THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 754 J.R.]

BETWEEN

SINEAD FITZPATRICK AND ALLAN DALY

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

GALWAY COUNTY COUNCIL AND
APPLE DISTRIBUTION INTERNATIONAL

NOTICE PARTIES

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of October, 2017

1. The applicants were granted leave to apply for judicial review seeking an order of *certiorari* quashing the determination of the respondent to grant planning permission in appeal reference PL07.245518 for the construction of a data centre and associated grid connection (BA07.00020) at Athenry, Co. Galway on 11th August, 2016. A declaration is also sought that the decisions of the first respondent were in breach of Directive 2011/92/EU of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment, and the related jurisprudence.

Background

2. On 24th April, 2015, the notice party, Apple Distribution International, applied to the first named notice party, Galway County Council, for planning permission for a development which comprised the construction of a single data centre building on lands at Toberroe and Palmerstown, Derrydonnell, Athenry, Co. Galway. This application was accompanied by an Environmental Impact Statement (EIS) and an Appropriate Assessment Screening Report (AASR).

3. The proposed development under the application for planning permission related to Phase 1 of an overall development consisting of a 23,505m^2 single storey data hall, a 5,232 m^2 single storey logistics and administration centre, together with a maintenance building and all ancillary infrastructure and associated works including site levelling works for a 220kV substation and a lay down area for proposed data hall envisaged as part of Phase 2 of the data centre project. Once all phases of the data centre are complete, it will contain eight data halls, an administration and logistics building and all ancillary infrastructure and associated works including the proposed sub-station and associated grid connection to facilitate the data centre. The plan also contemplates the provision of eighteen standby diesel generators to serve the Phase 1 development and the 200kV electrical substation. Standby generators are proposed which will be located immediately to the north of the data hall building and each generator has a rated output of 2MW. Each proposed additional data hall constructed in the future will also have eighteen back up generators. In addition, access from the public road is proposed together with car parking for the accommodation of 207 cars including seven visitor spaces and 50 internal staff mobility spaces. The build-out of the centre would be completed over eight phases within a fifteen years period.

4. The need for the proposed development and the additional data halls is said to arise from a strong global demand for data storage to support the rapid expansion of electronic communications and "on demand computing". Apple is said to have experienced an exponential growth in the demand for data processing and storage and expected this pattern to continue in the future. It has developed a global strategy for the development of data centres. The company hopes to have a geographic spread across each continent with dedicated centres on the east and west coast of the United States and the development two locations in Europe, one at Viborg in Denmark and the other at Athenry. The proposed data centre campuses in both countries are expected to work in parallel and adhere to high standards of data security. Users of the company's services will then be able to rely on the continuity, dependability and security of the service for their various devices.

5. The first and second named applicants made submissions in respect of the development to the County Council. These submissions concerned the adequacy of the EIS, and the prematurity of the application pending an application for a 220kV line and substation to serve the proposed development.

6. In his submission dated 27th May, 2015, the second applicant raised an issue concerning the energy demand of the proposed development in its entirety and whether or not the proposed development could run on one hundred percent renewable energy as proposed and the possible and likely effect of the development on greenhouse gas emissions.

7. The County Council sought further information from Apple on 11th June, 2015, concerning alternative sites. It also sought information on whether the proposed development would be powered entirely by renewable energy and the necessity for generators on the site. Further information was submitted on behalf of

Apple on 27th July. On 9th September, the County Council issued a notification of a decision to grant a planning permission subject to twelve conditions. An appeal was thereafter lodged on behalf of the first named applicant representing the "concerned residents of Lisheenkyle" on 6th October. An appeal by the second applicant was lodged on 5th October. These appeals were based on concerns regarding bio-diversity and ecology; the prematurity of the application pending an application for the 220kV line and sub-station to serve the proposed development; greenhouse gas emissions from the likely energy demand required by the development; the source of the electric power required; whether the proposed development could run on 100% renewable energy, and the use of generators.

Additional Information Sought

8. Apple made submissions dated 2nd November addressing the issues raised by the applicants. On 14th December 2015 and by further letter dated 4th February 2016 the Board sought further information from Apple pursuant to s. 132 of the Planning and Development Act 2000 which was deemed to be necessary for the purpose of enabling it to determine the applications.

9. The information sought was set out as follows:

> "1. The proposed development is located in an unserviced rural area on lands outside of any settlement and which are not the subject of any specific development objective. It is considered that the applicant has not adequately addressed the issue of site location and the alternatives considered prior to selecting the proposed site. The applicant is therefore requested to submit further information regarding the alternative sites considered and justification for the location of the proposed development. The information submitted should include a

detailed justification of the site size requirement used in the assessment of alternatives and comments on the specific alternative locations identified in the appeals submissions, and should be undertaken at a national scale.

2. The commitment to the use of sustainable energy sources to power the proposed development is noted, and specifically the aspiration that the development would be powered by 100% renewable energy. Support for renewable energy projects and the sourcing of renewable energy from energy suppliers is also noted as is the fact that the EIS assesses the impact of the proposed development on the basis of the use of sustainable energy. However, no site or project specific information regarding the renewable energy projects is provided and details of how they might be connected to the proposed development is required. Similarly, it is not apparent how the applicant would be in a position to fulfil the commitment to purchase renewable energy from the grid via its energy suppliers. Further information on how this could operate given the nature of energy supply via the national grid is therefore required.

3. The EIS shall be revised to reflect the following requirements/issues:

   (a) The Board notes that the overall development incorporates both the data centre development and the sub-station/grid connection element. The Board is not satisfied that the EIS in its current format presents a logical and clear overview of the potential future impacts arising from the overall development, such that the cumulative impact of the overall development can be accurately

assessed as required. The EIS shall be revised to clearly set out the impacts arising on foot of the overall development comprising the data centre and sub-station/grid connection together. Cumulative impacts with other relevant projects shall also be presented.

(b) The format of the EIS is considered to be somewhat inconsistent with regard to the extent of development proposed and the impacts presented. The site location is justified on the basis of a phased development of up to eight data halls and a masterplan for the overall development of the site has been submitted with the application. However, sections of the EIS assess impacts solely on the basis of Phase 1. In order that a comprehensive assessment of the overall impacts of the proposed development arising can be undertaken, the revised EIS shall clearly set out the predicted impacts arising from the development as proposed in the current application (Phase 1) and those predicted to arise with future phases of development.

(c) Related to Item 2 above, in the absence of clarity regarding viable direct sustainable energy sources for the proposed development and where the case for 100% renewable energy supply to the development cannot be sustained, the EIS requires to be revised to address the direct (material assets including transportation, climate, air) and indirect effects potentially arising."

10. There was a concurrent application for the construction of a 220kV sub-station located to the North-West of the proposed data centre building together with a grid connection partly over ground and partly under ground between the current site and

the 220kV power line that runs to the North-East of the site. This application for the sub-station and connection was submitted to An Bord Pleanála on 12th February 2016 (ABP Ref. 07.VA0020). It sought permission for the construction of a 220kV substation and connections to the 220kV Cashla to Prospect and 220kV Cashla to Tynagh electricity circuits was pursuant to s. 182A(1) of the Planning and Development Act, 2000 as amended, and the provisions of the Strategic Infrastructure Act 2006. It sought permission for a sub-station structure with the capacity to supply a completed site of 8 data halls with the requisite electricity supply.

11. On 12th February, 2016 Apple submitted a revised EIS (REIS) replacing the EIS originally submitted to Galway County Council which addressed a number of matters raised as requested in the letter seeking further information. In particular it was said to address the issue of renewable energy. It indicated that Apple would not generate renewable energy itself but that its commitment to running the proposed development on 100% renewable energy would be achieved by purchasing an amount of renewable generated power on a contracted basis from a renewable energy supplier equal to the total power consumption of the data centre building in any particular year.

12. Following circulation of this response submissions were received from the applicants and others by An Bord Pleanála in respect of the REIS.

13. An Bord Pleanála appointed an Inspector to report in respect of the appeal and the application for approval for the power supply. A joint oral hearing was held in respect of these applications between the 24th and 27th May, 2016. Separate reports in respect of each application were prepared by the Inspector.

The Inspector's Report

14. In his report dated 28th July, 2016 (discussed later in the judgment) Mr. Stephen Kay, the Inspector appointed by An Bord Pleanála in respect of these applications, recommended that permission should be granted for the proposed development on the basis of the reasons and considerations set out at pages 105 to 106 of the report and subject to conditions 1 to 25 set out at pages 107 to 116 of the report. The Inspector had regard to:-

- The design, scale and layout of the proposed development including the indicative masterplan for the possible future development of the site.
- The projected demand for data storage in the future, the economic and operational rationale for the clustering of data storage capacity on the one site and the consequent potential site size requirements.
- The limited alternative sites identified which are capable of meeting the locational requirements of the development.
- The location of the site within the area identified as a Strategic Economic Corridor in the Galway County Development Plan, 2015-2022.
- The proximity of the site to power connections and to the required fibre network.
- The pattern of development of the area including the separation between the application site and the surrounding residential and other land uses.

An Bord Pleanála's Decisions

15. An Bord Pleanála following a meeting on the 5th August, 2016 decided to grant planning permission for the proposed development and the strategic

infrastructure development of the 220kV substation. Thereafter, following a further meeting on 10th August Board directions were agreed in respect of both proposals and decisions. The orders granting permission for both developments issued on 11th August, 2016.

16. In granting permission for the proposed development of the data storage unit in PL07.245518 the Board stated that it had regard to those matters which it was obliged to take into account by statute and listed a number of reasons and considerations to which it had regard in coming to its decision including:-

> "(d) the projected demand for data storage in the future, the economic and operational rationale for the clustering of data storage capacity on one site, and the consequent potential site size requirements,
>
> (e) the indicative masterplan of the site and the extent of the site available,
>
> …
>
> (f) the scale of constraints in identifying suitable sites in terms of the requirement for and availability of multiple high voltage grid connections, of significant fibre capacity and a large scale land use requirement,
>
> (g) the merits of the site in terms of the nature of the development including the proximity of the site to secure grid locations and the fibre telecommunications network,
>
> (h) the proximity of the site to multiple strategic grid connections, including substantial power generation capacity, through the 220 kV line to the Tynagh power station, which connects onwards to the 400 kV network at Old Street, the 220kV line to Prospect, which is in turn connected to the power stations at Moneypoint and Tarbert, and two

220 kV connections to the Cashla substation, which is itself highly interconnected…

(k) the adjoining proposal for a 220kV substation to connect the proposed development to the national grid, submitted to An Bord Pleanála under application reference 07.VA0020, and

(l) the documentation and submissions on file and made at the Oral Hearing, including submissions from prescribed bodies, and the report Inspector, which incorporated an examination, analyses and evaluation undertaken in relation to appropriate assessment screening and Environmental Impact Assessment."

17. The Board also stated that it was satisfied the information furnished was adequate to undertake an Appropriate Assessment Screening (AAS) and an Environmental Impact Assessment (EIA) in respect of the proposed developments.

18. The Board stated in respect of the Environmental Impact Assessment (EIA) that:-

"the Board considered the nature, scale and location of the proposed development, the documentation submitted with the application and further information, including the revised Environmental Impact Statement, the submissions made on file and of the Oral Hearing, the mitigation measures proposed, and the report, assessment and conclusions of the Inspector. It is considered that this information was adequate in identifying and describing the direct and indirect effects of the proposed development, including forestry replanting proposals. The Board completed an Environmental Impact Assessment in relation to the proposed development, by itself and in cumulation with other developments in the vicinity, including the adjoining

proposal for a 220 kV substation to serve the proposed development and the proposed N17/M18 motorway, and concurred with the Inspector's assessment of the likely significant impacts of the proposed development, and agreed with the conclusion on the acceptability of the mitigation measures proposed and of the residual impacts. The Board concluded that the effects of the proposed development on the environment would be acceptable. In doing so, the Board adopted the report of the Inspector."

Similar conclusions and reasons were stated in the decision on the strategic infrastructure development in respect of the 220kV substation and associated connections.

19. The Board direction in respect of the planning application for the data hall of 10th August, 2016, stated in terms which reflect what it stated in the order granting permission quoted above, that the Board had regard to the following (*inter alia*):-

"(d) the projected demand for data storage in the future, the economic and operational rationale for the clustering of data storage capacity on one site and the consequent potential site size requirements.

(e) the indicative masterplan for the site, and the extent of the site available;

(f) the scale of constraints in identifying suitable sites in terms of the requirement for and availability of multiple high voltage grid connections, of significant fibre capacity and a large scale land use requirement;

(g) the merits of the site in terms of the nature of the development, including the proximity of the site to secure grid connections and to the fibre telecommunications network;

(h) the proximity of the site to multiple strategic grid connections including substantial power generation capacity through the 220kV line to the Tynagh power station…

(i) the location of the site within the area identified as a strategic economic corridor in the county development plan…

(k) the adjoining proposal for a 220kV substation to connect the proposed development to the national grid…"

It also had regard to the documentation and submissions on file and made at the oral hearing, the appropriate assessment screening and the Environmental Impact Assessment. The Board expressed itself satisfied that the information before it was adequate to undertake an appropriate assessment screening and an Environment Impact Assessment in respect of the proposed development. In considering the appropriate assessment screening and the Environment Impact Assessment, the Board reiterated its adoption of the report of the Inspector. It also stated that it had completed the appropriate assessment screening exercise and the Environmental Impact Assessment in relation to the proposed development by itself and in cumulation with other developments in vicinity including the adjoining proposal for the 220kV substation and proposed N17/M18 motorway. It expressly concurred with the Inspector's assessment of the likely significant impacts of the proposed development and agreed with the conclusions on the acceptability of mitigation measures proposed and the residual impacts.

20. The Board direction in respect of the strategic infrastructure development concerning the 220kV substation and associated connections was also in the same terms.

Grounds

21. Grounds 1 and 2 in the statement of grounds allege a failure on the part of the respondent to carry out a proper Environmental Impact Assessment (EIA) of the proposed development. Ground 2 claims that the respondent has failed to properly describe or assess the development as a whole. The application was for the construction of a single data centre in Athenry, the first of eight contemplated as part of an overall development masterplan. The Inspector appointed by the Board identified that the site selection process was predicated and justified on the basis of the need to accommodate a total of eight data halls on the site. He also acknowledged that in the event that all data centres are not needed or constructed the site selection process was questionable and that the Board should consider a refusal of permission if it were not satisfied that all eight halls were necessary. It was claimed the Board gave no consideration to this issue and did not record any determination in that regard.

22. The balance of the grounds 3 to 13 inclusive relate to the electricity demands required if the entire masterplan were to be implemented. The application for permission in respect of one data centre indicated that it had an energy capacity of 30MW but the proposed development of eight data centres had an energy demand of 240MW. It is claimed that the respondent failed to identify or assess the likely impacts of the proposed development on energy demand and climate change. Furthermore, the proposed development was presented as one which would be powered entirely by renewable energy. The Inspector rejected this proposition and concluded that the development simply connected to the national grid and that the notice party did not intend to provide any additional renewable energy generation to meet the increased energy demand created by the proposed development. The Inspector, it is claimed, left that issue to the Board to consider and determine which it failed to do. It simply granted permission without an assessment other than that

provided by the Inspector. It is claimed therefore that this issue was not lawfully considered and determined by the Board and that its decision is contrary to national and European law.

23. It is claimed also that the Board was obliged to properly assess the impact of the proposed development upon power generation requirements nationally. It is submitted that the Board was obliged to require the developer to address the power generation requirements in the masterplan and provide measures to mitigate or offset these requirements. The public ought to have been afforded an opportunity to make submissions on such possible mitigation measures. It was therefore submitted that the Board resolved the central issue in the EIA process against the applicants but did not give them an opportunity to them to make relevant submissions thereon.

24. The applicants claim that the Commission for Energy Regulation indicated that no grid infrastructural works would be required for the first phase of the development but were silent on the remaining phases. It was claimed that the Board had a duty to assess the likely effects of the development as a whole and the potential need to increase power generation and upgrade grid infrastructure to accommodate the development. In addition, the Board was obliged to identify the environmental impacts of the development on climate change. However there was no assessment in this regard and it is claimed that the Inspector correctly concluded that the development was likely to have a significant effect on energy demand and CO2 emissions. He also noted that there was no national policy within which these effects could be assessed or evaluated. He is said to question how the respondent ought to approach these issues in the absence of any such policy and ultimately confines his assessment to an economic assessment that 150 jobs would be provided by the development. In the absence of a defined energy policy nationally it was submitted

that it was impossible for the Board to be satisfied the development was consistent with such a policy or for the Board to be satisfied that the proposed development was in accordance with Directive 2003/87/EC and decision 406/2009/EC on the reduction of green house gas emissions. Furthermore it was claimed that in the absence of a Strategic Environmental Impact Assessment (SEIA) it was not possible for the Board to assess the sustainability of the project.

25. Once the Board was satisfied that a significant level of power was required by the overall development and that it would not be powered by 100% renewables it should have sought additional information from the developer as to the proposed mitigation measures to ensure adequate legally enforceable climate change mitigation. It is claimed that the following matters could have been considered namely, on-site or off-site renewable energy production, the building of the data centre in an area where waste heat recovery could be utilised, a requirement to purchase carbon credits, requiring forestation of additional lands, requiring other measures aimed at reducing turf/peat combustion.

26. The applicants also claim that the provision of 144 diesel generators on full construction under the masterplan and the requirements for these to be tested and run intermittently during the lifetime of the project and their use in the event of a power failure gave rise to a very large generation requirement and significant noise and air emissions which were not properly assessed.

Obligation to Carry Out and Record EIA

27. Ground 1 claims that the respondent failed to record the EIA that it purportedly carried out and provided no assessment, description or evaluation of the proposed development and/or its likely significant effects. It is said that there is no

record of any assessment of the likely environmental impacts of the project conducted by the Board as required by s. 172 (1J) of the Act which states:

> "(1J) When the planning authority or the Board, as the case may be, has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public:
>
> (a) the content of the decision and any conditions attached thereto;
>
> (b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;
>
> (c) having examined any submission or observation validly made,
>
> (i) the main reasons and considerations on which the decision is based, and
>
> (ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;
>
> (d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects …"

28. It is submitted that the Board was obliged to identify the direct and indirect effects of the proposed development on the matters set out at s. 171A of the Act. They were:

> "(a) human beings, flora and fauna,
>
> (b) soil, water, air, climate and the landscape,
>
> (c) material assets and the cultural heritage, and

(d) the interaction among the factors mentioned in paragraphs (a), (b) and (c)."

29. The applicants submit that the Board has also failed to identify the main measures to abate, reduce or offset the likely effects of the proposed development and in particular additional power generation. It is said that there is no evidence of any consideration of this matter in the decision of the Board. Section 172(1H) of the 2000 Act provides that in carrying out an Environmental Impact Assessment the Board may have regard to and adopt any reports prepared by its officials. The Inspector's report was expressly adopted by the Board which concurred with the Inspector's assessment of the likely significant impacts of the proposed development and agreed with the conclusions on the acceptability of the mitigation measures proposed and of any residual impacts. It is well established that if the Board accepted the Inspector's report and did not deviate from it or reject any of its conclusions the Board is taken as in effect adopting the Inspector's report. (*Maxol v. An Bord Pleanála and Ors* [2011] IEHC 537 per Clarke J.; *Fairyhouse Club Ltd v. An Bord Pleanála* unreported High Court 18th July, 2001 per Finnegan J.; *Agolas v. An Bord Pleanála and Ors* [2015] IEHC 205 per Baker J.) In the two cases in suit the Board expressly adopted the Inspector's reports.

30. In *Ratheniska Timahoe and Spink (RTS) Substation Action Group v. An Bord Pleanála and Eirgrid plc.* [2015] IEHC 18, Haughton J. in addressing a similar argument that the applicants had failed to record the EIA or to engage with the Inspector's assessment stated at para. 85:

> "The court is satisfied firstly that the Board did undertake a comprehensive EIA in relation to this aspect of the Development and that this is recorded in the body of the decision where the Board stated that it was satisfied that the

information available on file was adequate to allow an EIA to be completed. It is also apparent from a reading of the decision as a whole that the Board considered and assessed the EIS, the Inspector's Report (where an assessment of the EIS and this issue was carried out by the Board's nominated officer) and other relevant documentation. The Board also expressly confirms that in forming its view it had regard to listed and publicly available documents of a scientific or guidance nature relevant to this issue."

31. This approach was adopted and applied also by Cregan J. in *Edward Buckley v. An Bord Pleanála* [2015] IEHC 572 at pp. 39 to 44.

32. I am not satisfied that the decision of Barrett J. in *Connelly v. An Bord Pleanála* [2016] IEHC 322 should be regarded as altering the legal principles applicable to this issue. In that case there was a considerable alteration to the plans submitted during the planning process. The Inspector had reported initially upon a proposal for six wind turbines which was then altered to four when further information was sought by the Board. Other important changes were made to the application which were not addressed in the Board's decision. Though the Inspector's report was "generally adopted" it was in some parts negative towards the proposed development. The court is satisfied that the Board's decisions in these cases when read together with the Inspector's reports constitute an adequate record of the EIA carried out by the Board in both cases and is in compliance with the statutory obligation set out above. This ground is rejected.

Site Location

33. As already observed the choice of the site at Athenry was the subject of the request for further information. A more detailed justification for the proposed location was set out in the REIS of 12th February. This described a total of 25 sites

that had been considered throughout the country against criteria set out by Apple and alternative locations suggested by various appellants (see Chapter 3.1.1.1 – 3.1.1.4 and Appendix 2.1 thereof).

34. Further submissions were received in respect of this information from the appellants. It was submitted that the proposal for Phase 1 was really a part of a larger development and involved a degree of project splitting. The implications of the additional energy generation required to serve the development of the grid had not been covered in the EIS. It was noted that the scale of development was unprecedented and should have been the subject of phasing. However, if only Phase 1 of the development was to progress, the rationale for the location of the site was said not to be sustainable and a grant of permission would significantly underuse the site and be tantamount to poor planning. It was submitted that the selection criteria were unrealistic as they were based on a full build-out of the development of the masterplan whereas only one data hall was proposed.

35. The Inspector considered these submissions. In particular, he addressed the criteria used for site selection, the requirement for site size and the scope of the alternatives considered. This had been the subject of significant discussion at the oral hearing. The Inspector regarded some of the criteria used by Apple as very restrictive and without clear justification. In particular, he noted that the criteria requiring a separation of 300km from nuclear facilities and 80km from any major petro-chemical storage sites were questioned during the course of the hearing and were in his opinion excessively restrictive. That particular suggestion had the potential to exclude all east coast sites notwithstanding the fact that a number of Apple data centres in the United States were located within 320km of nuclear facilities as were Google and Facebook facilities in Ireland.

36. The Inspector also took into account that most of the sites examined by Apple were presented for consideration by Industrial Development Authority with whom they had a close working relationship. No independent assessment of these sites was undertaken by any other party or firm acting on behalf of Apple. However, the Inspector did not consider that the restriction of sites to those independently sourced and assessed by Apple would have been very desirable. It was noted that the bulk of the sites identified during this process or proposed by others were not appropriate since they did not meet the minimum site size requirement of 360 acres. In addition, a planning report prepared by McCarthy Keville O'Sullivan which accompanied the application made reference to the fact that an assessment of suitably zoned lands located within 1.6km of 220kV and 400kV power lines was undertaken throughout the country to identify an appropriate zoned site of 360 acres but it was not possible to do so. The Inspector concluded that:-

> "… 12.1.1.9 It would appear that there are no or at very least limited alternative zoned sites of the size specified by Apple and conveniently located relative to the 220 and 400kV power network and fibre networks available nationally, irrespective of the other site location criteria contained in the REIS. An assessment of the merits of the minimum site size requirement specified by the applicant is therefore appropriate."

37. The Inspector also considered the fact that the masterplan drawing submitted showed that the data hall the subject of the application was Phase 1 of what was envisaged to be the larger scale development of eight identically sized data halls. The appellants and other objectors submitted that no case had been made as to why additional data halls would be required. It was submitted that if the applicant was

certain that the larger scale was required, these additional phases should have been included in the application with a possibility of a phased plan being presented. The Inspector noted the report of CISCO Global Cloud Index Forecast which concluded that by 2019, more than 85% of workloads would be processed by data centres that serve the cloud and that global data centre traffic was projected to triple between 2014 and 2019. It also predicted that the number of devices and connections per user would double over the same period with consequent increase in demand for data storage.

38. It was also submitted that the nature of the IT sector was such that very rapid developments of technology might eliminate a demand for conventional data centres towards the end of a fifteen year timeframe. This was rejected by Apple. No such step change in technology was envisaged over this period.

39. The Inspector concluded:-

> "12.1.21 On the basis of the information presented I consider that the case made by the applicant with regard to need, both in terms of the projected increase in data storage demand and also the likelihood of a significant change of technology is robust. There is, of course, a chance that a new technology that renders conventional data centres obsolete will be developed or that Apple's market share and data demand may fall significantly, however both of these scenarios are in my opinion unlikely. In any event, the phased nature of the development of the Derrydonnell site is such that changes in the rate of demand for additional capacity could be accommodated or the development of the site ceased in the event demand did not increase as projected. I would also note the scope of the alternative

technologies put forward by the appellant and objectors was limited…."

40. The Inspector noted very significant problems in terms of security of data, maintenance and terms of cost in decentralising data storage. He did not see how these issues could be readily overcome. He stated:-

"12.1.21 In conclusion on this issue, it is my opinion that the applicant has put forward a convincing case regarding the likely increase in demand for data storage and the need for the development of additional data storage capacity in the future. The case made regarding the development of two complementary data storage locations in Galway and Viborg in Denmark is strong, and is set out in s. 4.2 of the planning report. The applicant has also made a convincing case as to why the dispersal of data storage into a number of smaller locations does not make economic or operational sense given the level of investment required in grid connection infrastructure and back up infrastructure. In this regard, the layout of the proposed Apple facility provides for support and research staff to be located on site in the administration building and I agree with the applicant that it would not be efficient for support staff to be spread across a number of locations. Maintenance of efficient security and the provision of secure fibre connections to the sites are further reasons why the cluster of data halls on one site makes sense. For all of these reasons, I consider that the case made by the applicant for the provision of the data centre facility with the

> capacity to accommodate projected future demand clustered on a single site is convincing. This issue is a fundamental one for the Board to consider and in the event that it does not accept the case made by the applicant, regarding likely future data storage demand and consequent requirement for additional phases of development with a consequent site size requirement, then a significant range of alternative options for the location of the Apple facility are opened up. The assessment of alternatives undertaken by Apple is on the basis of a minimum site size requirement of 146HA (360 acres) and it is evident that there would be alternative sites on zoned land with an existing developed urban area which would be viable alternatives for a smaller scale of development than that indicated in the submitted masterplan."

41. The Inspector considered the submissions that the area of the site could be reduced by way of a more efficient layout which could render alternative site options viable. However, he was satisfied on the basis of the information presented in the REIS that the site size proposed was not excessive to accommodate the full build-out of the development as envisaged in the masterplan. He did not consider that it could reasonably be said that minor reductions would mean that the proposed development could be accommodated on alternative zoned sites.

The court is satisfied that the Board adopted the Inspector's report and his findings in relation to the issue of site location which were in favour of the development. It was clearly satisfied to adopt his opinion that the eight halls were necessary at this time. It is clear that the Inspector on the basis of the information presented concluded that the

case made concerning the need in terms of a projected increase in data storage demand and the likelihood of significant change in technology use was "robust". He thought that the alterative scenario of the development of new technology rendering conventional data centres obsolete "unlikely". He concluded that the applicants' case was convincing regarding the likely increase and demand for data storage and the need for development of additional storage capacity in the future. The court is satisfied that while the issue was regarded as fundamental both by the Inspector and for the Board in its consideration, the Board accepted the case made by Apple based on the Inspector's conclusions and recommendations which it was entitled to do. Consequently, the court is not satisfied that the Board did not give any consideration to this issue or did not record its determination in that regard. That element of ground 2 is rejected. Furthermore, the suggestion that the Board's conclusion in relation to that issue is unreasonable and irrational is not sustained having regard to the contents of the Inspector's report and the decision of the Board.

Energy Requirements and Supply

42. The Inspector's report contains a detailed analysis of the "energy demand climate change and sustainability" effects of the proposed development. A module at the oral hearing had been devoted to energy and climate change impacts of the proposed development. The full roll out of eight centres was likely to be a significant user of power notwithstanding measures taken by Apple to ensure the best technology to ensure minimum power demand. The Inspector summarised the likely electricity requirements of the development. The data hall included in the application would generate a demand of 6MW of power by the end of 2018 which was anticipated to rise to 30MW by 2023 when the development was fully operational. If the seven

additional data halls were developed it was envisaged that the power demand generated by the site could extend to 240MW.

43. The scale of the effect of this demand on the national supply and demand for electricity and generated capacity was outlined as follows:-

> "12.6.1 … a significant number of figures were presented during the course of the hearing with references made to the energy demand relative to generating capacity, average energy demand and peak energy demand. The calculation is also influenced by whether the energy use of the development is assessed against current or future energy use/demand and whether it is assessed relative to the relevant figure for the Republic of Ireland or all Ireland. In terms of peak power demand, the 30MW demand from one data hall would equate to approximately 0.59% increase in all time peak demand and a 0.84% increase in annual energy use if measured against the 2015 figure which was the most recent available in the EirGrid 2016 – 2025 Generation Capacity Statement. Corresponding figure for a full build out of eight data halls would be a 4.7% increase in peak all time demand (which was in 2010) and an approximately 6.7% increase in terms of annual energy use based on 2015 figures. This figure of 6.75% takes account of a stated 88% capacity factor in the development and without allowance for this figure energy use would be approximately 8% of 2015 annual energy use. It should be noted that these figures related to current energy use and percentage energy use would likely

be less by the time 30MW demand (c. 2023) or 240MW demand (2030 – 2035) scenarios arose if we assume that total energy use will increase over time. Whatever way the figures are calculated and presented it is clear however that the amount of energy consumed by the proposed development, both as proposed in the current application and certainly it would arise with the full build out of the masterplan for the site would be very significant."

44. The Inspector noted that in respect of planning policy there was no national climate change policy regarding very high energy consuming projects such as data centres. The EirGrid All Ireland Generation Capacity Statement 2016 – 2025 made specific reference to the projected increase in demand arising from consented and likely planned data centres. He noted that data centres are a form of development which has to locate somewhere and at an international level there is a strong case that locations such as Ireland and Denmark where Apple are proposing to develop their European facilities are the most appropriate given the temperate climate which will reduce the overall energy requirement to run them.

"12.6.3 … for Ireland and An Bord Pleanála in making an assessment of the merits of specific proposals such as that currently under assessment the decision has to be made in the context of the nature of the facility, the clear need for such facilities and the necessity that it would locate somewhere. In the absence of a clear policy on this form of development at a national level, it is in my opinion very difficult for a Board such as An Bord Pleanála to make a decision that this form of development is

not acceptable in principle. In addition, while data centres may have the potential to make the achievement of climate change targets more difficult, they have clear potential benefits in terms of employment and spin off economic activity. The location of the proposed facility is also such that it would have a potentially significant role in the rebalancing of economic development at a national level. All of these factors have, in my opinion to be taken into account in making an overall assessment of the merits of this proposal."

45. The Apple response to the issues raised in respect of Ireland's obligations in respect of CO2 admissions and climate change indicated that Apple used best technology and design to minimise energy usage. It supported renewable energy generation projects and provided for the purchase of renewable sourced energy from energy suppliers via the grid. However, the Inspector noted that no direct renewable energy connections or renewable energy projects were identified by Apple in its submissions and no specific renewable energy projects were included as part of the application. He added:-

"12.6.5 … in any event the question has to be asked whether any such new renewable projects will be additional to that which would otherwise come on stream. Maybe in the event that there was a direct connection between the project and the data centre development it could be definitively stated that the power generated would be additional to what otherwise would be the case. However, at present such connections are not permissible in Ireland and any power supply has to be via the normal grid

network. For this reason, I do not see the direct power supply projects are currently relevant."

46. Apple submitted that they had entered an agreement for the supply of energy to the proposed data centre by a renewable energy provider Vayu. This was a binding commitment that all of the electricity supplied to the proposed data centre would be generated from a renewable source. It submitted that their development and the commitment from Vayu would lead to the development of new or additional renewable generation. However, there was no way in which this could be clearly demonstrated. The Inspector concluded:-

"12.6.5 … in addition, as set out in the course of the oral hearing there is a recognised limit to the penetration of renewable energy sources to the grid and there is always a need for base energy supply via conventional sources to provide power when conditions are not suitable for wind energy. The amount of renewable power available is always going to be finite and in the absence of direct connection of renewable generation to the development, it is not possible to definitively state that the power supply to the development is from renewable sources. The limitations of the approach proposed by Apple are in my opinion set out in 13.6.2.2 of the REIS where it is stated:-

'Due to the intermittent characteristic of many forms of renewable generation Apple does not claim that in every moment of the day, every day throughout the year, the energy consumed by the data centre will exactly match the quantity of renewable energy supplier or Apple

> supported projects. Apple strategy is to ensure that on an annual basis the power consumption of Apple's proposed data centre is matched by renewable energy generation.'
>
> My reading of this statement is that while on an aggregate (yearly) basis power to the development may be traced to renewable sources, it is not possible to state that power supplied at any particular time is not from conventional sources."

47. The Inspector, having regard to the future phases of the development and given the limitations in terms of the grid and the amount of power required, was not satisfied that it could be clearly shown that power to the Apple data centre would be from one hundred percent renewable resources. The best assumption that could be made was that its power supply would be from the grid average power generation sources.

48. The Inspector then considered the assessment contained in the REIS in s. 9.8.7.1 of the potential impact effect on climate that would arise in the case of power supply if the one hundred percent renewable source was not achieved by Apple and it was instead supplied from the grid. The report stated that there could likely be an increase of 0.187% in CO2 emissions in respect of the proposal for the development of a single data hall and circa 1.49% in the case of the development of the full masterplan. These figures were based on the existing facts of 2013 generation mix and assumed a continued increase in renewable electricity generation towards a 40% target. The likely effect of CO2 emissions upon completion of a masterplan was in his view difficult to assess. He stated:-

"12.6.9 The 0.187% increase in CO2 emission (at 2013 generation mix) is stated in 9.8.7.1 of the REIS not to be significant and while this is a significant figure for one development in the context of overall emissions, I would be in agreement with this statement and consider that the climate change impacts arising from the current proposal are limited. Regarding the potential for the overall development of the masterplan to increase national CO2 emissions by approximately 1.5% I would question the conclusion of the REIS (9.8.7.1) that such an impact would not be significant. Against this it should be noted that the 1.5% figure is on the basis of a 20% penetration of renewables which would increase significantly by the 2030 – 2035, anticipated full build out of the masterplan. It should also be noted that overall CO2 emissions will likely have increased by 2030 – 2035 such that the percentage used to power this development will reduce and that there is the potential for changing circumstances whereby Apple provided renewable generation projects serving the development either directly or via the grid may come on stream and also they are likely to be continuing slight increases in overall efficiency of conventional power generation. For all of these reasons, it is not my opinion possible to state with any certainty what the impact of the full build out of the data centre as per the masterplan would be in terms of CO2 emissions other than to state that the 1.5%

increase referred to in the REIS is a very much worst case scenario."

49. The Inspector then considered the potential environmental impact of the additional phases of development that might take place in the future. He stated:-

"12.6.10 notwithstanding the factors set out above that may result in a reduction of the 1.5% increase in CO2 predicated in the REIS it is my opinion that the future full build out of the site as envisaged in the masterplan would have a potentially material impact in terms of increased overall CO2 emissions and hence implications in terms of climate change and the ability of Ireland to meet its climate change in greenhouse mission targets. As set out at 5.6.2 above, there is limited guidance available regarding the principle of accommodating this form of very energy intensive development in Ireland. It is however my opinion that the potential benefits of the proposed development of the facility in terms of direct and indirect employment and the positive impact on regional development are such that they outweigh the potential adverse climate change and increased greenhouse gas emission impacts which may arise. In coming to this conclusion I have regard to the factors set out at 5.6.8 and 5.6.9 above whereby the impact of the future development in terms of increased CO2 emissions were likely not to be as significant as that set out in the REIS. I also would have regard in reaching this conclusion to the fact that the nature of the development is one which is required to

> be provided in some location and the fact that any additional phases of development would require permission at which time changing circumstances in terms of direct energy supply, climate change policy and potentially a new policy direction on data centre and other energy intensive forms of development could be taken into account. This approach of having regard to potential future developments in energy generation and demand is, however, an issue on which the Board will need to take a position, particularly given the importance of the scale of overall development and site size in the choice of location."

50. It is submitted by the applicants that the Board did not take a position on this issue.

51. The Inspector then considered the impact of the proposed development on the grid infrastructure. Evidence was given by EirGrid that the current application for a single data hall could be accommodated without reinforcement of the grid network. This was not clear in respect of future phases of the development. There was evidence that the proposed location in the western region close to an existing 220kV line could be expected to require lower levels of grid reinforcements than would be the case if a similar development was to be located in the Dublin region. However, the Inspector was satisfied that the extent of additional development that might be accommodated on the site without grid reinforcement was not clear from the information available and "would depend on future developments and electricity demand and supply across the network". It was noted that the 2016 – 2025 capacity statement which predicated the availability of generating the capacity had taken into account projections in the development of data centres over this period.

52. The Inspector gives the following conclusion:-

> "12.6.12 …I do not consider that on the information available there is a clear basis to support the objections made regarding the negative impact of the proposal on grid infrastructure and the assertions that Apple would not make a fair contribution to maintaining grid capacity. There is existing capacity to accommodate a Phase 1 of the development comprising the first data centre however Apple will be paying transmission use of system charges (TUOS charges) as well as paying for electricity used and as set out by the CER in the short run at least additional use of the system will likely lead to reduced charges for all users. The situation at the time of any future application for expansion of the data centre is hard to predict and would have to be assessed at that time."

Application of Legal Principles

53. The applicants submit that the planning permission for the single data hall would not have been granted in respect of Phase 1 if it were not part of the wider project to construct and operate eight data halls on the site in the future. They point to the Inspector's view that planning permission would have to be refused if the later expansion of the facility were not taken into account. Thus, the court was asked to infer that planning permission was granted on the basis that it was intended to complete the masterplan which was integral to the grant of permission. Therefore, it was submitted that the EIA for the project ought to have included an assessment of the impacts on the environment locally, nationally and globally of the construction of the eight halls.

54. The respondents do not accept that an EIA was required in respect of the construction of all eight data halls. It was only required in respect of the application that was made for the construction of one data hall and its effects on the environment. An EIA was not required in respect of planning permission for the balance of the project. If the construction of the remaining data halls were to proceed, Apple would have to apply for planning permission in respect of any such development which in turn would give rise to a necessity for an EIA in respect of any such application. However, the respondents also submit that the overall effect of the masterplan insofar as it could be taken into account was considered appropriately by the Board.

55. Article 1(2)(a) of Directive 85/337/EEC, subsequently amended and replaced by Directive 2011/92/EEC (and later by Directive 2014/52/EU) defines the project which was the subject of the directive as follows:-

a. "Project" means

"- the execution of construction works or of other installations or schemes,

- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;"

56. Article 2 provides:-

"1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.

2. The Environmental Impact Assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive."

57. Article 2 of the directive also defines "development consent" as:-

"the decision of the competent authority or authorities which entitles the developer to proceed with the project."

Thus the decision initially under which the directive applies is that which is sought in a particular case in respect of the project which is the subject of the application for planning permission.

58. Article 3 of Directive 2011/92/EU as amended by Directive 2014/52/EU provides that the EIA must 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 the following factors:

(a) population and human health;

(b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;

(c) land, soil, water, air and climate;

(d) material assets, cultural heritage and the landscape;

(e) the interaction between the factors referred to in points (a) to (d)"

59. In *Commission v. Ireland* (Case C-50/09) the CJEU held:-

"37. In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on

certain factors, but must also assess them in an appropriate manner, in the light of each individual case…

40. However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors."

60. The requirement to carry out an EIA was transposed into Irish law under the provisions (*inter alia*) of the Planning and Development Act 2000. Section 171(A) requires an EIA to include an examination, analysis and evaluation of the direct and indirect effects of any proposed development. The Board in reaching its decision must under s. 172(1J) (c) set out "the main reasons and considerations on which the decision is based". It is entitled under s. 172(1H) when carrying out an EIA to have regard to and adopt in whole or in part any reports prepared by its officials, other consultants experts or advisers. If there is no divergence between the decision of the Board and the conclusion reached by the Inspector, it is appropriate to infer that the

reasons of the Board were the same as those of the Inspector (per Clarke J. in *Maxol v. An Bord Pleanála*, unreported High Court 21st December, 2011). The burden lies with the applicants to establish that the decision of the Board is fundamentally flawed and should be quashed (see *Weston Ltd v. An Bord Pleanála* [2010] IEHC 255).

61. The applicants place considerable reliance on the opinion of Advocate General Gulmann in Case C-396/92 *Bund Naturschutz in Bayern v. Freistaat Bayern*. The issue in those proceedings concerned the construction of sections of a federal highway in Bavaria. The CJEU was asked to address three questions. The first two questions related to whether the EIA directive applied at all. The court determined that it did not and that it was therefore unnecessary for it to consider a third question which was:-

> "Is the concept of "project" in Articles 1, 3 and 4 of and Annex I, point 7, to the directive to be understood as meaning, in its application to motorways and express roads, that the environmental impact:
>
> (a) is to be assessed solely for the section of a road link for which development consent has been sought, or
>
> (b) in addition to the area covered by that section, for the road link as a whole?"

62. In his opinion, Advocate General Gulmann addressed this question and stated:-

> "66. The optimal solution is presumably for an environmental impact assessment to be carried out both in connection with decisions on the routing of the entire length of road and on decisions for the specific construction projects for sections. That is also the solution chosen by the Bundestag when it transposed the EIA Directive, in connection

with which, as mentioned, when amending the Law on Trunk-Roads it imposed an obligation to carry out an environmental impact assessment in both respects.

67. That is, however, not a solution that the Member States are bound to choose under the EIA Directive. As stated by Freistaat Bayern and the three governments which have submitted observations, it is not possible to interpret the directive to the effect that it makes an environmental impact assessment mandatory for anything other than the specific projects submitted by developers to the competent authorities in order to obtain authorization to carry out construction or other works - even if the actual application relates to only one part of a longer road link which, as normally happens in practice, is to be constructed in stages.

68. The principle underlying the directive is unambiguous: an environmental impact assessment is to be carried out for projects in respect of which the public or private developer is seeking development consent (see on this point Article 1(2), Article 2(1) and (2), Articles 5, 6 and 8 in particular, which all assume that applications have been submitted for consent to a project).

69. That result is confirmed by the difficulties which could arise in laying down what comprises an 'entire project' when that concept is not the same as 'a specific project in respect of which an application has been submitted'. In addition, there might be difficulties in carrying out an environmental impact assessment as provided for in the directive for projects which have not yet been worked out in detail. It must be self-

evident that the directive cannot indirectly have the effect of forcing the Member States to depart from the normal practice according to which long road links are executed by constructing sections over staggered periods.

70. It is, however, undoubtedly correct that, as the United Kingdom points out, the purpose of the directive should not be lost by the projects which should be subject to an environmental impact assessment being given a form which renders an environmental impact assessment meaningless. The Member States must ensure that the obligation to carry out an environmental impact assessment is not circumvented by a definition that is over-strict or otherwise inappropriate, in the light of the purpose of the directive, of the projects in respect of which application must be made.

71. The important question in the present connection is not, however, which projects are to be subject to an environmental impact assessment. It is whether, in connection with the environmental impact assessment of the specific project, there is an obligation to take account of the fact that the project forms part of a larger project, which is to be carried out subsequently, and in the affirmative, the extent to which account is to be taken of that fact. The subject-matter and content of the environmental impact assessment must be established in the light of the purpose of the directive, which is, at the earliest possible stage in all the technical planning and decision-making processes, to obtain an overview of the effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect

on the environment. That purpose entails that as far as practically possible account should also be taken in the environmental impact assessment of any current plans to extend the specific project in hand.

72. For instance, the environmental impact assessment of a project concerning the construction of the first part of a power station should, accordingly, involve the plans to extend the station's capacity fourfold, when the question of whether the power station's site is appropriate is being assessed. Similarly, when sections of a planned road link are being constructed, account must be taken, in connection with the environmental impact assessment of the specific projects of the significance of those sections in the linear route to be taken by the rest of the planned road link.

73. There is neither reason nor basis for a more specific determination of the scope of that obligation in the present case."

In that case an Environmental Impact Assessment was not carried out because the consent for the development was granted after the German transposition law came into effect in circumstances where under the transitional rules it was not necessary to carry out an EIA. The third question was confined to the issue of whether the concept of a "project" in connection with roads required an Environmental Impact Assessment to be carried out of the entire road link planned or only for the sections in respect of which consent was sought. The two sections of road were 6.9km and 3km long and part of a 130km long new motorway link.

63. The applicants submit that it is unlawful to limit the EIA to the first phase data hall because to do so restricts the practicable importance of the EIA or renders it meaningless. It is said that very important matters relating to site selection and design

are all predicated upon and dictated by the overall masterplan. It is submitted that the actual "project" for the purposes of the EIA in this case is the masterplan and not a single data hall. Emphasis is placed on para. 71 of the Advocate General's opinion and in particular the example given in para. 72 that the EIA of a project for the construction of the first part of a power station should include the plans to extend the station's capacity fourfold, when assessing the suitability of the site chosen for the station. In this case the plan is to extend the single data hall's capacity eightfold. Therefore, it is submitted that an EIA must address the overall effect of the building of the eight data halls. The applicants rely upon the fact that the grid connection application is for the entire masterplan development and that the proposal is a first phase element of an overall development for which the site has been specifically selected.

64. It is also submitted that the purpose of the EIA is as soon as possible to identify and assess the full effects of a proposed development. It is claimed that it is possible for the development masterplan to be fully assessed. The only issue that remains unclear is said to be "one of timing". It is claimed that it is possible to carry out an EIA of the entire masterplan and that an EIA including the grid connection for the entire project which covers the environmental impact likely to result from the use of electricity required to run the entire development is required. It is submitted that information existed upon which "a cumulative assessment" under the EIA may be conducted.

65. The respondents submit that the application for permission for the data hall is a standalone development and is not dependent upon the completion of any of the future data centre buildings which are indicated in the masterplan. The data hall will operate on its own and is thus not functionally dependent on the construction of other

data centres in future years. It is clear that the power supply development will have the capacity to carry power to any future data centre halls constructed. Until future permissions, if any, are granted for future data halls, the power supplied through that development will be limited to the one permitted data centre. The respondents and notice parties emphasise that a planning application would have to be submitted and permission granted for the construction and operation of any new data hall and that each stage of development would require a further Environment Impact Assessment. The EIA would assess the effect of the additional data hall proposed on the environment and will doubtless refer to any knowledge accumulated in respect of the construction and operation of the phase 1 development.

66. The respondents submit that there is no legal basis upon which Apple were required to carry out an EIA on the entire masterplan development. This is not a case in which the applicants for planning permission sought to avoid the carrying out of an EIA by project splitting. Although the respondent did not carry out an EIA which subjected the likely effects of the possible future construction and operation of seven additional data centres nevertheless, it did not exclude consideration of their potential effects insofar as that was practicable. It considered the extent to which it could practicably and reasonably do so in respect of relevant aspects of the project. This depended on the level of information available and the applicable variables related to the timing of any future development and any potential changes in technology or circumstances that might occur in the interim.

67. In that regard, the respondents submit that the applicants' interpretation of Advocate General Gulmann's opinion in Case C-396/92 is incorrect. The opinion emphasises the principle underlying the Directive which is said to be "unambiguous" that an EIA is to be carried out for projects in respect of which development consent

is sought. An EIA is not mandatory for anything other than the specific projects submitted by a developer to the competent authority in order to obtain authorisation to carry out construction. This applies even if the actual application relates only to one part of the development such as a longer road link which as normally happens as a matter of practice is constructed in stages.

68. The extent to which the EIA of a specific project is required to take account of the fact that the project forms part of a larger project is to be established in the light of the purpose of the Directive which is "at the earliest possible stage in all the technical planning and decision making processes, to obtain an overview of the effects of the projects in the environment and to have projects designed in such a way that they have the least possible effect on the environment." The respondent emphasises the next sentence of para. 71 of the opinion which provides:-

> "That purpose entails that as far as practically possible account should also be taken in the Environment Impact Assessment of any current plans to extend the specific project in hand."

It is therefore submitted that the Advocate General's opinion does not indicate that an EIA should be conducted in respect of "current plans to extend the specific project in hand". That statement is qualified by his opinion that "as far as practically possible" account be taken of any such plans. It is submitted that the Inspector's report and the Board's ultimate decisions had full regard to that obligation.

69. The respondents also submit that the example provided in the Advocate General's opinion at para. 72 concerning the power station refers to a requirement that an EIA for such a project should involve the plans to extend the station's capacity fourfold "when the question of whether the project site is appropriate is being assessed". It is submitted that the opinion does not indicate that an EIA must also be

conducted in respect of envisaged future extension but that the plans for the extension should be taken into account in respect of one particular aspect of the EIA namely the question of whether the site was appropriate. The respondents point to a number of features of the Inspector's report and the Board's decision which establishes compliance by the competent authority with its obligations in respect of EIA within the framework of the jurisprudence and the opinion of the Advocate General. Thus, for example, reliance is placed on paras. 12.6.11, 12.6.12 and 12.8.2.5 of the Inspector's report. The court is satisfied that the submissions of the respondent and the notice parties are correct.

70. The court is satisfied that the Inspector and the Board in its decisions took into account the fact that the project which forms the basis of the application for the permissions granted in this case forms part of a larger project which is to be carried out subsequently. The court has also considered whether at the earliest possible stage in all the technical planning and decision making processes to date the purpose of the EIA in obtaining an overview of the effects of the project on the environment and to have projects designed in such a way that they have the least possible effect on the environment has been achieved. It is achieved if "as far as practically possible" account is taken in the EIA of any current plans to extend the specific project in hand. The court is satisfied that it is clear from the information sought and gathered by the Inspector and by the Board and the considerations set out in the evidence adduced before the court, that the obligations cast upon the Board have been fully discharged. Future contingencies and occurrences in relation to future aspects of the project have been extensively explored and considered in the course of this process. It is abundantly clear that the possible future expansion requirements of the developers were considered. The Board concurred with and adopted the Inspector's assessment

which, *inter alia*, included an extensive assessment of later potential phases of the project relevant to the assessment of the site location and in assessing the potential material impact in terms of climate change of a future build out of the masterplan.

71. The court is not satisfied that there was any obligation to carry out an EIA of the entire masterplan which was not the subject of the planning permission application. Of primary concern to the competent authority is the development in respect of which the EIA is required.

72. In *Friends of the Curragh Environment Ltd. v. An Bord Pleanála* [2006] IEHC 390 the applicant challenged the decision of An Bord Pleanála whereby it granted planning permission for the realignment of a stretch of roadway through the Curragh and the demolition of part of the west stand at the Curragh racecourse together with the construction of a 72 bedroom hotel. An EIS was submitted. It was common case that the two planning applications formed part of a larger masterplan for the redevelopment of the entire racecourse to be carried out in later intended phases of development. It was alleged that the Board had acted in breach of the EIA Directive because it had failed to carry out an assessment of the impact on the environment of the overall masterplan.

73. Finlay Geoghegan J. concluded that the relevant proposed development is that referred to in s. 173(1) of the 2000 Act which is the development for which permission is sought. The question to be considered was whether there was anything in the Directive which made it clear that a planning authority must assess not only the impact on the environment of the development in which permission is sought but also the impact of any future proposed related development for which permission is not yet sought. The learned judge stated (at pp. 18-20):-

"The only decisions, which were being made by the respondent in relation to the subject matter of these applications, were the decisions on the appeals against the decisions of the planning authority in respect of the applications for road re-alignment and the 72-bedroom hotel and part demolition of the existing stand. No decisions were being taken on the balance of the overall Master Plan for the redevelopment.

Accordingly, it appears that there is nothing in the Directive which makes it clear that a planning authority must assess not only the impact on the environment of the development for which permission is sought but also the impact on the environment of future or proposed related developments for which permission is not yet sought. … It is clear from the case law that there are circumstances in which a planning authority should have regard to related developments or even proposed developments when considering whether an EIA is required. However, the issue in this application is quite different. An EIS was submitted and an EIA conducted. The issue relates to the project or proposed development in respect of which the respondent or second named notice party as planning authority is obliged to carry out the EIA in circumstances where an EIS was submitted.

The conclusion which I have reached that Directive 85/337/EEC as amended only requires an environmental impact assessment of the project or development which is the subject matter of the application for planning permission and not of any related project which may be the subject of future or proposed application appears to me similar to the conclusion reached (albeit in relation to a different national statutory scheme) by Davis J. in the English

High Court in *R (on the application of Candlish) v. Hastings Borough Council* [2005] EWHC 1539 (Admin.)"

74. The English Court of Appeal in *Bowen-West v. Secretary of State* [2012] Env. L.R. 22 considered a challenge brought against a permission granted to dispose of Low Level Radioactive Waste (LLW) on a landfill site in addition to Hazardous Waste (HW) which was already permitted. The developer had indicated an intention to seek a substantial extension of the landfill site to accommodate a larger amount of waste in the future. The applicant contended that an assessment of those plans for the extension of the site ought to have formed part of the EIA of the current application to dispose of LLW on the existing landfill site. It was submitted that the "project" which the Secretary of State had to consider was, in fact, the larger scheme not yet applied for by the owners and therefore the larger scheme effects on the environment had to be considered and/or that the Secretary of State ought to have treated the intended further proposals as involving or constituting "indirect, secondary or cumulative sections" of the existing proposal such that they ought to have been assessed under an EIA. The Court of Appeal rejected these arguments.

75. The court considered whether the relevant "project" was the larger project or what might be regarded as the masterplan for the purposes of EIA. Laws L.J. (delivering the judgment of the court) stated:-

> "23. The term 'project' appears in the Directive where it is defined by Article 1(2) as including 'the execution of construction works or of other installation of schemes'. I do not accept that the relevant project here was the whole prospective scheme up to 2026. My reasons for so concluding are relevant also to the question whether, assuming the project to consist only in the July 2009 proposal, its context as part of

the intended larger scheme meant that the latter had to be considered by a way of an assessment of the July 2009 proposal's 'indirect secondary or cumulative effects'. I should note that the argument as to the scope of the project was put by the second respondents at the inquiry and rejected both by the Inspector and the Secretary of State.

24. My reasons for concluding as I do are briefly as follows. First, I see no reason to disagree with the Inspector's conclusion … that the July 2009 proposal was 'a stand alone proposal which can be and is being considered on its own merits' or the Secretary of State's like conclusion at paragraph 4 of the decision letter. This is so notwithstanding … that the third respondent's intention has been to achieve a continuing facility for waste disposal effective, without interruption, until 2026.

25. Secondly, the judge was clearly right in my view to hold at paragraph 40 that:

> 'In the present case, the permitted developments can go ahead irrespective of the future proposals. That was the finding of the Inspector, who said that this was a 'stand-alone proposal'. It is not in truth one integrated development such as the Carlisle Airport development in Brown; [That *is Brown v Carlisle City Council* [2010] EWCA Civ 523] or the Madrid ring road project in the *Ecologistas* case; or the Mediterranean Corridor rail project in *Commission v Spain*...'

Thirdly, the Inspector stated … that 'at present, there are no details of any future proposals'. This was challenged before the deputy judge:

> …. Clearly there was a degree of information about the overall intended scheme given in … evidence to the enquiry. But, in my judgment, the Inspector was perfectly entitled to state that there was a want of detail.
>
> 26. All these considerations in my judgment point to the conclusion, which I regard as inescapable, that the 'project' in this case is only the proposal contained in the July 2009 application. And I would so conclude whether the issue is one of law or one of judgment for the Secretary of State and in the latter case whatever the appropriate standard of review."

76. The respondent submits by analogy that the project in this case is a standalone development. The provision of a further seven data halls may or may not go ahead in the future and is subject to market demand, as apparently accepted by the first named applicant in a submission dated 29th March, 2016. It is accepted that the maximum capacity of the power supply development is such that it could carry the power that might be required in respect of the operation of future data centre halls, but its current operation is not dependent upon or restricted by a requirement to use all or indeed most of that capacity. It appears to the court that this is recognition of the reality that each subsequent application for the development of a further element of the "masterplan" will require planning permission and a further EIA. It is submitted that the permitted development can go ahead irrespective of future proposals. I am satisfied that this is so. In addition, it is submitted that while there was in *Bowen-West*, a degree of information about the overall intended scheme, in this instance there was insufficient detail to allow a full assessment at this stage. The court is satisfied that there was substantial detail available and set out in the REIS in respect of the

masterplan. There was no clarity regarding timescale or phasing of future development. In that sense, the court is satisfied that there was uncertainty as to the future prevailing circumstances that might prevail at the time when further applications for development would be made. There may be changes in respect of climate policy, grid infrastructure or energy supply at that time. It is clear that the substation will not be built in part but that in my view is not determinative. The question is whether the proposed project in respect of which permission has been granted namely the data hall, can operate on a standalone basis and it is clear that it can.

77. The second question considered by the Court of Appeal was whether the Secretary of State should have concluded that the largest scheme involved indirect, secondary or cumulative effects of the July 2009 proposal. Laws L.J. considered this to be primarily an issue of fact in any particular case and stated:-

> "30. [It was submitted] … that the question whether the effects of the larger scheme are cumulative effects of the smaller is itself one of law. This, with respect …, is in my judgment a mistake. It entails a suggested rule to the effect, broadly, that in any case where it is intended to continue or supplant a limited scheme with a larger one, the effects of the latter are to be treated as the cumulative effects of the former. There is in my judgment nothing in the Regulations nor indeed the Directive to suggest that the European legislature or domestic legislature implementing the Directive contemplated an approach that could be categorised by so rigid a rule. It seems to me that the texts are all consistent with the proposition that what are and what are not indirect, secondary or cumulative effects is a matter of degree and judgment."

78. The court considered whether the granting of a planning permission in suit could be regarded later as a precedent:-

> "34. I should next say a word about the effect of the grant of the present planning permission as a precedent, a 'foot in the door': an expression used by Sullivan L.J. in *Brown*: see paragraph 39 of the judgment in that case. It is said it was a foot in the door for the larger intended scheme. As I have shown, the Inspector and the Secretary of State accepted that there would be some precedent effect.
>
> 35. The grant of planning permission may, in my judgment, be said to concede the principle of disposing of LLW on this site or adjacent to it, but only to the extent or on the scale allowed by the permission. If the larger application proceeds, the issue of disposal of LLW of the magnitude thereby contemplated will be open and undecided. It will certainly not be foreclosed nor in my judgment prejudiced by the current permission. It seems to me that the Secretary of State was entitled to conclude at paragraph 4 of the decision letter … that:
>
> > 'There is nothing to support the Council's claim that permission in this case would frustrate the aims of the Environmental Impact Regulations and the Directive.'
>
> It is noteworthy that if the larger scheme is in due course applied for, it will as a whole (including that part of it which is in effect the present scheme) be the subject of an EIA; and thereby it seems to me the purpose of the Directive will be fulfilled. In *Commission v Spain* [Case C-277/01] the court said this (paragraph 47):

> '... the Directive's fundamental objective is that, before consent is granted, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to a mandatory assessment with regard to their effects.'
>
> That is precisely what will happen if the larger scheme is in due course applied for…."

79. In this case, the development of the first phase is not a development which can only properly be considered as part of a larger masterplan. It is not inevitable that it will be part of a more substantial development. As in the *Bowen-West* case, if the development is permitted, it will be implemented as a standalone project regardless of the outcome of any further planning application. In that sense, there is no cumulative situation that would necessarily arise between the two proposals, even if subsequent permissions were granted. Any subsequent permission will require a full EIA on the full extent of the effects of the extended permission sought and any cumulative effects will be considered at that stage. The Inspector and ultimately the Board understood that to be the position and recognised that future permission would be required for any expanded development beyond Phase 1: that fact was one of the circumstances taken into account in the decision to grant permission insofar as that was practicable. The Inspector concluded that the situation at the time of any future application for expansion of the data centre in respect of, for example, the negative impact of the proposal on grid infrastructure was hard to predict and would have to be assessed at the time of any future application for permission. It should be noted that the Inspector at para. 12.6.1 contemplated that the permitted data centre would not operate at full capacity until 2023 and that the full plan would not come on stream until circa 2030 –

2035. It is also clear that the Inspector considered and assessed the potential environmental impact of later phases of the development insofar as that was practicable or reasonably possible but ultimately determined that such an assessment is best concluded at the relevant time of any future application for permission.

80. The court is satisfied that the approach adopted by the Board and the Inspector is in accordance with the principles and purpose of the EIA Directive, the opinion of the Advocate General in Case C-396/1991 and the approach adopted in the persuasive Court of Appeal decision in *Bowen-West* and the High Court in *Friends of the Curragh Environment Ltd.* discussed above.

81. Counsel for the applicants relied upon a number of decisions of the CJEU and Irish and United Kingdom authorities to support the proposition that an EIA was required in respect of the masterplan development in this case. Although these cases address projects in which no EIA was carried out or an inadequate one was completed, they concern hugely different circumstances. Some concern project splitting, others allege a failure to conduct an EIA in respect of two projects which were entirely interdependent or functionally dependent on each other. Some of the projects arose in jurisdictions which operate under different national laws with different planning processes and procedures but which nevertheless adopt the principles of the EIA Directive. The common feature of these cases is the recognition and application of the principles and purpose of the EIA Directive in planning applications. However, it is clear that each case must be considered on its own facts. The approach to be applied in one type of case is not necessarily to be "read across" to a case of a different type (per Laws L.J. in *Bowen-West*). It follows that the circumstances in which an application is made for planning permission in respect of a project are central to the appropriate scope of the EIA. The determination of whether

an EIA is required and its nature and scope in any particular case is of course subject to the principles and purpose of the Directive. The task is then carried out by a specialist, officials and decision makers. For that reason and others set out below the court has not found a number of the authorities cited to be of assistance in this case.

82. The court is satisfied that the reliance placed by the applicants on the decision of the CJEU in *Abraham and others v. Région Wallonne and others* Case C-2/07 is misplaced. In that case the court was asked to consider whether an agreement between public authorities and a private undertaking concerning the operation of an airport runway, specifying its proposed length, featuring an exact description of work necessary to the adaptation of the runway and the construction of a control tower for the purpose of accommodating an increased number of flights corresponded to a "project" for which an EIA was required under the terms Directive 85/337. The court was also asked whether a Member State must take account of an increase in activity at an airport in examining the potential environmental effect of modifications made to infrastructure with a view to accommodating that increase in activity even though it is not directly referred to in the Annexes to Directive 85/337.

83. The court concluded that the contract could not be regarded as a "project" under the terms of the Directive. However it stated that it was for a national court to determine on the basis of the applicable national legislation whether such an agreement constituted a development consent. Thus it is for the national court to determine whether the contract constitutes a decision which entitles a developer to proceed with a project. It added:-

> "26. In addition where national law provides that the consent procedure is to be carried out in several stages, the Environment Impact Assessment in respect of a project must in principle, be carried out as soon as it is

> possible to identify and assess all of the effects which the project may have on the environment (see Case C-201/02 *Wells* [2004] ECR 1-723, para. 53). Thus where one of those stages involves a principal decision and the other involves an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure (*Wells* para. 52)."

84. This is not a case in which the project or development the subject matter of the permissions granted in this case is to be carried out in several stages. It is a single application for permission to proceed with Phase 1 of the project and the development of the power station grid connection. It does not involve a principal decision and an implementing decision "which cannot extend beyond the parameters as set by the principal decision". It is noteworthy that the decisions in relation to the development of the airport and facilities and the operational agreement both concerned exactly the same development. It did not involve the consideration of projects which were part of an overall plan to be implemented over a prolonged period and in respect of which each stage required separate planning permission under national legislation and an EIA. The decisions to grant permission in this case should not be regarded as a "principal decision" which determines any future application for permission to develop further phases that may be contemplated or made. The consent procedure provided for under Irish domestic legislation and the requirements of an EIA in respect of each such application is not comparable to the procedure considered in the

Abraham case. That is not to say that the underlying principles applicable in this case do not derive from the Directive. However, they fall to be applied in completely different circumstances. The court is not satisfied that their application in this case conflicts with the principles set out in the jurisprudence of the CJEU in *Abraham* or in the case of *Brussels Hoofdstedelijk Gewest* Case C-275/09 which was also relied upon by the applicants. Similarly, the court is also satisfied that the decisions in *Ecologistas en Accion Coda* Case C-142/07 and *The Queen v Carlisle City Council* [2010] EWCA Civ. 523 are not in point.

85. The applicants also relied upon the decision in *O'Grianna v. An Bord Pleanála* [2014] IEHC 632. The applicants sought to quash a decision of An Bord Pleanála granting planning permission for six wind turbines and associated buildings and infrastructures. The applicants submitted that the Board had failed to carry out an EIA concerning the overall project of which the construction of the wind type turbines was only the first stage. It was submitted that there was a necessary second phase to the project namely the works necessary to connect the windfarm to the national grid. The cumulative effect of the entire development on the environment, it was argued, should have been the subject of the Board's EIA and that an impermissible "project splitting" had occurred thereby invalidating the decision making process. It was submitted that the connection to the national grid was a fundamental part of the overall development as without any such connection the windfarm could not operate and that the two stages should be considered as a single project and be assessed as such on a cumulative basis in order to comply with the EIA Directive.

86. Peart J. was satisfied that the development on its own served no function if it could not be connected to the national grid and that the connection was "fundamental to the entire project and in principle at least the cumulative effect of both must be

assessed in order to comply with the Directive." The learned judge posed the question whether the cumulative assessment or even a decision as to whether any such cumulative assessment is required at all should be made prior to permission being granted for the first stage of the development namely, the construction of the turbines or, whether the construction of turbines could be allowed to proceed and then, in due course, when the details of the connection to the national grid were known, a cumulative assessment of the environmental impact of both could be carried out. The applicants were apprehensive that if the turbines were erected pursuant to a permission it would be more difficult for the authority to refuse permission in respect of the connection to the grid and that the developers would have "a foot in the door" as discussed in *Bowen-West*.

87. The court was satisfied that in reality the windfarm and its connection in due course to the national grid was one project and that neither was independent of the other. The developers submitted that no proposal had yet been formulated by ESB Networks for the design and route of a connection to the national grid. However, the court was not satisfied that this justified treating the turbines as a standalone project when in truth both projects were interdependent.

88. In this case the first phase of the project is on a far more limited scale than that envisaged in *O'Grianna*. This is not a project splitting case. Each additional phase of the development will require planning permission and an additional EIA which will assess at that particular time the potential effects of the particular phase of development on the environment in all its aspects on the basis of information known at that time, including information gleaned from the operation of Phase 1. I am satisfied therefore that it is a standalone project and that the decision in *O'Grianna* is not applicable to the circumstances of this case.

89. The applicants also rely on the decision of White J. in *An Taisce v. An Bord Pleanála* [2015] IEHC 633. The applicants sought to quash a permission granted by An Bord Pleanála for the continued use and operation of a previously permitted peat and biomass coal fired power plant in Co. Offaly which would be operated using peat extracted from nearby bogs. It was submitted that the respondent had an obligation to include the environmental effects of extracting the peat fuel source for the thermal power plant which were the direct and indirect effects of the project under the EIA Directive. The court was satisfied that the thermal power plant the subject of the planning permission application and the bogs from which the power station derived the vast majority of its raw material were separate sites. However, the power plant was constructed close to the Midland bogs for the generation of electricity by burning peat. The court had to determine if the respondent was obliged to take into account the indirect effects on the environment of the power plant's major source of fuel supply. It was satisfied that there were possible indirect effects of the use of peat from the bogs on the environment. However, the respondent "excluded completely the consideration of the indirect effects, when considering the planning application for the extension of life of the power plant". It was satisfied that the respondent had interpreted Article 3(2) of the Directive too narrowly. It was held that the environmental effects of extracting the peat fuel source for the thermal plant had not been properly assessed for the purpose of the EIA Directive. Therefore, the respondent was obliged to ensure the effectiveness of the Directive by subjecting those effects to an assessment before granting planning permission. This was not done. The court was satisfied that there was a functional interdependence between the power plant and the extraction of its raw material from the bogs a fact which was central to the decision.

90. The direct or indirect effect of the Board's decision to grant permission in this case is the demand for power generated in respect of the project for which permission is sought. This is limited to the demand of 30MW for the first stage at full capacity. In the circumstances the increase in consumption of power which may occur over time may only take place following the future EIA assessments of the effect of such consumption at that time on the environment.

91. The court considers that this case is distinguishable from the functional and interdependent situations considered in the cases of *O'Grianna* and *An Taisce*. Within the framework of the principles elucidated in the Advocate General's opinion quoted above, I am satisfied that the Inspector and the Board considered and assessed the potential environmental impact of the masterplan. However, it was concluded that relevant changing circumstances including the availability of green sources of power, the effect of the electricity consumption on climate change and on the national grid infrastructure, were best considered at the time of any additional phase of development which would require permission. In my view this is the type of practical and reasonable consideration appropriate to the determination to grant permission in respect of Phase 1. It is important to recall that in this case there has been an EIA. In both of the cases cited there was no EIA in respect of the effects of the connection to the national grid in *O'Grianna* or in respect of the windfarm development or the indirect effects on the bogs of the development in the *An Taisce* case.

92. The applicants also submit that the respondent failed to assess the development of the entire masterplan in combination with other plans and projects. A number of the grounds are based on the proposition that though the single datacentre has an energy demand of 30MW, the proposed development of eight centres has an energy demand of 240MW which is a significant increase in energy demand. This is

clearly the cases as is set out in the Inspector's report and which takes into account the extensive level of information provided in the REIS following the request for further information. The project in respect of which permission was sought relates primarily to the Phase 1 development. Planning permission is not sought for the eight halls which are the subject of the masterplan. In effect the applicants contend that a full EIA which would be appropriate to planning permission for a masterplan ought to have been carried out. The applicants themselves acknowledge both in the grounds advanced and in the submissions made that notwithstanding the body of evidence and material submitted to the Inspector following the request for further information, there remain uncertainties as to the extent to which renewable energy sources can be used in the generation of the electricity, the effect on climate change and grid infrastructure. There will also in the future be questions to be addressed in respect of mitigation measures.

93. In *Ratheniska Timahoe* the applicants challenged the decision to grant planning permission for the development of a windfarm on the basis that the respondent failed to properly assess the cumulative impact of the development in the EIA conducted during the process. It was submitted that concerns existed in relation to the capacity of the proposed development in that it provided significant spare capacity which could be utilised into the future. It was submitted that the development was a part of an overall strategy that had not been subject to either a Strategic Environmental Assessment or an Environmental Impact Assessment contrary to European law and the public participation Directive. Haughton J. considered the essence of the applicants' fears related to the potential for the establishment of new windfarms in the region. It was submitted that the EIS submitted failed to identify and describe adequately the direct and indirect effects on

the environment of the proposed development. Applications had been made for such developments in nearby areas. The Inspector had concluded that there was very considerable uncertainty over these applications. They were not permitted developments. One had been refused and another was on appeal. He concluded that it was unreasonable to expect that such potential developments would be factored into consideration of the present project.

94. Haughton J. rejected the applicants' submission and stated:-

> "95 … cumulative assessment surely requires that the development be assessed in the light of existing and permitted development in the relevant area. It cannot involve deliberation on possible future development which may be at the concept, design or the early planning stage and which may not yet have been authorised. There may be exceptional cases in which development which has not yet been permitted must be considered but as a general rule this would not seem necessary as it would enter on the realms of speculation. A case where it could arise, which is identified in the written submission of the respondent, is where a project could be artificially sliced into several smaller projects so as to avoid thresholds for EIA purposes or in order to avoid possible objections based on cumulative effects. However, this is clearly not a proposed development where any such artificial slicing has taken place and no such argument was put by the Applicants.
>
> 96. The court accepts the respondent's submission that the Board was not required to consider possible wind farms for which planning permission had yet to be obtained. What the applicants assert in this

> instant case is that completely separate and inchoate matters, namely hypothetical developments of wind farms which at the time of the Board's decision were not permitted or approved, should be assessed cumulatively with an electricity transmission system, solely on the basis that same will either draw from it or feed into it. The applicants' assertion is unsustainable and the court finds that the applicants' complaint that there was no proper EIA in respect of potential wind farms in the region is not well grounded."

The learned judge concluded that the Board had in fact undertaken an EIA that encompassed consideration of the relevant cumulative effects both direct and indirect of the proposed development in that its decision in this regard was "unimpeachable".

95. It is clear that following its request for information on the possible cumulative effects on the environment of the proposed datacentre and power supply developments (the masterplan), information was supplied concerning their possible effects and considered by the Inspector and the Board. The Inspector's report sets out in considerable detail the documents furnished in this regard. The Inspector considered that an assessment had been made of the cumulative impacts which were likely to arise from the development of the datacentre application and the power supply development in combination. He stated:-

> "12.7.14 In this case an EIS has been submitted for both the datacentre application and the power supply development. These documents have made an assessment of the cumulative impacts likely to arise from the development of these projects in combination and have also made an assessment as appropriate of the potential cumulative impacts of the proposed development which is the subject of the

> current applications and that which is indicated on the Master Plan for further development of the site and which may be the subject of future applications. … Any future application for expansion of the datacentre will have to be accompanied by a future EIS which will assess cumulative effects. Given the content of the submitted EIS (power supply project) and REIS (datacentre) and the consideration of cumulative effects including that of the future development of the site in accordance with the submission of the Master Plan, I do not see how the decision of the *ECJ v. Abraham* case is relevant to the cases currently before the Board. Similarly, assertions of project splitting and salami slicing made in written submissions and during the course of the hearing are not in my opinion supportable given the fact that the applications are accompanied by EIS and that the submitted documents take account of the potential environment impacts arising from the planned future development of the datacentre site."

96. The court is satisfied that an appropriate EIA was carried out in respect of these applications and that the applicants and others had ample opportunity to consider and make representations upon the extensive documentation and materials furnished to the Board and to the Inspector during the course of the oral hearings. The documentation clearly establishes that the Inspector and the Board assessed the cumulative impacts which were likely to arise from the completion of the two projects under consideration in combination and this included an assessment insofar as it was practicable at that time of the future proposed development set out in the masterplan which of course must be the subject of future applications. It would be quite wrong of

the Board or the Inspector to embark on speculation in relation to future contingencies prior to any appropriate future application or to predetermine at this stage the outcome of any such applications (see also *Sloan v. An Bord Pleanála* [2003] 2 ILRM 61).

97. On a more general point, the court received submissions, oral and written, which criticised the conclusions reached by the Inspector who had received and considered all of the documentation exhibited in the case and conducted an oral hearing over a number of days in respect of the issues raised thereon. As pointed out by McMahon J. in *Klohn v. An Bord Pleanála* [2008] IEHC 111 "the adequacy of the information supplied in the EIS … is primarily a matter for the decision maker …". In this instance not only was extensive information sought but there was an enormous body of technical and factual information supplied to the Board in response to its request in the REIS. Furthermore, the assessment carried out by the Inspector and the Board is carried out by decision makers who have an expert knowledge in this area. It is a matter for the decision maker to consider all of the evidence in the material case before it in the context of the actual planning application made. As noted by McGovern J. in *O'Grianna v. An Bord Pleanála (No. 2)* [2017] IEHC 7 an application for judicial review is not an appeal on the merits against the Board's decision. Consequently, it is not the function of the court to act in the role of the planning authority. The learned judge stated:-

> "38. … The EIA Directive attempts to achieve one of the objectives of the European Union in the sphere of the protection of the environment and the quality of life but not in absolute terms. It involves striking a balance between the requirements of EU law and such discretion as is allowed to Member States in this respect. I entirely agree with the opinion of Advocate General Sharpston in *Antoine Boxus and Ors. v.*

> *Région Wallonne* where she stated that the EIA Directive is not about formalism but is concerned with providing effective EIAs for all major projects and with ensuring adequate public participation in the decision making process. The principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible. This involves the courts being astute to ensure the objectives of the Directive are met but not in an overly pedantic way."

Thus there may be occasions when the cumulative effect of related or subsequent projects may require to be assessed. However, there may also be occasions when such an assessment may more properly and usefully be carried out in a later application for permission and when the circumstances then obtaining may be more accurately assessed. In my view that is the reality recognised in the conclusions reached by the Inspector and the decision of the Board in these two decisions. It is based on the evidence and materials considered at great length and in great detail by the Inspector and the Board taking into account the extensive representations made by the applicants and others opposing the applications. The submissions in this case made on behalf of the applicants were helpful and it would be entirely wrong to regard them as "pedantic" in the extreme context referred to by McGovern J. above. The court however, is satisfied that the EIA conducted in respect of the projects the subject matter of these permissions was in accordance with national and European law and were reached in accordance with the purpose and principles of the EIA Directive.

Other Matters

98. In grounds 8, 9, 11 and 12 the applicants complain that the Board failed to identify the main measures to mitigate the likely effects on the environment of the

proposed developments. In particular, it is said that the Board failed to identify any measures to off-set the likely effects of additional power generation. It will be recalled that the Inspector in his report when considering Apple's contention that they would realise their stated goal of sourcing power from the datacentre development from 100% renewable energy resources concluded that the best assumption that could be made was that the power supply to the development would be from the grid average power generation sources. The REIS furnished in response to the request for information addressed this issue. Apple's submissions in that regard are set out at para. 1.4.3 and Chapter 13 of the REIS. The impacts or effects of the datacentres operation on power use in generating capacity are dealt with in detail at paras. 13.6.4.2 to 13.7.3 of the REIS and in Chapter 9. As noted earlier in the judgment the Inspector's report considered these materials and submissions in detail before reaching his conclusion.

99. The court is satisfied that the Inspector having received further information in the REIS determined that there was uncertainty about delivering a commitment to purchase 100% renewable energy to operate the project. The Inspector clearly considered the direct, indirect and cumulative effects of the additional power usage by the datacentre on power generation and transmission resources. The applicants submitted that the Board ought to have considered the issue of mitigation measures in respect of the use of 240MW power generation in the operation of the masterplan. It should be noted that this capacity is the maximum required capacity on the full operation of the plant which may not take place for many years. The maximum full capacity operation of the single data hall for which permission was granted is 30MW. The Board was satisfied as was the Inspector that this power was available from the national grid and as outlined earlier in extracts from the Inspector's report the effects

on the consumption of this amount of power were limited. The Inspector concluded that there was an existing capacity to accommodate the Phase 1 development comprising the first datacentre. He stated that the situation at the time of any future application for expansion was hard to predict and would have to be assessed at that time.

100. The court rejects the submission that the Board has failed to identify the direct and indirect effects of the proposed developments or that it has failed to identify the main measures to abate, reduce or offset the likely effects of these developments.

101. Ground 13 complains that the effects of the construction and operation of 144 diesel generators as a backup to the entire project was not properly assessed. The generators will be tested and run intermittently throughout the life of the project. In the event of a power failure they will be required to power it. This will require a large generation of electricity and generate significant noise and air emissions. The applicant complained that no modelling was carried out **in respect of the generators** and their potential impact.

102. A detailed consideration of the likely effect of the operation of the generators on air quality and noise is set out in the Inspector's report at paras. 12.2.2 to 12.2.11. These matters were canvassed before the Inspector who concluded that though it would have been preferable if calculations had been presented to cover the scenarios presented, he did not consider that on the information available "that there would be a likely significant negative impact arising from such a scenario given the small likelihood" of such an occurrence and also the limited time period for which any outage would likely last. An option also existed to switch the datacentre's functions to its related datacentre facility in Viborg, Denmark during any such outage.

103. The noise issue was addressed and it was concluded that the Environmental Protection Agency's night-time noise limit would not be breached.

104. It should be noted that these assessments by the Inspector were carried out insofar as practicable in relation to information concerning the operation of 144 generators which was the full complement of generators required for the operation of the masterplan. Only 18 generators will be required in respect of the single data hall for which permission was granted. The applicant's submissions on this matter are rejected.

Conclusion

105. The court is not satisfied having considered all of the evidence and submissions in the case that the applicants have not established the grounds advanced on this application which are refused for all of the above reasons.