should be identified by name so long as the relevant substantive points made in the submission are appropriately addressed.

81. Counsel for the applicant strongly argued that the concluding part of the passage quoted in para. 77 above suggests that the assessment carried out by the inspector was done to an EIA standard even though the stage 2 appropriate assessment requires a much higher standard. Counsel also argued that this section of the inspector's report does not engage with the essential elements of the Article 6(3) test and he highlighted in particular that there is no finding in this section of the inspector's report that the development will not adversely affect the integrity of the Blackwater SAC and the freshwater pearl mussel in particular.

82. However, the inspector returns to the subject of the Blackwater SAC when he purports, at a later stage in his report, to carry out a stage 2 appropriate assessment. As noted above in the context of the hen harrier, the inspector, at p. 121 of his report, draws attention to the NIS which he suggests has concluded that *"subject to adherence to a series of specified mitigation measures, there would be [no] adverse effects on the integrity of the identified Natura 2000 sites as a result of the proposed development"*.

83. He then refers to the section in his report dealing with EIA and continues, with regard to the Blackwater SAC, at p. 122 as follows: -

> *"Similarly, I would refer the Board to my earlier comments with regard to the hydrological implications of the proposed development as set out in my environmental impact assessment of the subject application. In my opinion, this outlines how the design of the proposed development, when taken in combination with specified mitigation measures, will not adversely impact on*

the integrity of the Blackwater ... [SAC] and thus will not compromise its qualifying interests ...

Therefore, I consider it reasonable to conclude, on the basis of the information available, that the proposed development, when taken individually and in combination with other plans or projects, will not adversely affect the integrity of ... the Blackwater ... SAC in view of the sites conservation objectives".

84. Again, counsel for the applicant strongly criticised this section of the report and said that it contains no analysis or evaluation of the mitigation measures and that it does not explain how the inspector came to the conclusion that the mitigation measures were sufficient to allow a conclusion to be reached, capable of removing any scientific doubt, that the freshwater pearl mussel would not be adversely affected by the proposed development. In addition, counsel emphasised the points made in the statement of grounds summarised in para. 20(a), (f) and (g) above. Counsel also criticised the report because it does not set out what the mitigation measures are. While I agree that it would be preferable that the mitigation measures should have been set out, it is nonetheless clear from the decision of the Supreme Court in *Connelly* that a party in the position of the respondent (and this applies equally to an inspector of the respondent) is entitled to rely on other documents submitted in the course of the appeal if it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the material contained in those documents actually formed part of the reasoning relied on for the purposes of making the relevant decision. Thus, it will be necessary to consider the relevant material before the board to ascertain whether it would be sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the inspector had a proper basis to form the view that the proposed development would not have an adverse impact on the freshwater pearl

mussel. The material available to the respondent is considered in paras. 86 to 93 below.

85. Before addressing the material available to the respondent, I should also, for completeness, address the inspector's assessment of the issue relating to peat stability. As noted in para. 55 above, the inspector identified that the most significant potential impact arising as a direct result of the construction of the proposed development is the possibility of bog failure/slippage given the peaty subsoil conditions on site. While issues relating to peat stability do not appear to me to form part of the applicant's pleaded case, it should be noted that at p.p. 93-97 of his report, the inspector carries out a careful review of the information in relation to peat slippage. The inspector identified a number of discrepancies in the peat stability assessment submitted on behalf of Silverbirch. In particular, he recalculated the relevant factors of safety in respect of the turbines and also in respect of the proposed Ballynahulla substation. At p. 96 the inspector identified that the approach taken in the EIS in relation to historical peat failures in the area was to apply the precautionary principle. Having regard to that principle, Silverbirch, in the EIS utilised a conservative risk allocation for historical failure. While a peat slide had occurred in the Sliabh Luachra area in 1896, there were a number of factors which justified a risk ranking for the affected areas of the site as *"very low"* or *"low"*. In this context, a number of factors were considered including the fact that significant peat extraction had taken place in the intervening 121 years. There was also now the presence of extensive man-made and natural drainage channels which serve to limit the presence of water on the affected slopes. At p. 97, the inspector came to the conclusion that the peat stability analysis, notwithstanding certain discrepancies in the material submitted by Silverbirch (which he effectively corrected himself through the analysis undertaken by him) established

that the proposed development can safely proceed without giving rise to peat slippage. This is subject to the implementation of a series of mitigation measures. It seems to me, on the basis of the extensive analysis undertaken by the inspector in relation to the peat slippage issue, the inspector has arrived at a decision (following evaluation and analysis) which meets the requirements of the case law, in particular the decision of the High Court in *Kelly* and of the Supreme Court in *Connelly*.

86. As noted in para. 84 above, it is next necessary, having regard to the approach taken in *Connelly*, to consider the material available to the respondent in relation to the freshwater pearl mussel. In this regard, very extensive material was placed before the respondent by Silverbirch to address the concerns in relation to the Blackwater SAC and the freshwater pearl mussel in particular. At s. 5.1.1 of the EIS, it was acknowledged that particular care is required with regard to the Blackwater and its feeder streams that drain the proposed development. The EIS stated that protection of these water courses *"will be imperative in preventing water quality deterioration downstream"*. The EIS also stated that best practice pollution control measures (which are described in detail elsewhere) will be employed during the construction phase to prevent the transport of deleterious substances to the Blackwater SAC. In this context, it was specifically stated:

> *"release of suspended solids to all surface waters will be controlled by interception (E.G. Silt Traps) and management of site runoff. Any surface water run-off must be treated to ensure that it is free from suspended solids, oil or any other polluting materials".*

87. Counsel for Silverbirch acknowledged in the course of the hearing that this requirement is caught by condition 2 of the conditions imposed by the respondent in its decision to grant permission. Condition 2 requires that all of the environmental,

construction and ecological mitigation measures set out in the EIS, the NIS and the other particulars submitted with the application (expressly including the report of Dr. William O'Connor discussed further below) should be implemented by Silverbirch. Counsel for Silverbirch submitted (correctly in my view) that the passage quoted above, although it does not say so in terms, amounts to a *"zero silt requirement"* equivalent in its effect to the express condition contained in the decision of the respondent in the *People Over Wind Case.* I should also make clear that, in my view, condition 2 goes significantly further than what was described by counsel for the applicant, during the course of the hearing, as the standard or *"generic"* condition requiring that all environmental and ecological mitigation measures should be implemented. Condition 2 specifically addresses the mitigation measures in respect of the freshwater pearl mussel since it refers, in terms, to the pearl mussel impact assessment (i.e. the report of Dr. O'Connor).

88. Counsel for Silverbirch, in his submissions, drew attention to the underlying rationale of the mitigation measures which are proposed to be used in this case. He explained that the drainage from the windfarm development will be kept separate from the natural drainage on the site and that the drainage from the development site will not discharge directly to water courses but instead will be discharged over land through the use of level spreaders after any siltation has settled out in settlement ponds. He drew attention to the objective of the SWMP which is to ensure that the drainage network for the development does not impact on the existing natural drainage network on the subject site. Thus, at s. 3.1 of the SWMP it is specifically stated that it is a fundamental principle of the drainage design that: -

> *"... clean water flowing in the upstream catchment, including overland flow and flow in existing drains, is allowed to bypass the works areas without being*

contaminated by silt from the works. This will be achieved by intercepting the clean water and conveying it to the downstream side of the works areas either by piping it or diverting it by means of new drains or earth mounds. In the same section of the SWMP, it is explained that the mitigation measures proposed are designed to the standard recommended in a 2006 study of freshwater pearl mussel populations in the Lutter River in Germany by Altmuller & Dettmer. The significance of this is that the measures described in Altmuller & Dettmer are specifically referred to in the sub Basin Management Plan for the Blackwater as the appropriate standard of sediment control for construction projects within the sub basin. The Altmuller & Dettmer study describes a two phase treatment system comprising a sediment trap and plant filtration bed. Water from construction works first enters the sediment traps and then flows through the plant filtration bed. There is a secondary vegetative system which attenuates and absorbs the residual particles which do not settle in the sediment trap. According to the SWMP this two phase system has proven to be successful in the protection and influential in the restoration of the resident freshwater pearl mussel pollution in the Lutter river in Germany. However, as the SWMP makes clear, the system which is to be put in place here adds a further phase to the Altmuller & Dettmer system. This will involve a secondary treatment system in the form of a graded gravel filter bed through which water from the ponds will pass before being dispersed across a wide area of vegetation".

89. Individual settlement ponds will be designed for every single turbine or hardstand area and for every 1.2 km area of internal access road ensuring that each item of windfarm infrastructure will have its own individual three tier treatment

system including settlement pond and vegetative filter. In addition to this system, the SWMP describes additional measures to minimise sediment and erosion at source by minimising exposed areas, establishing vegetation, road cleaning, silt fences, check dams, wheel washes, and the avoidance of works in or near water courses.

90. The treatment process summarised above is dealt with in detail in s. 4.2 and 4.3 of the SWMP. A detailed description of the settlement pond design is contained in s. 4.5. Detailed descriptions of the attenuation design are contained in s. 4.6. In s. 4.3.11, a commitment is given that the drainage and treatment system will be managed and monitored at all times particularly after heavy rainfall events during the construction phase. The drainage and treatment system will be regularly inspected and maintained to ensure that any failures are quickly identified and repaired so as to prevent water pollution. Similarly, s. 4.3.1.3.1 requires that continuous turbidity monitors will be installed upstream and downstream of the site in the river Blackwater which will relay real-time information and can trigger an alarm if limit values are being approached. This will give advance warning of a potential difficulty. The relevant limits in this regard are set out in Dr. O'Connor's report at p. 7. These limits are in accordance with the recommendations in the Freshwater Pearl Mussel Conservation Status Assessment Report published by the National Parks & Wildlife Service (*"NPWS"*) in 2015. It is confirmed on p. 20 of Dr. O'Connor's report that, prior to construction, the aquatic monitoring programme will be agreed in consultation with NPWS and Inland Fisheries Ireland (*"IFI"*). In addition, a weekly monitoring report will be forwarded to (among others) NPWS and IFI. Crucially, all of these commitments are caught by condition 2 attached to the respondent's decision and will therefore be fully enforceable.

91. The SWMP deals not only with the construction phase but also the operational phase. In s. 4.4, it provides that, following construction, runoff on the roads, hardstands and other work areas will continue to be directed to the outfall weirs. The check dams within the drainage channels will remain in place to ensure that runoff continues to be attenuated and dispersed across existing vegetation. Water monitoring will continue during years one and two of the operational phase, commencing after the complement of construction. The sediment ponds will be kept *in situ* once construction has been completed.

92. During the course of the hearing, counsel for the applicant suggested, by reference to an earlier version of the SWMP, that its terms were vague and uncertain; that the mitigation measures were generic and were not specifically designed with the Freshwater Pearl Mussel in mind. It is unnecessary to form any view as to whether those criticisms were well founded with regard to the first version of the SWMP. However, in light of the very considerable detail that is contained in the SWMP which was before the respondent and in light of the standard by which the mitigation measures were to be applied (namely the Altmuller & Dettmer report), I do not believe that these criticisms are justified in the case of the SWMP which was considered by the inspector and the respondent. Moreover, the SWMP must also be read in conjunction with the report of Dr. O'Connor. In that report, Dr. O'Connor reviews the SWMP and he expresses the view that the highest standards of surface water quality management and pollution control will be employed during the construction of the development. Among the features which he highlighted was the use of sedimats which will be used in water courses draining the site. Dr. O'Connor explained that these sedimats have been successfully used downstream of drainage maintenance works on the River Nore in Co. Laois upstream of the location of a

population of Nore pearl mussels (which are a particularly rare species of freshwater pearl mussel). Dr. O'Connor also draws attention to the use of continuous turbidity monitors which will provide real-time information and can trigger an alarm if limit values are being approached. Dr. O'Connor expresses the view that, because the development has taken on board key elements and the recommendations of the Blackwater sub-basin management plan, it will be part of the solution rather than the problem for the Blackwater catchment. Crucially, having reviewed the mitigation measures and the proposed monitoring Dr. O'Connor expresses the following view in relation to predicted impacts: -

> *"the developers demonstrated via a detailed surface water management plan (including erosion and sediment control details) the intention and ability to protect water quality. With agreement of method statements and a monitoring programme with IFI and NPWS, implementation of mitigation measures proposed and due to the considerable distance upstream of the nearest FPM population, no impacts on FPM are predicted to occur as a result of the proposed development. The mitigation measures are also considered to be sufficient to protect aquatic species such as salmon and trout which are present in the streams on and near sites. The measures will be more than sufficient to protect the nearest FPM population which occurs c.2.6 downstream of the boundary of the site and both distance and water dilution will provide further significant protection to this mussel population".*

93. The material summarised in paras. 88-92 above is both very comprehensive and impressive. Given the approach taken by the Supreme Court in *Connelly*, it seems to me that the SWMP and the report of Dr. O'Connor in this case provide extensive analysis and evaluation which assist in understanding the conclusion

reached by the inspector and subsequently, by the respondent that the proposed development will not have an adverse impact on the freshwater pearl mussel in the Blackwater SAC.

94. Before reaching any final conclusion on this issue, I should consider two further aspects of the case made by the applicant at the hearing before me:-

(a) In the course of opening the report of Dr. O'Connor to the court, counsel for the applicant drew attention to the manner in which Dr. O'Connor dealt with the potential for a landslide or a peat slide. In this context, it should be noted that Sliabh Luachra was the scene of a natural disaster in 1896 when a moving bog caused a number of fatalities in the area. As noted above, a concern in relation to peat slippage does not appear to me to be part of the case made in the statement of grounds and to the extent that I address it below, I do so for completeness and without prejudice to the fact that this case has not been pleaded.

(b) Secondly, as summarised in para. 20 above, the applicant contends that the conditions attached to the decision of the respondent impermissibly leave over for consideration to a later stage, the construction-stage details of proposals for the management of surface water through a Construction Stage SWMP. It might also appear from the passage of the inspector's report quoted in para. 77 above that a CEMP of any kind has yet to be prepared.

Peat slippage

95. Insofar as the potential for landslide or peat slippage is concerned, the relevant passage in the report of Dr. O'Connor notes as follows:-

"The risk of a potential bogburst or landslide occurring on the site as a consequence of the works required to facilitate construction of the windfarm ***is negligible****. Therefore, the risk of serious pollution or siltation of the watercourses occurring as a consequence of such an incident* ***is negligible*** *subject to the appropriate mitigation measures outlined... in the EIS".*

(emphasis added).

96. Counsel for the applicant submitted that to assess risk as *"negligible"* was to apply entirely the wrong standard. He argued that it was clear that this fell far short of the *"reasonable scientific doubt"* standard. However, in response, counsel for the respondent strongly urged that a negligible risk of an adverse impact was not sufficient to warrant refusal of a planning consent. She argued that Article 6(3) does not require that the risk of adverse effects should be ruled out to the standard of absolute certainty. She relied, in this context, on the judgment of the CJEU in Case C-236/01 *Monsanto* [2003] ECR I-8166. That case was concerned with novel food ingredients which are regulated by Regulation (EC) No. 258/97 (*"The Novel Foods Regulation"*). Under the Novel Foods Regulation, novel foods cannot be placed on the market for human use without first giving notice to the EU Commission. However, there is an accelerated and simplified procedure for the authorised use of such foods where, on the basis of scientific evidence, the novel foods are substantially equivalent to existing foods or food ingredients as regards their composition, nutritional value, metabolism, intended use and the level of undesirable ingredients. In that case, the simplified procedure was used by Monsanto in order to place on the market novel foods derived from maize. The Italian Health Ministry alleged that the use of the simplified procedure was improper. The Ministry was concerned that the proposed product contained a number of transgenic ingredients. The Italian Ministry

expressed concern that the product would be a danger to human health. However, the Commission consulted the EU Scientific Committee for Food which expressed the view that the information presented by the Italian Ministry did not provide specific scientific grounds for considering that the use of the novel foods at issue endangered human health. Nonetheless, the Italian authorities issued a decree prohibiting the sale of the product. This was challenged by Monsanto. While the facts of this case are very different from the present case, counsel for the respondent argued that the approach taken by the CJEU is instructive given that, in common with Article 6(3) of the Habitats Directive, the Novel Foods Regulation proceeds on the basis of the precautionary principle. Counsel also highlighted the fact that the decision of the CJEU in *Monsanto* was subsequently cited by the CJEU in its seminal decision in the context of Article 6(3) in Case C-127/02 *Waddenzee* [2004] ECR I-7448 at para. 59. Crucially, *Monsanto* was cited in the context of reasonable scientific doubt (as para. 59 of the judgment in *Waddenzee* makes clear).

97. In the course of its judgment in *Monsanto*, the CJEU said at para. 106:-

> *"If the twofold objective of [the Novel Foods Regulation], namely ensuring the functioning of the internal market in novel foods and protecting public health against the risks to which those foods may give rise, is not to be adversely affected, protective measures adopted under the safeguard clause* ***may not properly be based on a purely hypothetical approach to risk, founded on mere suppositions which are not yet scientifically verified****".* (emphasis added).

98. The approach taken in *Monsanto* is also reflected, subsequently, in *Waddenzee*. In that case, Advocate General Kokott expressed the view that absolute

certainty is not required under Article 6(3). At paras. 107-108 of her opinion, she said:-

> *"107. However, the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of Article 6(3)... that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.*
>
> *108. Such a conclusion of the assessment is tenable only where the deciding authorities at least are satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned. As in the case of a preliminary assessment – provided for in the first sentence of Article 6(3)... – to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring on the extent and nature of the anticipated harm. Measures to minimise and avoid harm can also be of relevance. Precisely where scientific uncertainty exists, it is possible to gain further knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly".*

99. Although absolute certainty is not required, it is clear from the judgment of the CJEU in the same case that the Article 6(3) standard is a stringent one. As all of the case law makes clear, planning consent can only be granted where the deciding authority is satisfied that there is no reasonable doubt as to the absence of adverse effects on the relevant protected interest. However, it is striking that in para. 59 of its judgment, the CJEU expressly cited the *Monsanto* decision in the context of reasonable scientific doubt. At para. 59, the CJEU said:-

> *"59. Therefore, pursuant to Article 6(3)..., the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of [the relevant development] for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, Case C-236/01 Monsanto..., para. 106 and 113)".*

100. It should be recalled, at this point, that para. 106 of the judgment in *Monsanto* (quoted in para. 97 above) is the paragraph which expressly says that decisions should not be made on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified. Thus, although the CJEU, in para. 59 of its judgment in *Waddenzee* refers to the planning authority having *"made certain that [the development] will not adversely affect the integrity of that site"*, the CJEU was clearly not intending to override or reverse the approach taken previously in *Monsanto*. On the contrary, the CJEU was reiterating the approach taken in para. 106 of *Monsanto*. In the circumstances, it seems to me that the submission of counsel for the respondent is correct. As an expert body, the respondent is in a much better

position than the court to form a view as to whether a risk which was described by an expert as no more than *"negligible"*, is sufficiently remote to be discounted in the context of an Article 6 (3) appropriate assessment of risk. In my view, having regard to the approach taken in *Monsanto*, the respondent was not required to be absolutely certain that a bog movement or landslide would never occur in the future. The relevant standard is reasonable doubt.

Post consent conditions

101. As noted in para. 20 above, the applicant makes a number of complaints in relation to the conditions imposed by the respondent and contends in particular that the conditions leave over a number of matters for consideration at a later stage, post consent. The applicant submits that this is contrary to the approach taken by the CJEU in *Holohan*. The applicant also contends that condition 17 imposes no more than generic construction techniques and does not include a zero silt requirement such as the condition imposed in the *People Over Wind* case.

102. In *Holohan*, the CJEU made clear that a planning authority may only leave matters over for future determination where the authority is certain that the planning consent establishes sufficiently strict conditions to guarantee that the integrity of the Natura site will not be adversely affected. At para. 47 of its judgment in *Holohan*, the CJEU said:-

> *" ... Article 6(3) ... must be interpreted as meaning that the competent authority is permitted to grant to a plan or project development consent which leaves the developer free to determine later certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent*

granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site."

103. If condition 16 were to be read on its own, one might form the impression that the respondent had left over for future determination the details of the CEMP relating to the method statements for construction, the location of the site and material compound and the other elements of the construction required for the development to be carried. One might also get a similar impression from what is said by the inspector at p.p. 89-90 of his report (quoted in para. 77 above) where he speaks of the proposal to prepare a detailed CEMP and a construction stage SWMP. However, condition 16 and the relevant section of the inspector's report must both be read in context. In particular, they must be read in the context of condition 2 and the detailed mitigation measures which are required to be put in place as a condition of the grant of permission. Under condition 2, Silverbirch is required to implement all of the environmental, construction and ecological mitigation measures set out in the EIS, the NIS and the other particulars furnished in the course of the planning appeal process including Dr. O'Connor's report. These include, insofar as condition 16 is concerned, all of the material set out in Chapter 2 of the EIS dealing with the construction of turbine foundations, associated crane hardstanding areas, drainage infrastructure, borrow pits/repositories, windfarm entrances and access roads which are described at p.p. 657-662 of the EIS. They also include the detail in relation to construction materials, tree felling, forestry replanting works, site establishment (including temporary site facilities and access) at p.p. 678-679 of the EIS. In addition, further details are given in relation to crane hardstanding area construction, turbine foundation construction and drainage construction and borrow pits at p.p. 680-683 of the EIS. Thus, it is clear that the matters listed in condition 16 are already addressed

in detail in the material which must be read with condition 16. The CEMP required under condition 16 is necessary so that the local planning authority will be in a position to maintain oversight and control during the construction phase. As counsel for the respondent said, in the course of oral submissions, condition 16 is not, as contended by the applicant, a licence to agree terms and conditions in the future. It must be seen against the framework of what has been already been addressed in detail in the EIS. To paraphrase what has been said by the CJEU in *Holohan*, the decision of the respondent contains conditions in condition 1 and condition 2 that are, when read with the underlying documents, detailed enough and strict enough to ensure that the parameters of condition 16 will not adversely affect the Blackwater SAC or the freshwater pearl mussel in particular.

104. Insofar as condition 17 is concerned, it provides that, prior to commencement of construction, construction-stage details of proposals for the management of surface water by means of a construction SWMP must be submitted to and agreed with the planning authority. Again, if one read condition 17 on its own, one might form the impression that, contrary to *Holohan,* the decision of the respondent left over important matters to be agreed in the future. However, as in the case of condition 16, it is clear that the parameters of the SWMP have already been addressed in detail in the material filed during the course of the appeal, in particular in the SWMP described in paras. 88 to 90 above. By virtue of conditions 1 and, in particular, condition 2, Silverbirch is obliged to carry out surface water management measures in accordance with the existing SWMP. The purpose of condition 17 is to ensure that the local planning authority will be in a position to oversee and monitor the carrying out of those surface water management measures in accordance with the criteria set out in the SWMP which has already been reviewed and accepted by the respondent. In

those circumstances, I cannot see how there is any breach of the principles laid down by the CJEU in *Holohan* insofar as condition 17 is concerned.

105. As noted in para. 20 (g) above, the case is also made that condition 17 imposes no more than a requirement to follow generic construction techniques and that the condition fails to impose a zero silt limit such as that imposed in the *People Over Wind* case. However, as discussed in paras. 86-87 above, there is, in substance but not in name, a zero silt requirement in this case as a consequence of the commitment made by Silverbirch that any surface water run-off must be treated to ensure that it is free from suspended solids oils or any other polluting material. Furthermore, there are a suite of very specific measures which Silverbirch is required to take in this case (as outlined in paras. 88 to 91 above) which are very clearly designed to ensure that sediment is not released into any watercourse. Very specific measures are to be put in place which are designed to protect the freshwater pearl mussel. The measures in question are detailed and impressive and I do not believe that one can dismiss them as being merely *"generic"*.

106. With regard to condition 18, it provides for a number of measures in order to protect water quality and aquatic ecology including the freshwater pearl mussel. Condition 18 requires that the water quality downstream should not materially deteriorate as a result of felling or construction. It also requires that proposals for a detailed programme of water quality monitoring throughout the construction period should be submitted to and agreed with the planning authorities. Finally, it requires that continuous turbidity monitors should be installed upstream and downstream of the site during any felling activities and construction. Similar issues arise in relation to condition 18. The applicant argues that condition 18 is not sufficiently precise. The case is also made that it leaves over matters for agreement with the planning

authority. There is also a contention that the relevant standard to which monitoring is to take place is not specified anywhere in the condition.

107. I take a similar view in relation to condition 18 as I did with regard to conditions 16 and 17. While condition 18, on its face, might appear to be imprecise and contrary to the *Holohan* principle, it must also be read in context. In particular, it must be read with condition 2 and with all of the material that was placed before the respondent which Silverbirch is now required to implement in order to protect the freshwater pearl mussel. This includes all of the measures previously discussed in paras. 88 to 91 above and the measures in the report of Dr. O'Connor. That report also provides the relevant limits against which the requirements of condition 18 are to be assessed. Insofar as matters are left over for agreement with the local planning authority, it is clear that the measures in question have already been prescribed in the EIS and the SWMP which were before the respondent and which are now enforceable pursuant to conditions 1 and 2. It is important that the local planning authority should have oversight and control over the carrying out of the measures (the parameters of which are already set out in the material furnished to the respondent) so as to ensure that Silverbirch and any contractor retained by it should fully implement the measures concerned.

Conclusions in relation to appropriate assessment

108. For the reasons discussed in paras. 101 to 107 above, I am of opinion that the case made by the applicant in relation to conditions 16, 17 and 18 must fail. It also seems to me that the balance of the applicant's complaints in relation to appropriate assessment, insofar as the freshwater pearl mussel is concerned, has not been made out. The only element of the applicant's case that succeeds in relation to appropriate assessment is in relation to the hen harrier to the extent that it is unclear from the

inspector's report how a conclusion could have been reached that all of the potential impacts on the hen harrier had been satisfactorily resolved at the stage 2 appropriate assessment.

EIA

109. It is fair to say that, save for the issue addressed in para. 110 below, there was very little discussion at the hearing (or in the written submissions of the parties) of EIA issues. The principal argument made on behalf of the applicant was that there was no evidence that any EIA had been carried out by the respondent. This was on the basis that there is an absence of any reference to the carrying out of an EIA in the board direction issued by the respondent or in the decision ultimately made by the respondent. Nonetheless, the applicant also made a case (as recorded in para. 20 above) that there had been no satisfactory analysis, evaluation or assessment of the direct and indirect effects and impacts of the proposed development on the receiving environment contrary to ss. 171A and 172 of the 2000 Act and Article 3 of the EIA Directive (Directive 2014/52/EU). The case was also made that the only EIA carried out was in respect of turbines 8 and 9 and that no assessment of the remaining turbines had been carried out. To that extent, there was an overlap between the case made in relation to appropriate assessment and in relation to EIA.

110. The first issue to be addressed is whether, having regard to the absence of any reference to an EIA in the board direction and decision of the respondent, it can be said that an EIA was carried out by it. In this context it is clear from the board direction dated 23rd November, 2018 that the decision of the respondent to grant permission for the development was significantly based on the inspector's report and recommendations. The second paragraph of the board direction expressly states that the respondent:

"...decided to grant permission generally in accordance with the Inspector's recommendation ...".

The board direction also refers to the EIS submitted by Silverbirch.

111. In its subsequent decision of 27th November, 2018 the respondent explicitly had regard to, *inter alia*, the EIS the submissions and observations made in connection with the planning application and appeal (including the observations and submissions made in relation to the environmental and Natura impacts of the proposed development), and the inspector's report. The decision also expressly states that the respondent accepted and adopted the appropriate assessment carried out in the Inspector's report in respect of the potential effects of the proposed development on the conservation objectives of, *inter alia,* the Stacks SPA and the Blackwater SAC. It will be recalled that the inspector, in his report, expressly adopted, as part of his appropriate assessment, the assessment previously described in the EIA exercise carried out by him. That said, it is striking that there is no express adoption by the respondent of the EIA carried out by the inspector.

112. The relevant legal principles are very usefully summarised and considered in the judgment of Cregan J. in *Buckley v. An Bord Pleanála* [2015] IEHC 572. In that case, there was a sentence in the decision of the respondent in relation to EIA in which the respondent stated that it noted the inspector's report. The question which arose for consideration was whether that was sufficient to establish that the board had adopted the inspector's report (which contained a very full EIA). The applicant in that case argued that there had been no adoption of the inspector's report as required by s. 172 (1H) of the 2000 Act under which it is provided that, in carrying out an EIA,

a planning authority or the respondent may have regard to and adopt in whole or in part any reports prepared by officials, consultants, experts or other advisors.

113. In his judgment, Cregan J. reviewed the relevant case law including the decision of the Supreme Court in *Ní Eili v. EPA* (Supreme Court, unreported, 30th July, 1999, Murphy J.), the decision of Clarke J. (as he then was) in *Maxol v. An Bord Pleanála* [2011] IEHC 537, the decision of Finnegan J. (as he then was) in *Fairyhouse Club Ltd v. An Bord Pleanála* (High Court, unreported, 18th July, 2001), the decision of Kelly J. (as he then was) in *Cork City Council v. An Bord Pleanála* [2007] 1 I.R. 761 and the decision of Baker J. in *Ogalas v. An Bord Pleanála* [2015] IEHC 205. Those decisions demonstrate very ~~clearly that it is~~ not necessary that the respondent should expressly adopt the report of an inspector where it is reasonable to conclude that the respondent adopted the reasoning of the inspector in arriving at its decision. Cregan J. also cited, in this context, the observations of McCarthy J. in the Supreme Court in *Re. XJS Investments Ltd* [1986] I.R. 750 where McCarthy J., at p. 756, stressed that planning documents are not to be read in the same way as legislation emanating from skilled draftsmen. They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training. Cregan J. also referred to the judgment of Haughton J. in *Ratheniska Timahoe and Spink Substation Action Group v. An Bord Pleanála* [2015] IEHC 18. At para. 117 of his judgment, Cregan J. came to the following conclusion:-

> *"117. On the facts of the present case, it is clear that the inspector carried out an [EIA]. Indeed the Applicant accepts that were this 'adopted' by the Board then its argument would fall away. In circumstances however, where the Board in its decision, at the very outset, stated that it decided to grant permission 'generally in accordance with the inspector's recommendations for*

the following reasons and considerations and subject to the following conditions' and that it had regard to 'the report of the inspector' and that it adopted all 25 conditions in the Inspector's Report, I am of the view that it is clear that the Board did 'adopt' the Inspector's Report and carry out an appropriate EIA in accordance with its statutory obligations."

114. The present case is not quite on all fours with the facts which were considered by Cregan J. in *Buckley*. Nonetheless, it seems to me that, applying the principles set out in the judgment of Cregan J. and the further case law analysed by him, the result must be the same. In this case, the respondent expressly stated in the board direction drawn up on the date of the meeting at which the respondent considered the appeal that it decided to grant permission generally in accordance with the recommendations of the inspector. In addition, as noted in the decision itself, the respondent expressly states, as part of its reasons and considerations, that it has had regard to the report of the inspector. Furthermore, in common with the facts considered by Cregan J. in *Buckley*, the conditions attached to the respondent's decision are precisely those which were recommended by the inspector. In those circumstances, it seems to me to be reasonable to conclude that the respondent adopted the report of the inspector for the purposes of arriving at its decision. Thus, if the inspector carried out an EIA which meets the requirements of s. 171A of the 2000 Act and of the EIA Directive, it follows that this has been adopted by the respondent. In such circumstances, there is no substance to the complaint made by the applicant that the respondent failed to carry out an EIA.

115. It is therefore necessary to consider (to the extent that this arises on the basis of the statement of grounds) whether the EIA carried out by the inspector satisfies the requirements of s. 171A of the 2000 Act and the EIA Directive. In this context, it is

important to bear in mind that the focus of the applicant's case has been the hen harrier and the freshwater pearl mussel. While that case was principally made in the context of appropriate assessment, this overlapped with the case made in respect of EIA. The applicant contended that there had been a failure to examine, analyse and evaluate the direct and indirect effects of the proposed development on the hen harrier and the freshwater pearl mussel. There was no attack on the EIA in other respects. This is unsurprising given the very extensive material contained in the report of the inspector in relation to EIA. The inspector's report runs to 137 pages in total. 61 of those pages are taken up with the very detailed EIA carried out by the inspector which, subject to what I say below in respect of the hen harrier, assesses the direct and indirect effects of the proposed development on each of the interests identified in s. 171A (1) of the 2000 Act.

116. Insofar as the hen harrier and the freshwater mussel are concerned, I have already explained in paras. 46-61 above that the inspector has identified all of the potential effects on both species in his report. Furthermore, having regard to my finding that precise and definite conclusions have been reached as to the absence of adverse impacts on the freshwater pearl mussel, it must follow, in my view, that, for the purposes of EIA, this amounts, in substance, to a finding that there will be no direct or indirect effects on the mussel.

117. The position is, however, different insofar as the hen harrier is concerned. I have already drawn attention in paras. 72 - 74 above to the fact that the report is silent in relation to the effects on the hen harrier in respect of those elements of the development other than turbines T8 and T9. It seems to me to follow that the report is insufficiently complete to form the view that the inspector has identified all of the actual effects (whether direct or indirect) of the development on the hen harrier. As

noted in para. 76 above, it may well be the case that the inspector was in a position to form the view that the development (other than turbines T8 and T9) would not have an effect on the hen harrier. However, as the report does not, in my view, rule out the possibility that such effects might occur, I am compelled to conclude that there was no sufficient evidence that an EIA was completed in respect of the effects of the development (other than turbines T8 and T9) on the hen harrier. It seems to me to follow that, accordingly, the decision of the respondent must be quashed on the grounds that there is insufficient evidence to conclude that an EIA was completed in respect of the effects of the development on the hen harrier. However, there may well be a basis to remit the matter to the respondent for further determination. I will, however, postpone making any order to that effect pending further submissions from the parties.

Overall Conclusion

118. For the reasons outlined above, I have come to the conclusion that the decision of the respondent must be quashed on the grounds set out in paras. 76 and 117 above. I find against the applicant in relation to the balance of the claim made by it. I will hear the parties in due course in relation to any consequential orders that should follow. I will also hear the parties in relation to whether or not the matter should be remitted to the respondent.