the designated species who normally forage across exposed tidal flats (such as the Lapwing and the Golden Plover) many will move to nearby fields to feed when such tidal flats are covered at high water. For that reason, NPWS recommended that assessments examining factors that have the potential to affect the achievement of the SPA's conservation objectives should also consider the use of *ex situ* habitats. In fact, it is confirmed by Table 5.2 that for six of the species for which the Boyne Estuary SPA is designated, there is an ability to use other alternative habitats at certain times (in particular at high tide). Thus, the

suggestion made by counsel for the Board that the EIAR establishes that the horticultural land and dry meadows are of no more than local importance does not, in any way, exclude their use by these six designated species. I fully appreciate that the Boyne Estuary SPA is situated some 4.4 or 4.5 km from the development site. However, I can see nothing in the report of the inspector or in the underlying material submitted on behalf of Trailford which establishes that this distance is sufficient to enable a conclusion to be reached at the screening stage that the site is not used on an *ex situ* basis by any of these species. As outlined in para. 56 above, the basis advanced by Trailford for the non-use of the site by such species is based on four factors. The first reason advanced was that there is no possibility of significant effects in light of the distance and what was described as the *"large estuarine and marine water buffer separating the project from designated sites".* As noted previously, the estuary is plainly not a buffer insofar as birds are concerned. With regard to the question of distance, the River Boyne and River Blackwater SPA is immediately adjacent to the site. It may well be the case that this can be discounted because the only relevant designated species is the Kingfisher but that is not stated anywhere in the materials placed before the court. It is true that the Boyne Estuary SPA is some 4.4. or 4.5 km from the development site. However, there is nothing in the material before the court to suggest that the species for which that SPA has been designated would be unlikely to travel 4.4 km for foraging purposes.

70. The next reason advanced was that the lands do not contain habitats for which the European sites in the zone of influence have been designated. On that basis it was concluded that there is no risk of loss of *ex situ* habitats arising from the proposed development. It is true that the lands do not contain mudflats or wetland habitats. However, as noted previously, that ignores the information contained in the NPWS supporting document which clearly identifies that a significant number of the bird species for which the Boyne Estuary SPA has been designated, are capable of using alternative habitats to the wetland habitats which are

the subject of Objective 2 (as explained in the supporting document). Furthermore, at p.p. 29-38 of the supporting document, there is significant information provided in relation to each of the individual species for which the SPA has been designated. Thus, for example, in the case of the Golden Plover, it is stated that, during winter, the birds feed *"primarily within agricultural grassland and arable land. Tidal flats are used more as a roosting/resting habitat…. Intertidal feeding is observed to a greater degree during cold weather periods when grassland feeding areas are frozen over".* While there is no suggestion in the NPWS supporting document that any Golden Plover (or any of the other species) have been observed on the site of the proposed development, this does not mean that there is no risk of loss of *ex situ* habitats arising from the project. The fact that the NPWS supporting document identifies that agricultural land of this kind provides suitable foraging for some of the relevant bird species illustrates that one cannot conclude that, because the lands do not contain a wetland habitat, there is no risk of loss of *ex situ* habitats.

71. The final reason advanced is that no qualifying interest or special conservation interest species for which either of the SPAs have been designated *"are known to occur within the subject lands, and they are not considered to be an ex situ site with respect to any European sites".* It is important to recall in this context that, under s. 177U (1) of the 2000 Act, the Board is required to carry out a screening exercise in order to assess *"in view of best scientific knowledge"* if a proposed development is likely to have a significant effect on a European site. The requirement to carry out such an assessment *"in view of best scientific knowledge"* is reinforced by the provisions of s. 177U (4) and 177U (5). In particular, under s. 177U (5) a competent authority (in this case the Board) is entitled to determine that an appropriate assessment is not required *"if it can be excluded,* ***on the basis of objective information,*** *that the proposed development will have a significant effect on a European site.".* It is clear, therefore, from the statutory scheme that there must be an objective basis

(informed by best scientific knowledge) before any conclusion can be made by a competent authority such as the Board that significant effects can be excluded. As noted above, in the present case, the applicants contend that there should have been a detailed bird survey carried out over the course of the winter in order to ascertain whether there was, in fact, any *ex situ* use of the lands by any of the bird species for which either of the SPAs were designated. In the absence of such a survey, they contend that there was no objective information available to the Board on which to conclude that the development site does not provide *ex situ* habitats for the bird species in issue.

72. It is important to bear in mind that there was some objective material before the Board. As noted previously, the EIAR identifies that there were two habitat surveys, the first carried out on one day on 25th September, 2018 and the other carried out on 26th March, 2019. In addition, the inspector visited the lands in January 2000 on one occasion. While very little detail has been provided as to the nature of the surveys carried out by Scott Cawley in September or March 2019, it is clear from the EIAR that those conducting the survey were clearly concerned to identify any bird species which they encountered within the lands on the two days in question in September 2018 and March 2019. This is made clear in para. 5.3.4 of the EIAR. In para. 10.1.6 of his report, the inspector confirms that his own observations at his inspection of the site in January 2000 were consistent with the observations made by Scott Cawley in September 2018 and March 2019.

73. In circumstances where there is some objective material before the Board, the court would usually not be in a position to interfere unless, as Barniville J. has said, there is an obvious deficiency in that material or unless there is clear evidence that the *"best scientific knowledge"* requirement had not been observed. However, in the present case, it seems to me that there is an obvious *lacuna* in the information before the Board in relation to bird surveys. While it appears to be clear that, on at least three occasions, there was no sighting of any of

the species for which the SPAs have been designated, there is no information contained either in the EIAR, the NIS or in the inspector's report which suggests that any of these inspections took place at high tide in the nearby Boyne Estuary. In this context, it is clear from the material contained in the NPWS supporting document in respect of the Boyne Estuary SPA that displacement of some of the species from the wetlands or tidal flats takes place at high tide and the species then migrates to agricultural lands in the vicinity of the SPA. It would therefore be a key requirement that any survey should be undertaken at high tide when, in the case of at least some of the species, resort to *ex situ* habitats is most likely to occur. (Obviously, any such survey should also be undertaken at a time of the year when the relevant bird species for which the SPA has been designated would be expected to be present on or in the vicinity of the SPA). Unfortunately, there is simply no information available in the materials before the court to establish whether the surveys and inspections took place during the high tide period. In the circumstances, I do not believe that it can be said that there was objective material which could be assessed by reference to the best scientific information standard to support the conclusion that *ex situ* impacts could be properly excluded at the screening stage.

74. In addition, there is an obvious error taken both in the EIAR and in the inspector's report insofar as they purported to exclude *ex situ* impacts by virtue of the fact that the development site does not contain habitats that could support any of the species which are the subject of the conservation objectives of the SPAs. Based on the supporting document issued by NPWS, this conclusion is plainly erroneous. For the reasons outlined in paras. 69 to 70 above, it is clear that some of the species for which the Boyne Estuary SPA has been designated resort to arable or agricultural land and, accordingly, it is incorrect to suggest as the inspector does, in para. 10.1.5 of his report that the application site *"does not contain habitats that would support any of the species which are the subject of the conservation*

objectives of the … SPAs … ". In these circumstances, this seems to me to be a further reason why the screening exercise did not involve the application of best scientific information. It could not be in doubt but that the material contained in the NPWS supporting document constituted best scientific information in relation to the Boyne Estuary SPA.

75. Accordingly, I have come to the conclusion that the screening exercise that was carried out by the Board in this case does not comply with the requirements of s. 177U (1) and s. 177U (5) of the 2000 Act. It follows that the decision of the Board must be quashed on this ground also.

Mitigation measures

76. The complaint made by the applicants is that, contrary to the principle established by the CJEU in Case C-323/17 *People Over Wind v. Coillte* ECLI:EU:C:2018:244, the Board in carrying out a stage 1 screening exercise, unlawfully took into account mitigation measures designed to avoid adverse impacts of the development on the four European sites identified in the EIAR. In *People Over Wind*, the relevant screening report had concluded that, in the absence of what were described as protective measures, there was potential during the construction of a particular project, for the release of suspended solids into waterbodies which were hydrologically connected to a European site of importance to the Nore Freshwater Pearl Mussel. However, the screening report concluded that there would be no adverse impacts because of the protective measures proposed. On that basis, a stage 2 appropriate assessment was not carried out. This decision was challenged by the applicants in that case. Applying the precautionary principles, the CJEU came to the conclusion that it would be inconsistent with the requirements of Article 6 (3) of the Habitats Directive to take into account, at the screening stage, measures intended to avoid or reduce the harmful effects of a project on a European site.

77. In the present case, Trailford expressly accepted that, in the absence of mitigation, there is a potential for pollutants such as sediments and hydrocarbons to affect water quality within the receiving surface water network (in particular the River Boyne). Furthermore, the EIAR and the NIS assumed that it would be necessary to carry out a stage 2 appropriate assessment. However, the inspector, in paras. 10.1.9 to 10.1.11 of his report, came to the conclusion that the measures in question constitute the standard established approach to surface water drainage for construction works on greenfield land which would be required regardless of the proximity or connection to any Natura site. In particular, in para. 10.1.9 of his report, the inspector stated that any competent developer would be expected to deploy such works on a greenfield site whether or not they were explicitly required by the terms or conditions of a planning permission. He also observed that the efficacy of such measures in preventing the risk of deterioration in the quality of water, downstream of construction works, has been demonstrated by long usage. He concluded that any adverse impact on the Natura sites would only arise if the proposed development works were carried out in an incompetent manner or "*with reckless disregard to environmental obligations that arise in any rural area whether or not it is connected to a Natura 2000 site."* In circumstances where there was no evidence to suggest that the applicant or its employees would be likely to behave in that way, he concluded that the proposed development would not be likely to have a significant effect on any Natura site, whether directly or indirectly or individually or in combination with any other project. On that basis, no stage 2 appropriate assessment was carried out by the Board.

78. It is the applicants' case that, when the materials before the Board are considered objectively, the intended purpose of the measures is to avoid the potential for adverse impacts on the European sites and that, accordingly, having regard to the principles established in *People Over Wind*, it was not open to the Board to take them into account at the screening

stage. The applicants have relied, in this context, on the judgment of Simons J. in *Heather Hill Management Company v. An Bord Pleanála* [2019] IEHC 450 and in particular on the statement by Simons J. in para. 157 of his judgment in that case that:

> *"The intention of the measures was expressly stated to be protective. In the circumstances, the … legal test under People Over Wind could readily be applied to the facts of the case".*

79. As a secondary argument, the applicants challenge the suggestion that the measures are standard techniques. In the verifying affidavit sworn by Mr. Peter Ryan on behalf of HRA, he referred to two cases where the Board had granted permission for strategic housing developments in which it was suggested that the measures proposed by Trailford here were not imposed as standard measures by the Board. On that basis, the applicants contended that, on the evidence before the court, the mitigation measures cannot be considered to be standard. I do not, however, believe that there is sufficient information before the court to substantiate this element of the applicants' case and I therefore do not propose to address it in this judgment.

80. In response, the Board argued that it was clear from the inspector's report that the Board did not intend that these measures should be included in order to avoid or reduce impacts on the European sites. Counsel for the Board stressed that, as the inspector had observed, these measures would be required on any greenfield site irrespective of the existence of any European site downstream of the development works. Counsel argued that the measures are intended to address water quality in the same way as the SUDS measures considered by Barniville J. in *Kelly. v. An Bord Pleanála* [2019] IEHC 84 where a conclusion was reached that, in circumstances where SUDS measures are required to be incorporated in all new developments (subject to some exceptions which are not relevant here), the measures

could not be treated as mitigation measures designed to avoid any harmful effects on a European site.

81. In light of these competing submissions, it is necessary to consider the relevant material generated during the course of the proceedings before the Board and the manner in which the issue was addressed by the inspector (whose report was adopted by the Board).

82. In para. 5.5.1 of the EIAR, it is acknowledged that, in the absence of mitigation, the possibility of significant effects cannot be ruled out with regard to the River Boyne and River Blackwater SAC, the River Boyne and River Blackwater SPA, the Boyne Coast and Estuary SAC and the Boyne Estuary SPA. In the same paragraph, the EIAR addresses the mitigation measures proposed in the following terms:

> *"The specific mitigation measures for the construction at operation phases are outlined in full within the Construction Environmental Management Plan (CEMP), prepared by Waterman Moylan Consulting Engineers …. In Summary, during construction the River Boyne will be protected from surface water runoff by a series of cut off trenches which follow existing contours, filled with check dams and/or straw bales and a final settlement pond. A suitably qualified person would inspect the system during construction works to ensure it is functioning properly and that excessive silt does not reach the River Boyne. Construction will involve a range of appropriate mitigation measures such as the use of drip trays, bunding and emergency response measures for spills. …. Temporary works during the construction phase are required to capture, attenuate and filter surface water run-off from the construction site. The existing culvert running along the southern site boundary will be replaced by a larger one at the start of construction works to reduce the possibility of flooding on the subject lands.*

During operation, SUDS measures are proposed for the treatment of all surface waters arising from the subject lands. These include a series of underground storm tech and hydrobrake facilities which will attenuate run-off to greenfield rates and will provide first flush settlement of silts and hydrocarbons and some level of percolation to ground. The hydrocarbon interceptor will be provided at the last stage prior to exiting the development site. Treated and attenuated surface waters will be rooted off the proposed development site …".

83. Paragraph 7.2.2 of the EIAR identifies a number of potential impacts from the construction of the proposed development including the risk of run-off of sediment, and the accidental spillage of oils or diesel from temporary storage areas. In addition, para. 7.2.3 identifies a number of potential impacts arising from the operational phase in particular increased surface water flows that could lead to downstream flooding and a potential impact for the discharge of contaminants from the proposed development and road surfaces to the surrounding drainage ditches which ultimately drain into the River Boyne. Paragraph 7.2.5 addresses the measures that should be put in place during construction which include the use of cut-off trenches along the northern boundary of the development (i.e. the boundary closest to the River Boyne) which would be fitted with a settlement pond/silt trap at the end of each trench with an overflow. Straw bales would be placed within the cut off trenches at strategic locations and at the outfall of the settlement ponds. These measures would be used to prevent surface water run-off discharging directly into the local water courses. In addition, settlement ponds/silt traps would be installed in existing ditches and watercourses during the drainage works. There would be regular testing of surface water discharges and, in the event that any failure of the silt control measures was noted, works would cease in the relevant area and the project ecologist would carry out a review. All fuels and chemicals would be bunded and stored within double skinned tanks or containers.

84. With regard to the operational phase, para. 7.2.6 of the EIAR explains that flow restrictions with attenuation storage would be used to slow down and store surface water run-off from discharging above greenfield rates to ditches and culverts. Attenuation systems would be constructed to intercept the first flush during rainfall events after periods of dry weather. A proposed Stormtech system would provide an *"Isolator Row"* which would provide treatment even in low flow conditions. This would be surrounded with filter fabric to prevent settling and filtration of sediments as the water passes through. In addition, SUDS measures (such as filter drains, permeable paving, rainwater harvesting and swales) would be provided. These measures are also described in Chapter 14 of the EIAR.

85. The issue is also addressed in the NIS. In para. 4.3 of the NIS, the authors state that, following an examination, analysis and evaluation of the relevant information and applying the precautionary principle, it is *"the professional opinion of the authors that it is <u>not possible to exclude,</u> on the basis of objective information, that the proposed development individually or in combination with other… projects, would have a likely significant effect on the … four European sites ….*

In the case of the four European sites … the only likely significant risks …in the absence of mitigation… arises from potential construction-related discharges to surface waters from the proposed development and the potential for these effects to reach downstream European sites. It was concluded, therefore, that likely significant effects on these … sites may require mitigation to avoid adverse impacts on the integrity of the … sites concerned." (underlining in original).

86. As noted above, the EIAR also refers to the Construction Environmental Management Plan (*"CEMP")* prepared by Waterman Moylan, Engineering Consultants. Table 1 at p. 6-7 of the CEMP describes the mitigation measures in tabular form. They are also set out in Table 2 of the NIS. These are introduced in para. 2 of the CEMP in the following terms:

"The following Mitigation Measures are to address potential impacts to water quality and are required to protect the Special Area of Conservation (River Boyne)…".

87. Counsel for the Board stressed that the measures are designed to address potential impacts to water quality. On the other hand, counsel for the applicants highlighted that potential impacts to water quality is only one aspect of the explanation provided by the CEMP. He highlighted that the above passage clearly envisages that the mitigation measures are also required to protect the SACs and, by inference, the SPAs. Counsel for the applicants noted that, at para. 3.5, the authors acknowledge that the site is located directly south of the River Boyne and is hydrologically connected to four European sites. In the same paragraph, the authors state:

"The mitigation measures outlined in this CEMP are designed to prevent pollutants from entering the River Boyne.

88. Counsel for the applicants also emphasised that, in the same section of the CEMP, it is stated that aquatic fauna and habitats will be *"protected through the implementation of mitigation measures detailed within Table 1 of this CEMP".*

89. Counsel argued that it was clear from these materials that the mitigation measures were clearly intended to avoid harmful effects on the protected European sites and that, in those circumstances, it was unlawful, having regard to the decision of the CJEU in *People Over Wind*, for the Board to take them into account at the screening stage. In contrast, counsel for the Board argued that the characterisation of the measures by the developer was not determinative. The intention of the measures had to be assessed objectively and the Board was entitled (through its inspector) to reach the conclusion that the measures were standard measures designed to protect water quality in the same way as the SUDS measures considered by Barniville J. in *Kelly v. An Board Pleanala*. In reply, counsel for the applicants accepted that the characterisation of the measures by the developer was not

decisive but he argued, nonetheless, that, on any objective consideration of the materials, it could not be said that the sole objective of the measures was to protect water quality. The intention was equally to ensure that there would be no harmful effects on the European sites in issue and he referred to the statement (quoted in para. 86 above) in para. 2 of the CEMP that the measures were intended to address potential impacts to water quality and were also required to protect the SACs.

90. In this context, it should be noted that, in *Heather Hill Management Company v. An Bord Pleanála* [2019] IEHC 450 at para. 162, Simons J. explained that the fact that measures might have a purpose unrelated to the Habitats Directive does not preclude a finding that the measures were also intended to avoid or reduce the impact of the development on European sites.

91. I have previously sought to summarise the relevant principles derived from the decision of the CJEU in *People Over Wind* and subsequent Irish case law in my judgment in *Sweetman v. An Bord Pleanála* [2020] IEHC 39 at para. 89. I will therefore not repeat that exercise here. It is sufficient to record that a stage 2 appropriate assessment must be carried out if, on a screening exercise, it is not possible to exclude the risk that a proposed development will have a significant effect on a European site. The appropriate time to consider measures capable of avoiding or reducing any significant effects on the site concerned is at the stage 2 appropriate assessment when a comprehensive analysis of those measures can be carried out in order to determine whether they will be effective. To take account of such measures at the screening stage is liable to undermine the protections afforded by the Habitats Directive and runs the risk of circumventing the stage 2 assessment which constitutes an essential safeguard under the Directive. For that reason, it is impermissible, at the screening stage to take account of measures intended to avoid or reduce the harmful effects of a proposed development. The question of the intention underlying

those measures must be assessed objectively. For that reason, the language used by the developer or by the Board in the course of the screening exercise is not determinative. Nonetheless, as the decision of Barniville J. in *Kelly v. An Bord Pleanála* demonstrates, there may be cases where it is clear that the measures in question were adopted not for the purpose of avoiding or reducing the potential impact on the relevant site but where adopted solely and exclusively for some other purpose. However, the fact that one of the purposes of the measures in question with the protection of a European site does not exclude the possibility that there may be more than one purpose for the measures. Accordingly, in cases where an unconnected purpose is identified, it is always necessary to consider whether, as a matter of fact, the measures were also intended to avoid or reduce the impact of the development on a European site. As Simons J. observed in *Heather Hill* that does not mean that it is legitimate to work backwards from the existence of the measures and to assume from their existence that the proposed development must be likely, in the absence of such measures, to have a significant effect on the relevant European site.

92. Bearing those principles in mind in the present case, the fact that Trailford described the measures in issue as mitigation measures intended to avoid the potential harm to the SACs and SPAs is not decisive. What is of crucial importance is that, as the inspector confirmed in para. 10.1.8 of his report, there is a potential risk to the European sites as a consequence of the development. The inspector described it as the *"mobilisation to surface waters of sediment and other pollutants during construction that could damage the quality of waters in the downstream Natura 2000 site, which might in turn have an impact on the prey abundance in the SPA upstream."* While the inspector refers there solely to a single SPA and solely to effects upstream on prey abundance, it is clear from the EIAR and the NIS that the Boyne Estuary SPA and the two SACs which had been identified in the EIAR and NIS are also within the zone of influence of the development and the sole concern is not with prey

abundance. For present purposes, it is important that, in the passage quoted above, the inspector plainly recognised that there was a pathway between the development site and the Natura 2000 sites which could potentially lead to deleterious materials being carried from the former to the latter. This is in contrast to the report of the inspector in *Kelly* where there was a finding (as para. 90 of the judgment of Barniville J. records) that there was no such pathway in that case. This is an important factor that distinguishes that case from the present one.

93. Thereafter, the inspector, in para. 10.1.8 of his report listed the measures proposed to be taken and he highlighted that most of them specifically referred to the protection of water quality. As noted above, in para. 10.1.9 of his report, he concluded that these measures constitute the standard established approach to surface water drainage for construction works on greenfield land and that their implementation would be necessary on any greenfield site whether or not there was a Natura 2000 site in the vicinity. He also observed that their efficacy in preventing the risk of a deterioration in the quality of water downstream *"has been demonstrated by long usage".* Having made all of those findings, the inspector continued as follows:

> *"**Therefore** the proposed development would be not likely to have a significant effect [on] the quality of the waters in the Natura 2000 sites downstream of the application site…".* (emphasis added).

94. While I have every sympathy for a person in the inspector's position who, through his expertise and experience, is well capable of forming a view as to the efficacy of measures of this nature, I regret to say that, in my view, he fell into error in the approach taken by him in para. 10.1.9 of his report. In the first place, the fact that the measures are standard construction techniques is irrelevant in the event that one of the purposes of the measures is to avoid potential impacts on a protected European site. In this case, even if one accepts that one of the purposes of the measures was simply to preserve water quality and that such

measures would be taken, as a matter of course, in any development of this kind, that does not alter the fact that a further purpose of the measures here was undoubtedly to protect the European sites. When one looks objectively at what is said by the inspector in para. 10.1.9 of his report, it is clear that he relied on the measures in order to form the conclusion that there would be no harm caused to the SPAs and SACs in question. As Simons J. observed in para. 158 of his judgment in *Heather Hill* at para. 162:

> *"…if, as in Kelly …, the measures are required for purposes entirely unrelated to the Habitats Directive, then the mere fact that reference is made to same in the context of the discussion of the screening determination does not invalidate that decision. It all depends on what reliance is placed upon same. As appears from the inspector's report in Kelly …, there was no watercourse on the application site … which could act as a pathway to any European site. …".*

95. In contrast, in the present case, there is a hydrological connection. In addition, there is reliance on the existence of the measures in order to form the view that the conservation interests protected by the SACs and SPAs would not be exposed to harm. In these circumstances, it follows that the measures cannot be taken into account at the screening stage. A full stage 2 appropriate assessment is necessary.

96. In my view, the inspector also erred in suggesting that a determination can be reached at the screening stage as to the efficacy of measures of this kind. The CJEU in *People Over Wind* has expressly said that this is not appropriate. The CJEU made this very clear in paras. 35 to 37 of its judgment in that case:

> *"35. As the applicants … and the Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment*

presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

36. That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out ***not at the screening stage, but specifically at the stage of the appropriate assessment.***

37. Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, ... an essential safeguard provided for by the directive". (emphasis added).

97. In light of the errors identified in paras. 93 to 96 above, I have come to the conclusion that the Board, in adopting the report of the inspector has failed to comply with its obligations under s. 177U of the 2000 Act and Article 6 (3) of the Habitats Directive and that its decision must be quashed on that basis.

Bats

98. The applicants have raised a number of issues in relation to bats which can be summarised as follows:

(a) In para. 41 of the statement of grounds, it is contended that the bat surveys carried out are insufficiently detailed. In particular, it is alleged that no detail is given of a *"transect"* which was stated to have been carried out. As I understand it, such a survey concentrates on a transect of a particular habitat in order to form a view, based on the level of activity within that transect, as to the likely total bat activity within that habitat as a whole. In any event, the applicants complain that there is

no detail in relation to the transect carried out here and no detail of any assessment of the hedgerows on site and the extent to which the hedgerows are used by bats;

(b) The applicants highlight in para. 42 of their statement of grounds that the EIAR discloses that there were a small number of roosting common pipistrelle bats in two derelict farm buildings on the proposed development site. Paragraph 5.5.3 of the EIAR noted that the construction phase of the project had the potential to result in the disturbance of the bats, or in a worst case scenario, their death. The EIAR attaches a draft bat derogation licence application in relation to the demolition of the farm buildings and the removal of some hedgerow habitats. The applicants complain in para. 47 of the statement of grounds that the inspector rejected an argument that the proposed development was incompatible with Article 12 of the Habitats Directive. In para. 48, the applicants make the case that the Board had no jurisdiction to grant permission in circumstances where bats are entitled to strict protection under Article 12 and in circumstances where they allege that the survey effort undertaken by Trailford was *"completely inadequate"*. It is alleged that no explanation or justification is given as to why the relevant NPWS Bat Mitigation Guidelines for Ireland (2006) were not complied with. They also allege in the same paragraph that only one emergence survey was carried out by a single surveyor on one night and they repeat the allegation made earlier in relation to the lack of details in relation to hedgerow or transect surveys;

(c) The applicants also allege that there was no *"robust evidence"* before the Board that the proposed development would not lead to roost loss. In this context, they complain in para. 49 of the statement of grounds that none of the trees on site

were assessed for roost potential. In para. 50 they make the case that the development will lead to loss of roosts on such a scale as to constitute *"deliberate disturbance"* of the bat fauna present on the site for the purposes of Article 12 of the Habitats Directive;

(d) They further allege in para. 52 of the statement of grounds that the inspector (and therefore the Board) erred in law in identifying the disturbance to bats as *"incidental"* and therefore not captured by Article 12 of the Habitats Directive. This case is further developed in paras. 52-56 of the statement of grounds;

(e) The applicants also raise a number of issues against the State respondents in relation to the extent to which Irish law properly gives effect to the provisions of EU law relating to the protection of bats. However, in circumstances where I have already determined that the applicants are entitled to succeed on other grounds, I will not consider the applicants' complaints in relation to this issue.

99. The only evidence placed before the court in relation to this issue by the applicants (other than exhibiting the relevant materials which were generated during the course of the proceedings before the Board) is contained in para. 17 of the affidavit of Mr. Ryan sworn on behalf of HRA where he exhibits the NPWS Guidelines and says in brief terms at para. 17 of his affidavit:

"17. I say that the survey effort expended by the Developer is entirely inadequate for the purposes of, inter alia, bat roost identification and that neither the Developer nor the Board could possibly know whether there are bats roosting in the trees on site".

100. In its statement of opposition, the Board rejected all of the complaints made in the statement of grounds in relation to bats. In particular, the Board highlighted p. 57 of the EIAR which noted that a bat survey was completed on 29th August, 2018 by Scott Cawley on behalf of Trailford. The Board referred to the emergence survey and the transect that was

carried out. In addition, the Board identified that, in Table 15.1 of the EIAR, the correct assessment criteria were used and an inspection of external areas of structures and trees on the development site was carried out to search for evidence of bats. While the EIAR acknowledged that the proposed development would result in a loss of suitable foraging, commuting and nesting habitats, the Board referred to the fact that an application had been made for a derogation licence to the NPWS. In the course of his submissions, counsel for the Board stressed that, as held by Simons J. in *Redmond v. An Bord Pleanala* [2020] IEHC 151, at para. 153, the existence of a grant of planning permission does not obviate the requirement to comply with other statutory codes and that the grant of planning permission merely confirms that the statutory requirements under the planning legislation have been complied with. Thus, any interference with bats would have to be addressed by means of a derogation licence from NPWS and works could not proceed in the absence of such a licence.

101. The Board also highlighted, in its statement of opposition, that, in accordance with the terms of the ecological measures in the CEMP, if any trees are encountered which support roosting bats, works will be suspended until the advice of a suitably qualified and licenced bat ecologist is sought. A derogation licence may need to be sought from the NPWS in order to permit removal of any bats and mitigate for the loss of any roosts on the site.

102. In addition, the Board, in its statement of opposition, placed some emphasis upon the fact that, although the proposed development would result in the loss of habitat and hedgerows, the potential impact will be reduced by the retention and augmentation of a landscaped buffer along the western side of the site and will be mitigated by the proposed linear landscaping and planting in the finished development and the design of public lighting.

103. In para. 47 of the statement of opposition, the Board drew attention to the observation made by the inspector that the EIAR makes clear that Trailford will comply with the licencing regime and, furthermore, that the EIAR also specifies that bat boxes would be

installed to mitigate the loss of roosting opportunities arising from the removal of the existing buildings on the site and that this was likely to be effective.

104. In para. 48 of the statement of opposition, the Board referred to the EC (Birds and Natural Habitats) Regulations, 2011 (S.I. No. 477 of 2011) (*"the 2011 Regulations")* and highlighted that the decision of the Board to grant permission pursuant to s. 9 of the 2016 Act does not entitle Trailford to engage in any activity prohibited by Article 51 or 52 of the 2011 Regulations save in accordance with a derogation licence granted pursuant to Article 54.

105. In circumstances where it is inappropriate for me to embark on any consideration as to whether the requirements of EU law have been complied with by the State respondents (insofar as the protection of bats is concerned) I must consider these aspects of the applicant's case on the assumption that the current statutory scheme (including the division of responsibility between the planning system, on the one hand, and the protection of wildlife under the 2011 Regulations, on the other) are lawful and in compliance with the overriding obligations of EU law. In this regard, the following observations made by Simons J. in *Redmond* are of particular relevance:

> *"152. The objector complains that the decision to grant planning permission is contrary to article 12 of the … Habitats Directive …. It is suggested that the carrying out of the proposed development may result in the 'deliberate disturbance' of protected bats species and the 'deterioration or destruction' of their breeding sites or resting places. It is alleged that a condition should have been attached to the planning permission requiring the developer to obtain a 'derogation licence' under regulation 54 of the [the 2011 Regulations] (which implements article 12 of the Habitats Directive).*
>
> *153. With respect, the objector's argument appears to be predicated on a misconception as to the interaction between the planning legislation and … [the 2011*

Regulations]. The existence of a grant of planning permission does not obviate the requirement to comply with other statutory codes. This is confirmed by section 10(6) of the … [the 2016 Act].

> *'(6) A person shall not be entitled solely by reason of a permission under section 9 to carry out any development'.*

154. The grant of planning permission merely confirms that the statutory requirements under the planning legislation have been complied with. Accordingly, the fact that [the Board] has granted permission does not obviate the need for the developer to apply for a 'derogation licence' in circumstances where [that is] required. Had [the Board] included a condition stating that a 'derogation licence' must be applied for where required, the condition would merely be replicating a legal obligation that subsists in any event".

106. One of the difficulties which I have had in dealing with this aspect of the applicants' case is that much of the argument that took place during the course of the hearing related to the case made by the applicants that Irish law fails to properly transpose the requirements of EU law in relation to protection of bats. For reasons previously outlined, it is not appropriate that I should address that aspect of the applicants' case. I must therefore attempt to strip any consideration of that aspect of the case from my analysis.

107. Furthermore, the only objection made by the applicants in the course of their submissions to the Board in relation to this issue is that identified on page 2 of the *Protect East Meath* submission which states in extraordinarily broad terms:

> *"The treatment of bats is deficient in light of their strict protection. It appears to be accepted that there will be deliberate killing or disturbance of bats and/or deterioration of breeding sites or resting places. A decision to grant permission in light of the bat assessment would breach Article 12 of the Habitats Directive".*

108. That submission provides no detail of the alleged deficiency in the way in which bats were treated in the EIAR or NIS submitted on behalf of Trailford. Furthermore, the submission is incorrect insofar as it suggests that a decision to grant permission in light of the bat assessment would breach Article 12 of the Habitats Directive. Instead, as Simons J. observed in *Redmond* the existence of a planning permission does not obviate the requirement to comply with the obligation (where it applies) to obtain a derogation licence under Regulation 54 of the 2011 Regulations which, as Simons J. confirmed, implements Article 12 of the Habitats Directive.

109. Moreover, it is not correct to suggest that there is no detail in the materials before the Board as to the nature of the survey carried out. At para. 5.2.5 of the EIAR, it is confirmed that a bat survey was completed on 29th August, 2018 by Ms. Cawley of Scott Cawley. This comprised an emergency survey which was carried out at dusk followed by a transect to identify the species present and the areas used by bats for foraging within the development site. The same section of the EIAR outlines, in tabular form, the assessment criteria used. It also identifies the scientific sources from which the criteria were derived. In addition, the section of the EIAR identifies eight different forms of evidence which were searched for in the course of the inspection (including droppings, feeding remains and fur-oil staining).

110. In para. 5.3.4 of the EIAR, it was disclosed that six species of bat have been recorded within two kilometres of the development site. This also disclosed that the lands contained suitable foraging habitat for a range of bat species including woodland and hedgerows. As noted above, the presence of a small number of roosting common pipistrelle bats in the two derelict farm buildings was also disclosed.

111. At para. 5.5.3 of the EIAR, it was accepted that the construction phase of the project has the potential to result in the disturbance, or in a worst-case scenario, the mortality of bats and that these effects could arise either during the demolition of the farm buildings or the

removal of trees. It is also accepted that, in the absence of mitigation, it is likely that demolition works to the sheds would result in the death of bats. However, in the same paragraph of the report, it is confirmed that a derogation licence application has been submitted to the NPWS in order to permit removal of the bats from the farm buildings on site. In addition, further mitigation measures were proposed (as to the timing of the removal of the farm buildings and as to the manner in which bats would be retrieved by hand from the roost and transferred to a bat box prior to demolition of the buildings). Thus, the Board was aware, when it came to make its decision in this case, that the question as to whether the removal of the bats would be permitted would be determined by the NPWS under Article 54 of the 2011 Regulations.

112. During the course of the hearing, counsel for the applicants also drew attention to a further aspect of the EIAR which addressed the sensitivity of bats to lighting of their foraging habitats and disclosed that, in the absence of mitigation, lighting near hedgerow and woodland habitat may have a negative impact on that species. This disclosure was made in the context of the fact that the proposed development will result in lighting being installed in an area that was previously largely unlit. However, this aspect of the potential impact of the development on bats is not something that was raised by the applicants in their statement of grounds and I do not believe that it is open to the applicants to raise this issue in the course of the hearing. For completeness, it should be noted that, in any event, the EIAR also confirms that lighting proposals for the development would be reviewed by a qualified bat ecologist.

113. As noted earlier, the applicants, in their statement of grounds, complained that the bat survey that was carried out was "completely inadequate" and did not comply with the NPWS Guidelines (2006). No details, however, were provided in support of this allegation. During the course of the hearing, counsel for the applicants opened a number of passages from the NPWS Guidelines. In particular, he referred to the detailed provisions of the Guidelines in

respect of surveys in relation to planning applications affecting possible habitat of the lesser horseshoe bat. However, that is not relevant for present purposes. The lesser horseshoe bat is not one of the six species of bats which were identified within two kilometres of the subject lands.

114. Counsel for the applicant also referred to para. 5.7.1.2 of the Guidelines dealing with trees and he highlighted in particular the guidance given in that paragraph to the following effect:

> "*Because tree-dwelling bats move roost frequently, the single bat-detector survey is unlikely to provide adequate evidence of the absence of bats in trees that contain a variety of suitable roosting places. Several dawn or dusk surveys spread over a period of several weeks from June to August will greatly increase the probability of detecting significant maternity roosts and is recommended where development proposals would involve the loss of multiple trees".*

115. However, this submission fails to take account of the full extent of the approach which Trailford has committed to undertake as set out in the mitigation and monitoring measures in Chapter 14 of the EIAR. In the first place, para. 14.2.2 of the EIAR explains that, during construction, all hedgerows and immature woodland due to be retained will be fenced off at the outset of works and for the duration of construction to avoid damage. Where fencing is not feasible due to insufficient space, protection will be afforded by wrapping hessian sacking around the trunk of the tree and strapping stout buffer timbers around it. Furthermore, the woodland will not be lit during the construction or operational phases of the development. In the case of any trees which are marked for felling, tree inspection surveys will be undertaken by a licenced bat worker to assess whether those trees have any suitability to support roosting bats. If the trees are confirmed to have potential roosting features, these trees must be inspected at height for roosting bats prior to felling

works. Felling will only proceed where the surveyor is satisfied that bats are not present. If bats are encountered during any works, the works will be suspended until the advice of a suitably qualified and licenced bat ecologist is sought and, where necessary, a derogation licence sought from NPWS in order to permit removal of bats and mitigate for the loss of any roosts on the site. Having regard to this submission, it seems to me that the concern outlined by counsel for the applicants, by reference to the NPWS Guidelines (2006), melts away.

116. The applicants have also criticised the manner in which the inspector addressed the impact of the development on bats in his report. Bats were addressed in Part 11 of the inspector's report where he carried out an environmental impact assessment of the development. In particular, bats were addressed in paras. 11.5.2 to 11.5.4. In those paragraphs, the inspector relied on the material contained in the EIAR. For the reasons already explained above, I do not believe that the applicants have succeeded in establishing that there was any inadequacy in the EIAR. In those circumstances, I do not believe that the applicant can complain that the assessment carried out by the inspector was incorrect. However, the applicants have raised an issue in relation to the following statement made in para. 11.5.3 of the report where the inspector said:

> *"Section 5.5.3 of the EIAR identifies a potential for mortality to bats … during construction, in particular during the removal of hedges and trees and the demolition of buildings that could provide roosts for bats. An argument was made in one of the submissions that this means that the proposed development would be impermissible under Article 12 of the Habitats Directive. This argument is incorrect. Any killing or capture of those animals would be incidental to the proposed housing development rather than deliberate. It therefore falls within the regime established by the state under article 12.4 of the directive which involves licencing of works by the NPWS separately from any grant of planning permission. The EIAR makes it clear that the*

developer will comply with this licencing regime, so a grant of permission for the proposed development would not contravene the requirements of the Habitats Directive...".

117. In the course of the hearing, counsel for the applicant suggested that the inspector had not complied with the requirements of Article 3 (1) (b) of the EIA Directive under which an environmental impact assessment is required to identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on biodiversity with particular attention to species and habitats protected under (*inter alia)* the Habitats Directive. In my view, this complaint is borne out. When one considers the terms of the inspector's report against the backdrop of the materials before the Board (including the EIAR) it seems to me that the effect on bats has been properly identified and assessed.

118. Counsel for the applicants was particularly critical of the statement made by the inspector that any killing or capture of bats would be incidental to the proposed housing development rather than deliberate. He suggested that this was inconsistent with the finding made by the CJEU in Case C-221/04 *Commission v. Spain* [2006] ICR I-4536 at para. 71 where the CJEU stated that the killing or capture of a protected species would be a "*deliberate*" action within Article 12 (1) (a) of the Habitats Directive where it is proven that the author of the act intended the capture or killing of a specimen belonging to a protected species or *"at the very least, accepted the possibility of such capture or killing".* Here, the EIAR clearly envisaged that the bats would, at the very least, be captured and removed in bat boxes.

119. I do not believe that it is necessary to reach any conclusion in relation to this criticism. The key point is that, as the inspector pointed out in para. 11.5.3 of his report, Trailford has committed to complying with the licencing regime under the 2011 Regulations.

As Simons J. emphasised in *Redmond,* the grant of planning permission does not obviate the requirement to comply with the 2011 Regulations. Thus, if Trailford wishes to proceed with the demolition of the derelict farm buildings in which the bats have been found to be roosting and if it wishes to attempt to capture those bats, it will have to act under the terms of derogation licence issued by NPWS under the 2011 Regulations. For completeness, it should be noted that, although Article 12 (1) (a) of the Habitats Directive expressly requires member states to take requisite measures to establish a system of strict protection for (*inter alia*) bats and to prohibit *"all forms of deliberate capture or killing of specimens of these species in the wild",* Article 16 of the Directive permits, subject to certain very strict conditions, Member States to derogate from the provisions of Article 12 where there is no satisfactory alternative and where the derogation is not detrimental to the maintenance of the population of the species concerned. In this case, such a derogation licence has been issued by NPWS. That derogation licence is not challenged in these proceedings. Since any such derogation licence is a matter to be determined by NPWS rather than by the Board, it seems to me that the applicants attack on the observations made by the inspector do not give rise to a ground of complaint as against the Board. Crucially, the decision of the Board does not permit any of the proposed interference with bats. Any such interference will have to be addressed appropriately under the 2011 Regulations, if it is to be lawful.

120. In all of these circumstances, I do not believe that it is necessary to consider the additional English case law that was debated in the course of the hearing. It seems to me that, having regard to the factors outlined above, this aspect of the applicants' case must fail.

Other issues

121. In light of the findings which I have made above, I do not believe that it is necessary to consider any of the other issues which arise in the proceedings.

Conclusion

122. For the reasons discussed in paras. 25 to 42 above I have come the conclusion that the Board was precluded by s. 9 (6) (b) of the 2016 Act from granting permission for the proposed development in this case. For the further reasons discussed in para. 68 to 74 above, I have come to the conclusion that the Board did not have a sufficient basis on which to conclude, at the screening stage, that *ex situ* effects on the bird species for which the Boyne Estuary SPA was designated, can be excluded.

123. Furthermore, for the reasons outlined in paras. 92 to 96 above, I have come to the conclusion that the Board, impermissibly, took mitigation measures into account in the course of the screening exercise conducted in this case. It follows that this is a further ground on which the decision of the Board was wrong in law.

124. In those circumstances, I propose to grant an order of *certiorari* quashing the decision of the Board dated 29th January, 2020 to grant planning permission for the construction of the proposed development by Trailford. I will also grant the declaration sought in para. D2 of the statement of grounds dealing with the grant of permission in contravention of the zoning of that part of the development site which was zoned *"Residential Phase II (Post 2019)".* I will also grant the declaration sought in para. D4 of the statement of grounds to the effect that the Board erred in law in screening out significant impacts on avi-fauna qualifying interests in respect of *ex situ* impacts on the Boyne Estuary SPA in breach of the requirements of the Habitats Directive. Finally, I will make the declarations sought in para. D5 to the effect that the Board erred in law in screening out, in the course of the stage 1 screening exercise carried out in this case, the possibility of significant effects on the four Natura 2000 sites mentioned in para. E22 of the statement of grounds arising from the mobilisation of silt and pollutants from the development site.

125. The parties may, however, wish to address the precise form of orders to be made. They may also wish to address whether any consequential orders should be made including orders in relation to the costs of the proceedings. I will accordingly direct that the parties should, in the first instance, correspond with each other with a view to trying to agree the terms of the orders to be made (including any consequential orders such as orders for costs) such communications to be completed within fourteen days from the date of electronic delivery of this judgment. In the event that agreement has been reached within that fourteen-day period, the results of the agreement are to be confirmed by email by the solicitor for the applicants to the registrar not later than 16th December 2020. In the event that the parties have not been able to reach agreement by 16th December 2020, the registrar is to be so notified by email by the solicitor for the applicants by the same date following which I will give further directions, electronically, in relation to whether any further written observations or submissions are required in relation to any of the matters then in dispute between the parties.