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*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Alternative A5 Alliance's Application for Judicial Review

IN THE MATTER OF AN APPLICATION BY THE ALTERNATIVE A5 ALLIANCE AND NAMED INDIVIDUALS

AND IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 67BA OF THE ROADS (NORTHERN IRELAND) ORDER 1993 (AS AMENDED)

STEPHENS J

Part one

Introduction

[1] This is an application under Article 67BA of the Roads (Northern Ireland) Order 1993 (as amended) by the members of the Alternative A5 Alliance and named individuals ("the applicants") for an order quashing the decision of the Minister for Regional Development ("the Minister") and/or the Department of Regional Development for Northern Ireland ("the Department") dated 31 July 2012 that the 85 km off-line A5 Western Transport Corridor dual carriageway scheme ("the scheme") would proceed (though in phases) together with the consequential vesting and other orders ("the decision").

[2] The decision was made under Article 67 of the Roads (Northern Ireland) Order 1993 (as amended). This statutory challenge is under Article 67BA. Article 67BA(1) sets out the circumstances in which and the time within which an application can be made. It is in the following terms:

> "67BA(1) If a person aggrieved by a decision of the Department to proceed with the construction or improvement for which an environmental statement

has been made desires to question the validity of the decision on the ground that—

(a) it is not within the powers of this Order; or

(b) any requirement of this Part has not been complied with in relation to the decision;

he may, within 6 weeks from the date on which the decision is first published under Article 67A(8), make an application for the purpose to the High Court."

Article 67BA(2) then sets out the powers of the court. In so far as relevant to this application it is in the following terms:

"(2) On any such application, the Court—

(a) …

(b) if satisfied that the decision is not within the powers of this Order, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any requirement of this Part, may quash the decision, or any aspect of it, either generally or insofar as it affects any property of the applicant."

[3] It is accepted by the respondent that the members of the Alternative A5 Alliance are "persons aggrieved" within Article 67BA(1)

[4] As the name Alternative A5 Alliance implies, the members of the applicant group contend that the decision to provide a dual carriageway standard to in effect the whole length of the A5 is incorrect. Hoy and Dornan Limited, consulting engineers, were engaged by the applicants in November 2010 to undertake a review of published information in relation to the proposed A5 scheme; engage in correspondence with the Department and seek clarification in relation to the scheme options development; and advise the applicants and their legal representatives on technical issues and representation during the statutory procedures. Martin Hoy sets out the following conclusions which also explain the alternative scheme supported by the applicants:

"4.1 I consider the Department's proposed scheme to provide an off-line dual carriageway to be disproportionate in terms of strategic traffic volume that would benefit over its entire length.

> 4.2 The A5 corridor could equally benefit from the provision of by-passes for centres of population, built to dual carriageway standard, combined with several 2+1 overtaking opportunities located along the existing A5 with a phased approach to the above works.
>
> 4.3 The use of by-passes and 2+1 overtaking opportunities could disperse the platooning of vehicles sufficiently to provide a significant improvement along the A5 corridor in terms of wider economic benefits, journey time savings, reliability of journey time and meet the Department's aims and objectives. This may be achieved at a significantly reduced capital cost and impact on the environment.
>
> 4.4 This current proposal will result in spending approximately £0.85 Billion of public funds on an off-line dual carriageway carrying some 500 vpd from end to end. This will have a significant and long lasting impact on the farming community, local economy, loss of arable land and environmental impact. It is my opinion that the Department's proposal is not solving a defined problem along the current A5 route corridor, rather a scheme driven by a contribution of £0.4 Billion from the Republic of Ireland.
>
> 4.5 Subject to the availability of the funding from the Republic of Ireland, this current course of action by the Department may result in the spending of over £30 Million progressing a single option to provide an off-line dual carriageway. This is with no consideration of benchmarking of alternatives, or thought given to 'what can be provided' within funds available should the Republic of Ireland withdraw in part or whole. It is my opinion that this situation must be reconsidered further prior to the making of any Orders in relation to this scheme." (AR/4/762)

[5] The grounds of challenge overlap and accordingly counsel in their submissions approached the grounds relied upon by the applicants under a number of headings as follows:-

(a) The report of the inspectors should be set aside on the basis of apparent bias.

(b) There was a breach of Article 7 of the Environmental Impact Assessment Directive in that a description of, and information in relation to, the scheme was not sent to the Irish Government as required by that Article.

(c) There was a failure to carry out an appropriate assessment of rivers Foyle and Finn Special Areas of Conservation under the Habitats Directive.

(d) There was a failure by the Department to comply with the Strategic Environmental Assessment Directive in that no environmental assessment was made of the plan or programme to construct a dual carriageway.

(e) That the environmental statement under the Environmental Impact Assessment Directive was inadequate and that there had been a failure to comply with that Directive.

(f) That there was a breach of the applicants' rights under Articles 6 and 8 of the ECHR together with a breach of their property rights under both domestic law and under Article 1 of the first protocol of the ECHR

[6] I divide this judgment into distinct parts. Part one contains this introduction. Part two contains the factual background to the scheme followed by a factual sequence. The other parts deal with the distinct areas of challenge as developed in argument and as set out in the previous paragraph. I seek to deal with all the diverse issues raised by the applicants but if, in the event, I have not expressly dealt with any issue then I make it clear that I decide that issue against the applicants on the basis of the evidence or on the oral or written submissions of the respondent or in the exercise of discretion.

[7] Voluminous documents have been produced in relation to this application. There are :

(a) 6 lever arch files labelled as "Appeal Books" each of which I will identify by the letters "AB"

(b) 5 lever arch files of documents containing pleadings, affidavits and exhibits each of which I will identify by the letters "AR"

(c) 5 lever arch files containing authorities each of which I will identify by the letter "A"

In addition skeleton arguments and further documents were made available at the hearing filling two further lever arch files. In this judgment I will identify documents by reference to the category of lever arch file in which they are

contained, followed by the number of the lever arch file, and then by the page number. On some occasions I identify the paragraph number and that will follow the page number.

[8] Mr Gregory Jones QC and Mr Jonathan Dunlop appeared on behalf of the applicants. Mr David Elvin QC, Mr Francis O'Reilly and Mr Philip Henry appeared on behalf of the respondent.

Part two

Factual background

(a) The scheme

[9] The existing A5 forms the *Western Transport Corridor* which is one of 5 Key Transport Corridors. The existing A5 runs from the border with the Republic of Ireland from a point south of Aughnacloy to Londonderry. In the south the existing A5 links to the N2 route to Dublin. In the North the existing A5 links to the A6 North Western Transport Corridor. The major towns along the existing route of the A5 are Aughnacloy, Ballygawley, Omagh, Newtownstewart, Sion Mills, Strabane and New Buildings just outside Londonderry. The N2 in the Republic of Ireland is the main road connecting towns such as Emyvale, Monaghan, Clontibret, Castleblayney, Carrickmacross, Ardee, and Slane with Dublin.

[10] The impetus to develop the scheme followed the announcement on 17 July 2007 by the Irish Government that they intended to make available a contribution of £400 million to help fund a major roads programme providing dual carriageway standard on the A5 and the announcement in the same communique of acceptance in principle to take forward this major road project by the Northern Ireland Executive.

[11] The scheme in Northern Ireland, as proposed by the Department, was to construct *off the line* of the existing A5, 85 kilometres of new trunk road, including 82 kilometres of new dual carriageway from the border near Aughnacloy in the south to New Buildings near Londonderry in the north (AB/2/508). This new road aligned approximately north/ south would bypass all towns along its route. It would connect to the new A4 dual carriageway at Ballygawley which is a major road development aligned approximately east/west within Northern Ireland, connecting Ballygawley to Dungannon and then by the M1 motorway to Belfast. It would also connect to a redevelopment in the Republic of Ireland of the N2 thereby providing an improved strategic link to Dublin. In addition it would provide links to the N14/N15 in the Republic of Ireland at Strabane/Lifford providing a strategic link between Co. Donegal in the northwest of the Republic of Ireland and Dublin. It was anticipated that the construction would commence in 2012 and be completed in 2015 (AB/2/508).

[12] The total length of the new trunk road, overwhelmingly dual carriageway, is 85 kilometres. It was this scheme which was put before a public inquiry. In the event the Minister has decided to defer the middle section of the scheme between Strabane and Omagh and also to defer the section of the scheme between Ballygawley and the border at Aughnacloy. The sections which are not deferred are 15 kilometres between New Buildings and Strabane and 23 kilometres between Omagh and Ballygawley. Accordingly, of the 85 kilometres contained within the scheme, 38 kilometres are to be constructed now ("the committed sections") and 47 kilometres have been deferred ("the deferred sections") (AB/1/10). The period of deferral depends on the availability of funding from the Northern Ireland Executive, HM Treasury, and from the Irish Government. The only reference to a date by which it is anticipated that the rest of the scheme will be constructed is to be found in an economic appraisal report dated 14 June 2012 compiled by the Department's consultants, Mouchel. The date of the opening year for the deferred section Strabane to Omagh and Ballygawley to Aughnacloy is given as 2025 (AB/5/2143).

[13] The scheme addresses a number of strategic aspects. On a Northern Irish dimension the A5 is identified as a key transport corridor. On a European dimension the A5 is part of the Trans-European Network reflecting its importance as a strategic link between Member States, joining Dublin with Londonderry which is the principal city of the northwest. Londonderry is a key cross-border and international gateway providing access by road, rail, sea and air to the northwest region. (AR/2/41).

[14] The A5 Western Transport Corridor was stated by the Permanent Secretary of the Department to be:-

> "One of the main transport investments that will help deliver the Government's priority to grow the economy and improve competitiveness, over the current budget period. This investment in the strategic road network will contribute to an extended high quality transport system which is vital for the success of our economy."

The importance of the scheme is also evident from the content of the affidavit of Mr Court (AR/2/4/16).

[15] The scheme impacts on the River Foyle and the River Finn Special Areas of Conservation.

(b) A sequence

[16] The Regional Transportation Strategy (RTS) for Northern Ireland 2002-2012 (AB/5/2196) was presented by the then Minister for Regional Development to the Assembly on Wednesday 3 July 2002. At this stage there was no proposal to provide

a dual carriageway standard to the A5. MLAs endorsed the strategic direction and underlying principles of strategy, which identified strategic transportation investment priorities and considered potential funding sources and affordability of planned initiatives over the 10 year period 2002 - 2012. The Delivery of the RTS was to be progressed through three transport plans including the Regional Strategic Transport Network - Transport Plan.

[17] In March 2005 the Regional Strategic Transport Network – Transport Plan 2015 was published (AB/5/2219). The A5 was identified in the March 2005 plan as one of the five key transport corridors (AB/5/2048). Again this plan did not provide for a dual carriageway standard to the A5.

[18] At the fifth plenary meeting of the North/South Ministerial Council on 17 July 2007 a decision was made at an inter-governmental level to progress a major roads programme providing a dual carriageway standard serving the northwest gateway, which is the A5. The Irish Government announced its intention to make available a contribution of £400 million to help fund the project. It is apparent that there were considerable public benefits from both the perspective of the Irish Government and from the perspective of the Northern Ireland Executive. The Irish Government would achieve a considerable improvement in transport links to Donegal and the Northern Ireland Executive would achieve considerable improvement of the transport network within Northern Ireland. Mr Loughrey, of the Department, at the subsequent public inquiry expressed the dynamics as follows:

> "… each government is effectively getting a half price solution that allows it to move towards delivering objectives. That is what makes the A5 Project so attractive and a priority for both governments." (T/1/198)

[19] In the joint communique of 17 July 2007 (AR/1/136) and under the heading "Cross Border Co-operation on Roads" it was stated:-

> "4. The Council noted the Irish Government's intention to make available a contribution of £400m/€580m to help fund major roads programmes providing dual carriageway standard on routes within Northern Ireland serving the northwest gateway and on the Eastern Sea Board corridor from Belfast to Larne. The Northern Ireland Executive confirmed its acceptance, in principle, to taking forward these two major road projects.
>
> …

> 7. The route serving the North West Gateway will be taken forward in line with funding and accountability, planning, management and delivery arrangements agreed between the Irish Government and the Northern Ireland Executive.
>
> 8. Relevant Ministers will take forward the necessary steps to progress this project, including the early commencement of a route corridor study."

[20] On 14 September 2007 the North/South Ministerial Council issued a Transport Joint Communiqué in which it was stated under the heading, 'Strategic transport Planning' in relation to the 'A5 and A8 Major Roads Projects':

> "5. The Council also agreed to the formation by October 2007 of a management structure for the A5 project comprising a Cross Border Steering Group…"

The Cross Border Steering Group was subsequently set up as was the A5 technical group, being a cross-border group consisting of two senior members of the Department and two senior members of the National Roads Authority in the Republic of Ireland.

[21] On 30 October 2007 the Department's Roads Service produced an A5 Route Corridor Study Consultancy Services Brief. The project brief contained under the heading "Objectives" that

> "It is planned to upgrade the A5 corridor, between the southern outskirts of Londonderry in the vicinity of New Buildings and the border at Aughnacloy, to dual carriageway standard." (AB/5/2146)

[22] In January 2008 (AB/2/1076) the Executive ratified the "Investment Strategy for Northern Ireland 2008/2018." In its introduction it stated:

> "The Investment Strategy 2008-2018 sets out the framework with which we will create a sustainable 21st century infrastructure. It identifies priority areas for investment in the years ahead and is intended to assist government and our private sector partners to plan ahead for the challenge of delivering the largest ever investment programme here. Delivery plans are currently being finalised to provide more detail on the implementation of this Strategy; these plans will be published before 31 March 2008."

It identified:

> "key goals over the lifetime of this strategy we aspire to deliver."

And stated that:

> "in working towards these goals, key milestones will include … opening the A5 … dualling scheme (…) during the lifetime of the strategy."

Accordingly the "Investment Strategy for Northern Ireland 2008/2018" contained a milestone of providing a dual carriageway for the A5 and opening that dual carriageway for use by the public after construction (AB/5/2360). It can also be seen that delivery plans were then being finalised to provide more detail on the implementation of this Strategy and that these plans would be published before 31 March 2008.

[23] The envisaged delivery plan was in fact published by the Department in April 2008 (AB/2/1076) under the title "The Investment Delivery Plan (IDP) for Roads." It is stated in this document under the heading "A5 and A8 Corridors" that:-

> "Included within the £3.1bn is a £400m contribution from the Irish Government to help fund major roads programmes providing dual carriageway standard on routes within the north on the western corridor (A5 Derry to Aughnacloy) and …. The Northern Ireland Executive has confirmed its acceptance, in principle, to taking forward these two major road projects." (AB/5/2337).

So by April 2008 the Department had incorporated into its own Investment Delivery Plan the acceptance in principle to provide a dual carriageway standard to the A5. In its subsequent adoption statement in relation to the inspector's report (AB/2/1076) the Department described the Investment Delivery Plan for Roads published in April 2008 as:

> "a delivery document for the Investment Strategy which was ratified by the Executive in January 2008. … It also identifies the programme of Strategic Road Improvements that are proposed for the 10 years of the Investment Strategy period to 2017/2018. In relation to the A5WTC project the Investment Delivery Plan anticipates delivery of the A5 dualling project within the 2013/14 to 2017/18 timeframe."

[24] Also in 2008 the "Northern Ireland Programme for Government 2008-2011" was published by the Northern Ireland Executive. Under the heading "Priority. Invest to Build an Infrastructure" it was stated:-

> "We will … progress plans to extend dual carriageways on the western corridor (A5)." (AB/5/2325)

The "Northern Ireland Programme for Government 2008-2011" contained a commitment to progress plans to extend dual carriageways for the A5.

[25] On 25 August 2010 Mr Loughrey of the Department signed a "Human Rights Act Impact Assessment Proforma" in relation to the scheme. This document stated under the heading "Policy title and aims" that:

> "The A5 Western Transport Corridor dualling project is contained within the Investment Delivery Plan for Roads (2008). The scheme involves provision of 85 km of dual carriageway from just south of Londonderry at New Buildings to the border at Aughnacloy."

The proforma then purported to articulate the human rights issues in the proposal/policy (AB/6/2730). The proforma was not published by the Department nor was it made available to other parties, the Inquiry Inspectors, those participating in the inquiry process, the public nor to the Minister.

[26] In September 2010 the Department's Roads Service published "Road Service Guidelines for the Acquisition of Land/Property for Major Road Development in Northern Ireland." This document sets out stages in scheme development including stage 1-preliminary options. It is stated that:

> "the stage 1 preliminary options study involves the identification and assessment of a range of options leading to the selection of a number of options, or a corridor considered worthy of further, more detailed, assessment. … Before concluding the stage 1 assessment and confirming the options or corridor that will be the subject of further, more detailed assessment, Roads Service may conduct an initial public consultation event. The decision as to whether a public consultation event is held at stage 1 is dependent upon the nature, scale and complexity of the project…"

Stage 2 is stated to involve a more detailed assessment of the options or corridor selected at stage 1, leading to the selection of a preferred route. There was no public consultation prior to the incorporation of the provision of a dual carriageway standard into the Investment Strategy for Northern Ireland 2008/2018, the Investment Delivery Plan (IDP) for Roads and the Northern Ireland Programme for Government 2008-2011.

[27] The Scheme was purportedly subject to Environmental Impact Assessment ('EIA') pursuant to the EU Environmental Impact Assessment Directive (Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC) ('the EIA Directive'), and Articles 67, 67A, 67B and 67C respectively of the Roads (Northern Ireland) Order 1993 ('the 1993 Order').

[28] In November 2010 the Department's consultants, Mouchel, produced an Environmental Statement for the scheme (AB/3/1120-1621B). This purported to address the likely significant environmental impacts of the Scheme. The area covered by the Environmental Statement is not easy to define as the study area differs depending on each chapter. For noise, air quality and ecology the area appears to be confined to Northern Ireland but there is discussion in ecology of the Republic of Ireland designated sites and impact on Lough Swilly and River Finn. Road drainage and water environment mentions Republic of Ireland Rivers. Noise and air quality sections have maps and study areas which appear to stop at the border. There is no separate chapter heading on transboundary effects. The Environmental Statement discusses, in brief terms, the issue of scoping at Chapter 7. No specific issues are 'scoped' in or out. However, Chapter 7 contains a fairly generic discussion of the sorts of areas of assessment which a road scheme might necessitate.

[29] In January 2011 Mouchel produced a Habitats Regulations Assessment entitled "Screening Report – SAC Watercourses. A5 Western Transport Corridor." (AB/6/2575) The conclusion of the report was that :

> "… it is evident that potential impacts from the Proposed Scheme, either alone or in combination with other projects, as proposed in the (environmental statement) are unlikely to lead to significant effects upon the SAC watercourse."

On the basis of that screening report the Department decided not to have an appropriate assessment under the Habitats Directive.

[30] In March 2011 Mouchel produced an "Environmental Statement Addendum. Air Quality, Traffic Noise and Vibration" (AB/3/1622)

[31] In April 2011 Mouchel produced a document entitled "A5 Western Transport Corridor Economic Appraisal Report." The economic assessment included an

assessment of the road user benefits, including the user time and operating costs over the whole of the model area shown on figure 2-1 which includes Donegal and an area extending down to Dublin.

[32] Between 9 May 2011 and 1 July 2011 a public inquiry was held in relation to the proposed A5 Western Transport Corridor Scheme. There were four elements to the public inquiry with hearings held during May, June and early July 2011. The first hearing dealt with the strategic issues, the second, third and fourth each dealt with a section of the proposed new route covering local issues. An identical procedure was adopted in each of the four elements of the inquiry, namely that on the first day the witnesses on behalf of the Roads Service read out summaries of their witness statements. The Roads Service's witnesses then remained as a panel to be cross-examined by anyone present at the inquiry who wished to do so. The applicants called one "expert" during the 8 week inquiry – Hoy & Dorman. At the inquiry the applicants argued principally that the traffic congestion on the existing A5 could be alleviated by their alternative scheme. A limited study and costing was provided by the Department during the inquiry as to the alternative scheme though there is a dispute as to the basis of that study and costing. On the basis of that costing the inspectors were satisfied that such an alternative scheme would not only involve vesting of lands and property and the stopping up of many side roads, but could prove to be at least as expensive as the full dualling contained in the scheme and that it would offer significantly less benefit (AB/2/512/3.1.3, AB/2/515-6/3.2.5-3.2.8, AB/2/690/6.4, AB/2/579-580).

[33] On 9 November 2011 and after the conclusion of the inquiry but before the report of the inspectors was delivered it became apparent that funding for the scheme had changed in that the Irish Government announced that, whilst remaining fully committed to the scheme, a significant element of the envisaged funding had to be deferred owing to their fiscal position (AB/5/2142). Payments totalling £22m had already been made and the Irish Government stated a revised position which commits £25m per annum in 2015 and 2016 with the outstanding balance being deferred. The inquiry report was produced on the basis of information and evidence presented before and during the inquiry process (AB/2/507).

[34] On 14 February 2012 following a decision by the Northern Ireland Executive, Ministers announced a funding package that would enable two sections of the A5 to be taken forward in the current budget period, between Londonderry and Strabane and between Omagh and Ballygawley. The estimated cost of these two sections is £330 million.

[35] On 24 February 2012 (AB/1/9) the inspectors submitted to the Department their report entitled "A5 Western Transport Corridor Public Inquiry Report" (A/2/488-1071). In that report the inspectors recommended that the scheme should proceed as proposed by the Department subject to a number of key recommendations.

[36] In a North/South Ministerial Council Joint Communiqué dated 27 April 2012 and under the heading, "North West Gateway Initiative," it was stated:

> "7. The Council welcomed progress on a range of initiatives delivered and planned which aim to deliver economic and social benefits in the North West including:
>
> - commitment to the upgrade of two sections of the A5 with NI Executive funding of £330m including the Irish Government's commitment of £50m…"

[37] On 14 May 2012 at the British / Irish Parliamentary Assembly in Seanad Eireann the Irish Minister for Transport, Tourism and Sport delivered a speech in which he stated:-

> "Of course there is still much to be done. There are significant mutual benefits in developing better road access to the northwest and this is fully understood by the Irish Government. The reality of our present economic circumstances however means that we have no choice but to 'cut our cloth' as it were. In the period to 2016, the Irish Government has committed £50m, in addition to the £22m already contributed to the A5 project in Northern Ireland. This contribution along with £280m being committed by the Northern Ireland authorities with the support of HM Treasury will allow for the upgrade of two significant sections of this route."

[38] On 14 June 2012 the consultants Mouchel provided an economic appraisal of the A5 Western Transport Corridor.

[39] In July 2012 Mouchel produced a document entitled "Environmental Review of the Proposed Changes in the Delivery Process." It is stated that the note

> "reports the findings of a screening exercise which has been undertaken by Mouchel to investigate changes to the Proposed Scheme since its publication in November 2010."

It then lists 3 changes one of which, in essence, involves the phasing of the scheme and continues that:

> "All 3 scenarios potentially have significant environmental effects additional to those reported in the Environmental Statement (ES) for the project."

In the case of traffic related noise the assessment reported in the ES has been revisited in detail in light of predicted changes in traffic movements along those sections of the proposed scheme which would be implemented and within the road network more widely, which would result from the partial implementation of the originally proposed scheme. This has involved the re-running of the noise model with updated inputs relative to predicted traffic flows and changes in alignment and arrangement at the three modified junctions. The overall conclusion was:

> "that there are no likely significant environmental effects beyond those already addressed in the ES which would warrant further investigation and reporting in an addendum to the ES."

[40] On 31 July 2012 the Minister for Regional Development announced the decision to construct two stretches of the scheme between New Buildings and north of Strabane and from south of Omagh to Ballygawley ("the committed sections"). He also announced that the timing of the remainder of the scheme will be dependent on the availability of funding through the investment strategy for Northern Ireland 2011-21, further contributions from the Irish Government and subsequent budget settlements beyond 2015 (AB/1/9-10). The statement from the Minister included this passage in relation to funding:

> "… Funding in the current Budget Period is committed to constructing the 2 stretches of the scheme between New Buildings and north of Strabane, and from south of Omagh to Ballygawley. Timing of construction of the remainder of the scheme will be dependent on the availability of funding through the Investment Strategy for NI 2011-21, further contributions from the Irish Government and subsequent budget settlements beyond 2015."

[41] At the same time as the Minister made the statement announcing the decision to construct two stretches of the scheme, the Department made public its adoption statement in relation to the report of the inspectors under the title "Statement by the Department on the Report on the Local Inquiries into the Environmental Statement, Direction Order, Vesting Order and Stopping-up of Private Accesses Order for the Proposed A5 Western Transport Corridor" (AB/2/1072). Under the heading "Content of Decision" it was stated that:

> "The Department for Regional Development has decided to proceed with the proposed A5 Western

> Transport Corridor (A5WTC) dualling scheme with implementation being phased to reflect availability of funding."

Under the headings "Basis of Decision" and "Strategic Context/Policy" it stated that:

> "The need to upgrade Key Transport Corridors, such as the A5, is included in many policy and other documents and is primarily related to the link between improving the infrastructure and the economy of the region".

Various policy and other documents are then considered including the "2008 Programme for Government/Investment Strategy for Northern Ireland". It states that this Programme for Government sets out the strategic priorities and key plans for 2011 – 2015 as well as some of the longer term aspirations and intentions and that it identifies 5 key priorities with "Growing a Sustainable Economy and Investing in the Future" being identified as the Executive's top priority. One of the key commitments under this Priority is to progress the upgrade of key road projects and improve the overall road network. The adoption statement also considered and relied on the "Investment Delivery Plan (IDP) for Roads."

[42] Also in July 2012 the Department made:-

(a) Vesting orders in respect of the land for the construction of the road between New Buildings and the north of Strabane and from south of Omagh to Ballygawley ("the committed sections"). No vesting orders were made for those parts of the scheme which were deferred, that is from Strabane to south of Omagh and from Aughnacloy to Ballygawley ("the deferred sections") (AB/2/29).

(b) A trunk road order covering the whole length of the road from the border at Aughnacloy to New Buildings outside Londonderry giving the Department permission to build the road over both the committed sections and the deferred sections (AB/1/13).

(c) A supplementary vesting order "to facilitate amendments arising out of the Public Inquiry process" and

(d) A private accesses stopping up order in respect of two accesses "within the stretches of the A5WTC being progressed at this time."

Part three

The Public Inquiry and the issue of apparent bias

(a) Introduction

[43] The applicants seek to set aside the inspectors' report on the basis that there was apparent bias on behalf of the inspectors in that they arrived in a car for a site inspection at the premises of an objector driven by a programme officer, an employee of the Department and accompanied in the same car by another of the Department's employees, Mrs Maura Hackett, who was the Department's project leader for the section of the scheme within which the objector's property was located. In its response the Department has accepted that the inspectors were accompanied in this way, not only to the premises of this particular objector but also on an unspecified number of other occasions on other site visits.

[44] The consequence if the inspectors' report is set aside would be that the decisions would be quashed as, *inter alia,* before making a vesting order where a local inquiry is held the Minister shall consider the report of the person who held the inquiry, see paragraph 3(2) of the Local Government (N.I.) Act 1972.

[45] The applicants disclaim any allegation of "actual bias" by the inspectors. Mr Jones on behalf of the applicants made it clear that there is no evidence of actual bias and that it is not alleged. The integrity of the inspectors and of the employees of the Department is not, therefore, in question.

(b) Legal principles in relation to apparent bias.

[46] The report of the inspectors should be set aside if there was apparent bias. The test which I seek to apply in relation to apparent bias is that set out in Porter v Magill [2002] 2 AC 357. It is a two stage test. First, the court must ascertain all the circumstances which have a bearing on the suggestion that the inspectors were biased. Then the question is whether the fair-minded and informed observer, having considered those circumstances, would conclude that there was a real possibility that the inspectors were biased. That test has been considered in a number of authorities such as *R (Condron) v National Assembly of Wales* [2007] 2 P & CR 4 at paragraphs [38] & [39].

[47] In this case the respondent relies on evidence from the inspectors. That evidence is admissible. The approach to such evidence was considered in *Locabail (UK) Limited v Bayfield Properties Ltd and another* [2000] 1 All ER 65. At paragraph 19 Lord Bingham CJ said:

> "While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time,

> the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."

[48] The approach to such evidence was also considered in *In re Medicaments and Related Classes of Goods* (No 2) [2001] 1 WLR 700:

> "[86] The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of a fair−minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair−minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."

[49] In this jurisdiction the governing principles in relation to apparent bias have been considered by McCloskey J in *R –v- Jones* [2010] NICC 39, *Re Belfast International Airport's Application* [2011] NIQB 34 and *Quinn Finance & others v Lyndhurst Development Trading SA & others* [2013] NICh 13. I adopt the passage at paragraph [17] of *R –v- Jones*:

> "[17] In every context, the test for apparent bias requires consideration of a possibility, applying the information known to and attributes of the hypothetical observer. Some reflection on the attributes of this spectator is appropriate. It is well established that the hypothetical observer is properly informed of all material facts, is of balanced and fair mind, is not unduly sensitive and is of a sensible and realistic disposition. Such an observer would, in my view, readily discriminate between a once in a lifetime jury and a professional judge. The former lacks the training and experience of the latter and is conventionally acknowledged to be more susceptible to extraneous factors and influences. Moreover, absent actual bias (a rare phenomenon), the proposition that a judge will, presumptively, decide every case dispassionately and solely in accordance with the evidence seems to me unexceptional and harmonious with the policy of the common law."

[50] The applicants rely on the 6th edition of De Smith's Judicial Review (June 2007) which states at page 526, paragraph 10-058 that:

> "There is little doubt that an inspector who accepts hospitality or a lift on the site visit from one party in the absence of the other would be disqualified for bias, but this would not be the case where the inspector had asked, sought and obtained the consent of the parties."

[51] The applicants also rely on the decision in *Fox v Secretary of State for the Environment and Another* [1993] JPL 448. That was a case in which at the close of an inquiry, the inspector travelled to the site for a site visit in a car driven by one of the council's two witnesses at the inquiry and in the company of the council's other witness; Mr Fox did not travel with them. At the conclusion of the site visit, the inspector left the site in the car of the council's witness and, again, Mr Fox did not travel with them. There was a dispute as to whether Mr Fox had been plainly asked whether he objected to the inspector being driven to and from the site by one council witness in the company of the other and that Mr Fox had said or indicated that he did not object. This conflict of evidence was resolved in such a way that the allegation of apparent bias failed. However, in giving judgment Mr Lionel Read QC (sitting as a Deputy Judge of the Queen's Bench Division) said:

> "At the end of the inquiry, the inspector travelled to the site for the purpose of his site visit in a car driven by the council's planning witness, Mr Flisher,

> accompanied by Mr Hunt. (Mr Fox) did not accompany him. The journey was one of some 12 miles. At the conclusion of the site visit, the inspector was driven away by Mr Flisher in his car, again in the company of Mr Hunt and, again, without (Mr Fox). (Mr Fox) did not know where the inspector was being driven to but Mr Flisher says it was to the railway station. *There cannot be any doubt, in my judgment, that if there were nothing more than these facts, a case of imputed bias would be established. A reasonable person could not fail to think that there was a real likelihood of bias, or a want of impartiality, if an inspector rode in a car to and from the site visit with the council's two witnesses in the case but without (Mr Fox) or, if he were represented, any representative of his.*" (emphasis added)

[52] I do not consider that the passage in De Smith' Judicial Review and the case of *Fox v Secretary of State for the Environment and Another* creates any rule that, if an inspector accepts a lift to a site visit from one party in the absence of the other, that automatically he will then be disqualified for apparent bias unless the inspector had asked, sought and obtained the consent of the particular objector whose site was being visited or all the objectors. Rather the decision in *Fox v Secretary of State for the Environment and Another* is an illustration of the need to determine the factual matrix in each individual case and apply to that matrix the question as to whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the inspectors were biased.

(c) Factual background in relation to the issue of apparent bias

[53] Between 9 May 2011 and 1 July 2011 a public inquiry was held in relation to the proposed A5 Western Transport Corridor Scheme. The inquiry was divided into four parts namely:-

(a) The overarching strategic issues covering the entire length of the scheme.

(b) Section 1 New Buildings to Sion Mills.

(c) Section 2 Sion Mills to south of Omagh.

(d) Section 3 south of Omagh to Aughnacloy. (AB/2/506).

Different inspectors had responsibility for conducting different sections of the inquiry.

[54] The inspectors appointed by the Department were:-

(a) Mr S K Chambers, a civil engineer by profession who has spent most of his working life in further education. He was the lead inspector with overall responsibility to arrive at a single composite report on all the sections of the inquiry to the Department (AR/5/1592 and T/1/9).

(b) Mr W F Gillespie, an accountant by profession who had been the head of a large building and civil engineering company (T/1/10 and AR/5/1592).

(c) Mr M Shanks, a chartered civil engineer who, after a varied career in the private and public sectors, worked for some 20 years with the Housing Executive, latterly as a Director of Development (AR/5/1592).

(d) Ms E Bready, who since 1995 was a practising barrister by profession and who also held an appointment as a legal member of the Exceptional Circumstances Body regarding education appeals. (AR/5/1593).

(e) Mr B Sleith, a fellow of the Royal Institution of Chartered Surveyors, who had a career in the Northern Ireland Civil Service as a valuer and surveyor. He retired as a district valuer (AR/5/1592).

(f) Mr J Cargo, whose background was as a highway engineer with over 40 years' experience in planning, design, construction and maintenance of roads, working in local and central government.

(g) Mr L McAvoy.

[55] At the time of the inquiry none of the inspectors were employees of the Department.

[56] Each section of the inquiry had a programme officer all of whom were employees of the Department but they were selected because they had no previous involvement in the preparation of the scheme. The role of the programme officers was to organise the efficient running of the inquiries and to deal with administrative issues.

[57] During the inquiry and in one particular hotel the inspectors on occasion lunched in part of a public dining area that was reserved for the use of the Roads Service. Although not marked as reserved, hotel staff would direct members of the public to another part of the dining room. The inspectors, though having their lunch in this area, did not sit at a table with any of the Department's witnesses (AR/4/123). They did lunch with the appointed programme officers who, while being employees of the Department, were in no way connected with the A5 project team. The role of the project officers was to assist the inspectors in the

administration of the public inquiry. Their duties included organising the lunch and refreshments for the inspectors. (AR/4/159-161). Whilst it may have appeared that the inspectors were lunching at that venue in an area reserved for the use of the Roads Service in fact:

> "at each venue the inspectors and programme officers were in fact designated a completely separate and remote eating area."

Obviously the degree of separation in this one hotel could not be described as "remote."

[58] It became apparent during the public inquiry that some objectors wished there to be site visits by inspectors. At the conclusion of the hearings and when site visits had been requested and granted the relevant inspectors travelled by car to the particular locations with their respective programme officers. When they arrived they were met by the relevant objector. No issue is raised as to how the site visit was then conducted once the inspectors had arrived. However, in these proceedings an objector, Robin Bruce, raised an issue as to the apparent bias of the inspectors in that they arrived at his premises for a site inspection in a car driven by the programme officer, an employee of the Department, and accompanied in the same car by another of the Department's employees, Mrs Maura Hackett, who was the Department's project leader for the section of the scheme within which his property was located. In his affidavit Robin Bruce stated:-

> "... On the day that the inspectors (for Section 1) came to visit our property they did so in the company of Roads Service employees, Mrs Irene McGinley (Programme Co-ordinator Section 1) and Mrs Maura Hackett (Section 1 Project Leader). They all travelled in the one car driven by a Roads Service employee, Mrs Irene McGinley. In doing this Roads Service staff would have had the opportunity to debrief inspectors on points raised during the site inspection and to have conversations to which my wife and I were not a party. Whether they did so or not, I cannot say. This created the impression of a lack of impartiality and I believe the inspectors should have made separate driving arrangements. The purpose of this visit was to see for themselves how the location of the ponds would affect our property especially at a time of heavy rainfall. At no time were we given the opportunity to speak with inspectors without a Roads Service employee being present and I felt this put us at a disadvantage. The inspectors left our property to

carry out further site inspections in the area." (AR/4/124)

[59] In response the lead inspector, Mr Chambers, has stated that he has spoken to each of the inspectors who conducted the Section 1, Section 2 and Section 3 inquiries and that he has been informed by them that:-

> "(i) That at no time did they discuss with their respective programme officers any aspect of the substantive issues being debated before them. This prohibition also applied to Roads Service officers who were also involved in the scheme.
>
> (ii) That when site visits were requested by participants, and granted, the inspectors travelled to the relevant location with their respective programme officer but did not discuss any matters that were the subject matter of the inquiry.
>
> (iii) On occasions, where the location of the site was difficult to identify or difficult to access (many of them being quite remote) they sought assistance from the Roads Service officer who is familiar with the location having attended there prior to any of the inquiries commencing.
>
> (iv) Again, that no discussions took place with any of these Roads Service officers.
>
> (v) At all site visits the relevant landowner and/or agent was present throughout the visit and no discussions in relation to the site, …, were had, other than at the site with either the landowners and/or their agents present.
>
> (vi) That none of the programme officers nor any of the Roads Service officers who accompanied the inspectors on site visits gave evidence before any of the inquiries.
>
> (vii) That at the outset of all four inquiries each inspector stressed the independence of themselves and their assistant inspectors."

[60] Mr Chambers also stated that during the hearing one of the objectors had by implication questioned the independence of himself and Mr Gillespie, on the basis of the questions that they had asked or the statements that they had made. Accordingly, on 20 May 2011 Mr Chambers made a statement at the inquiry again emphasising that he and all his colleagues were completely impartial and independent and influenced only by the body of evidence presented to them. He also expressed his regret that certain individuals were still questioning the independence of the inspectors. There has been no attempt by the applicants to explain and justify why this earlier challenge was made to the independence of Mr Chambers and Mr Gillespie.

[61] There was no immediate protest by Mr Bruce or his wife to the inspectors on the day of the site visit. There was no opportunity for Mr Bruce or his wife to raise this issue on the next sitting day of the inquiry as the site visits all occurred after the conclusion of the hearings. However, this issue was first raised with the Department in these proceedings commenced on 10 September 2012.

[62] This was not the only occasion on which the inspectors were accompanied on a site visit but there is no evidence of any other objector noting that it had occurred or complaining that it had occurred.

(d) Circumstances which have a bearing on the suggestion that the inspectors were biased

[63] It is accepted that Mrs Maura Hackett who accompanied the inspectors on their site visit to Mr Bruce's property did not give evidence during the inquiry but I consider that as project leader for Section 1 (Mr Bruce's property falling within Section 1) she would have been intimately aware of all the issues in relation to that section.

[64] None of the Roads Service officers who accompanied the inspectors were witnesses at the inquiry.

[65] I consider that the fair-minded observer would have no reason to doubt the evidence of Mr Chambers that when the inspectors travelled to the location that they "did not discuss any matters that were the subject matter of the inquiry" with the programme officers and that "no discussion took place with the Roads Service officers". I am of the view that the fair−minded observer would not consider that there was a real danger of bias notwithstanding the explanation advanced.

[66] Six of the seven inspectors were persons of standing, experience and professional qualifications. No evidence was put forward by the applicants in relation to the background of the seventh inspector. None of the inspectors were subject to a judicial oath of office but all of them emphasised, and were aware of, their independent status. None of them are employees of or dependent on the respondent.

[67] Some of the locations being visited were remote and difficult to find though maps and directions could have been used, however in the event the alternative method was to obtain assistance from an officer of the Department who was not a witness and who knew the area.

[68] None of the objectors visited in this way protested at the time and I consider that the fair-minded observer would conclude that the appearance of bias was not something that immediately and forcibly struck the objectors to the extent that they raised the matter with the inspectors immediately or even after some time for reflection.

(e) Conclusion in respect of this part of the judgment

[69] Taking the facts and those circumstances into consideration I do not consider that the fair-minded observer would conclude that there was a real possibility that the inspectors were biased. I decline to set aside the inspectors' report.

Part four

Article 7 of the Environmental Impact Assessment Directive and the obligation to send a description of and information in relation to the scheme to the Irish Government

[70] The applicants contend that there has been a breach of Article 7 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ("the Environmental Impact Assessment Directive") in that a description of and information in relation to the scheme was not sent to the Irish Government as required by that Article. Article 7 (A/1/203) requires that where a Member State is aware that a project is likely to have significant effects on the environment in another Member State, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible, and no later than when informing its own public, *inter alia*:-

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken.

The Article continues:-

> "The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures …"

[71] The applicants submit that to comply with this requirement the description and information should have been sent to the Irish Government. The submission did not condescend to the exact detail of who it was suggested should have sent the description and information and to whom exactly it should have been sent, except to say that it should have been at a formal inter-governmental level.

[72] The evidence in response on behalf of the Department is contained in the affidavit of Mr P Doherty, a member of the A5 Technical Group. In that affidavit he stated:-

> "(i) That there is no formal written exchange of correspondence between the Department and the Irish Government or the National Roads Authority regarding the issue of participation in the Environmental Impact Assessment process. There was however discussion at various A5 technical group meetings regarding the statutory procedures and the cross-border interfaces and there was agreement on the process and the participation and responsibility of both parties.
>
> (ii) That the agreed process in relation to the A5 project was that Northern Ireland Road Service would take forward the statutory procedures including the Environmental Impact Assessment, and that copies of the Environmental Impact Assessment, and that copies of the environmental statement and associated notices would be delivered to the Irish Government's National Road Authority offices in the adjoining counties of Donegal and Monaghan in order to allow interested parties to participate in the consultation process. In relation to the cross-border N14/A5 link which would impact physically in both jurisdictions it was agreed that both authorities would simultaneously publish the relevant documents in their respective offices.
>
> (iii) That this process reflects the Irish Government's desire to participate in the Environmental Impact Assessment process for the A5 and A5/N14 projects and Northern Ireland Roads Service's role in facilitating that participation."

[73] I do not propose to set out in detail the evidence as to the cross-border co-operation in relation to the scheme. It is readily apparent that the Irish Government

was a key partner in taking the scheme forward. Suffice to indicate that there was an A5 Technical Group being a cross-border group consisting of two senior members of the Department and two senior members of the National Roads Authority in the Republic of Ireland. This group met twice a year in advance of cross-border steering group meetings and North/ South Ministerial Council meetings. I am content that the A5 Technical Group members were able to keep their respective organisations, namely the Department and the National Roads Authority, informed of the development of the project in terms of procedures to be followed and progress against programme. I consider that descriptions and information in relation to the scheme were being shared within this body set up by the Irish Government and the Northern Irish Executive. No suggestion has been made by the applicants that the Irish Government was unaware of or had not been informed as to the descriptions and information set out in Article 7 or that they did not have an opportunity within an appropriate timescale to indicate whether they wished to participate in the environmental decision-making procedures.

[74] It is not necessary to decide whether there has been a breach of Article 7 except to indicate that, if there was, then it was of an entirely technical nature elevating form over substance. Accordingly, if there was such a breach I would have no hesitation in exercising discretion by declining to grant any relief.

Part five

Habitats Directive, screening for significant effects on the integrity of the sites, the lack of an appropriate assessment and the Fresh Water Fish Directive

(a) Introduction

[75] The Rivers Foyle and Finn are Special Areas of Conservation under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") (A/1/107). Article 6(3) of the Directive requires that any plan or project not directly connected with or necessary to the management of Special Areas of Conservation but likely to have significant effects thereon be the subject of an appropriate assessment. The Conservation (Natural Habitats etc) (Northern Ireland) Regulations 1995 (A/1/70A) implemented this provision by requiring a competent authority, firstly, to screen applications for plans or projects for likely significant effects and, secondly, to make an appropriate assessment of any such implications as found for the site in view of that site's conservation objectives.

[76] The scheme required to be screened for likely significant effects. That screening was carried out for the Department by its consultants, Mouchel, who undertook a Habitats Regulations Assessment and produced a screening report dated January 2011 with a control date of 24 January 2010 (AB/6/2575-2729).

[77] The conclusion of the screening report was that the proposed scheme was unlikely to lead to significant effects upon the Special Areas of Conservation water course (AB/6/2611). In arriving at that conclusion Mouchel had taken into account mitigation measures. They emphasised that construction procedures and mitigation must follow that incorporated within their Habitats Regulations Assessment screening report. Any deviation from the information identified in the screening report might introduce the requirement for further consideration of the project under the habitat's regulation assessment process (AB/6/2611).

[78] On the basis of that screening report an appropriate assessment has not been made in relation to either of the Special Areas of Conservation.

[79] If an appropriate assessment has been carried out, then in the light of the conclusions of the assessment on the implications for the site, and subject to the provisions of Article 6(4), the Department shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

[80] It is contended on behalf of the applicants that:

(a) Mouchel, and therefore the Department, have erred in considering the mitigation proposed as part of the package at the screening stage in order to determine the significant effects on the Special Areas of Conservation and the consequent need for appropriate assessments.

(b) Alternatively, that Mouchel, and therefore the Department, have erred in considering mitigation proposals as part of the package at the screening stage in order to determine the significant effects on Special Areas of Conservation *where there is doubt as to the efficacy of the mitigation proposals*.

(c) Alternatively, that the obligation to screen is a continuing obligation and that in the light of the evidence of Mr McCartney on behalf of the Loughs Agency at the inquiry the Department erred in not arriving at the conclusion that there was a need for an appropriate assessment.

(b) Legal principles

[81] The respondent submits that the test for the screening exercise is whether the plan or project is likely to have a significant effect on the integrity of the specific sites. The respondent relies on the provisions of Article 6(3) which refers to:-

> "3. Any plan or project not directly connected with or necessary to the management of *the site* but likely to have *a significant effect thereon*, either individually or in combination with other plans or projects shall be

> subject to appropriate assessment of its implications for the site in view of the sites conservation objectives." (emphasis added)

The respondent also refers to the Commission's guidance on Article 6 of the Directive, "Managing Natura" (2000), at paragraph 4.6.3 which, it is submitted, states that the focus of the assessment is on the designated site:

> "On the other hand, the expression `integrity of the site' shows that *focus is here on the specific site* thus, it is not allowed to destroy a site or part of it on the basis that the conservation status of the habitat types and species it hosts will anyway remain favourable within the European territory of the Member State." (emphasis added)

The respondent submits that the test is not whether individuals of a protected species may be affected. However, it is acknowledged that if the integrity of the site is affected, then individuals of the protected species will also be affected. Accordingly, it is accepted by the respondent that there may be an interaction between harm to habitat and harm to species. The respondent in making this submission did not expressly define "integrity of the site" as being restricted to the physical attributes of the site but that was the purport of their submissions.

[82] In relation to these submissions I consider that assistance can be obtained in relation to the meaning of "integrity" from the Commission's guidance on Article 6 of the Directive, "Managing Natura (2000)", at paragraph 4.6.3 which states:

> "As regards the conational meaning of `integrity', this can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation."

The second sentence not only emphasises the ecological context but also the ability to evolve in ways that are favourable to conservation. The ecology of the site comprises not only its physical attributes but also, for instance, one aspect of ecology namely bio diversity, which in turn may depend on the number and health of a particular species occupying the site. I consider that by concentrating on the word "site" the respondent has left out of account the ecological context which is a component part of the integrity of the site.

[83] However, it is not necessary to my decision in this case to define "integrity of the site" any differently than in the way contended for by the respondent. So I will proceed on the basis, without deciding, that the appropriate test is likely significant

effects on the integrity of the site as opposed to whether individuals of a protected species may be affected.

[84] That test includes the words "likely" and "significant" and accordingly it is necessary to consider the correct construction of those words. It is also necessary to determine whether at the screening stage remedial measures can be taken into account and, if they can, then to what extent.

[85] In relation to the correct construction of "likely" the question arises as to whether that word suggests a "strong possibility" so that there is no need for an appropriate assessment unless there is a strong possibility of significant effects upon the Special Areas of Conservation. The precautionary principle now contained in Article 191(2) of the Treaty on the functioning of the EU would indicate that the word "likely" should have a restricted meaning. The Grand Chamber in *Landelijke Vereniging Tot Behoud Van De Waddenzee Nederlandse Vereniging Tot Bescherming Van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer En Visser Main v Swansea City Council* (C-127/02) [2004] ECR I-7405 ("the Waddenzee case") at paragraph 44 stated:

> "In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first sub-paragraph of Article 174(2) EC, by reference to which the Habitats Directive must be interpreted, *such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned* (see, by analogy, inter alia, Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265 paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital and the pre-amble to the Habitats Directive and Article 2(1) thereof, its main aim, namely ensuring bio diversity through the conservation of natural habitats and of wild fauna and flora." (emphasis added)

In summary, whereas the word "likely," in contrast to "capable of", could suggest a strong possibility, the Grand Chamber held that *the risk exists if it cannot be excluded on the basis of objective information and that in a case of doubt as to the absence of significant*

effects an appropriate assessment should be carried out. This interpretation implies that in case of doubt as to the absence of significant effects an appropriate assessment must be carried out.

[86] In relation to the correct construction of "significant" I adopt paragraph 48 of the opinion of the UK Advocate General Sharpston in her opinion in Case 258/11 *Sweetman v An Bord Pleanala* delivered on 22 November 2012

> "*48. The requirement that the effect in question be 'significant' exists in order to lay down a de minimis threshold.* Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill." (emphasis added)

[87] In relation to consideration of remedial measures the applicants rely on the opinion of the Advocate General Kokott in *Waddenze* in support of their contention that at the screening stage no regard should be had to remedial measures. The passage to which they refer is as follows:

> "71. In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment."

[88] However in *R (on the application of Hart District Council) v Secretary of State for the Communities and Local Government* [2008] EWHC 1204 Sullivan J held, at paragraph [76], that there was no legal requirement that a screening assessment had to be carried out disregarding any mitigation measures that form part of the plan or project. In arriving at that conclusion Sullivan J gave detailed consideration to the *Waddenzee* case, the opinion of the Advocate General in that case and to the Court of Appeal authorities of *Gillespie v First Secretary of State* [2003] EWCA Civ 400, *R (on the application of Cat) v Brighton and Hove City Council* [2007] EWCA Civ 298 and *Jones* [2003] EWCA Civ 1408. As a matter of principle and for the reasons expressed by Sullivan J I agree that there is no legal requirement that a screening assessment has to be carried out disregarding any mitigation measures which form part of the plan or project. Developments come in all forms and the approach to the screening opinion must have regard to the particular development proposed. The duty of the decision maker in the screening process is to examine the actual characteristics of the particular project. At one end of the spectrum of potential developments one may have remedial measures whose nature, availability and effectiveness are already plainly established and plainly uncontroversial and there may be circumstances in which those remedial measures can be independently enforced and monitored. At

the other end of the spectrum one can have complex developments with remedial measures that are not plainly established and not plainly uncontroversial where it would be doubtful that such measures could be defined with sufficient precision in the absence of the factual basis of an appropriate assessment. There is no legal requirement that only the plainly established and plainly uncontroversial measures can be taken into account in the screening process but there comes a stage at which declining to conduct an appropriate assessment would pre-empt the very form of inquiry contemplated by the Habitats Directive and the purpose of the Directive would be frustrated.

[89] In *R (on the application of Hart District Council) v Secretary of State for the Communities and Local Government* the competent authority was not the developer. In that case Sullivan J stated:

> "If the competent authority does not agree with the proponents' view as to the likely efficacy of the proposed mitigation measures, *or is left in some doubt as to the efficacy*, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information (see *Waddenzee* above)." (Emphasis added)

I consider that is the test to be applied by the competent authority, namely if it is left in some doubt as to the efficacy of the mitigation measures. In this case the Department is both the competent authority and the developer but that does not relieve the Department of its obligation to have an appropriate assessment if it is left in some doubt as to the efficacy of the mitigation measures.

[90] The decision as to whether the plan or project is likely to have a significant effect on the integrity of the specific sites or whether there is some doubt as to the efficacy of the remedial measures, is for the Minister subject to judicial review on traditional *Wednesbury* grounds.

[91] A screening opinion is different from an appropriate assessment which involves detailed consideration. The screening opinion does not require all considerations to be mentioned. *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA 157 was a case relating to a screening exercise under the EIA Directive but the principles equally apply to a screening exercise under the Habitats Directive. In that case Moore-Bick LJ (with whom Jackson LJ agreed) said:

> "11. … the decision taken on a screening opinion must be carefully and conscientiously considered and must be based on information which is both sufficient and accurate. The opinion need not be elaborate, but must demonstrate that the issues have been understood and considered …

> 20. … I think it important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term screening opinion.
>
> 21. Having said that, it is clear from *Mellor* that when adopting a screening opinion the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Such information may be contained in the screening opinion itself or in separate reasons, if necessary combined with additional material provided on request."

[92] Section 46(1) of the Foyle Fisheries Act (Northern Ireland) 1952 (as amended by Article 18(3) of the Foyle and Carlingford Fisheries (NI) Order 2007) makes it an offence to disturb salmon without a licence from Foyle, Carlingford and Irish Lights Commission (whose functions are discharged by the Loughs Agency in the Foyle and Carlingford areas). The relevant provisions are in the following terms:-

> "(1) If any person—
>
> (a) wilfully takes, sells, purchases, or has in his possession the spawn, smolts or fry of salmon or trout, or
>
> (b) wilfully obstructs the passage of the smolts or fry of salmon or trout, or
>
> (c) injures or disturbs the spawn or fry of salmon or trout, or
>
> (d) injures or disturbs any spawning bed, bank or shallow where the spawn or fry of salmon or trout may be,

he shall be guilty of an offence against this Act

(2) ...

(3) …

(4) The Commission may, on the application of any person, grant its consent to the removal of material from the bed of the freshwater portion of a river on such conditions as it thinks fit."

[93] The respondent asserts that this is an important control which the Loughs Agency exercises over the proposals, namely the requirement that applications be made for licences and the potential for criminal proceedings if a licence has not been granted. It is clear that criminal proceedings in such circumstances occur after the work has been done and the damage has been sustained. That the standard of proof in those proceedings is beyond reasonable doubt so that if it was *only probable* that significant damage had occurred it would be incumbent on the court dealing with the criminal proceedings to acquit. The purpose of the Directive is "the conservation of natural habitats" and to pre-empt damage; not the imposition of criminal sanctions after a habitat has been damaged. At the first stage under Article 6(3) the obligation on the Department is to screen for likely significant effects on the integrity of the specific sites. If there is an appropriate assessment, then at the second stage the obligation on the Department is to agree only after having ascertained that the scheme will not adversely affect the integrity of the site concerned. This is prospective and not retrospective.

[94] The purpose of the criminal offence is to deter those who would cause damage and to punish those who have caused damage. At its height the deterrent aspect of proving a case beyond all reasonable doubt can be taken into account at the screening stage to be weighed in the balance with the unchallenged evidence of Mr McCartney of the Loughs Agency that there have been other schemes which "have been environmentally very, very, very bad for the environment and have very, very significant impacts" (T/1/555)

(c) The screening report

[95] The screening report deals in separate chapters with a series of topics, namely an introduction, legislation and procedural context, screening methodology, determination of the project and its relevance to the management of the site, description of the project, relevant European site description, assessment of potential impacts and discussion and recommendations. In the introduction it recognises the preliminary nature of the document in that it is "a preliminary assessment of the likelihood of significant effects on the integrity of these sites". In the chapter "Screening Methodology" and under the heading "Likelihood and significance of effects" it states that:

> "The indicators of most relevance to the identified SACs would be the quality and extent of habitats, species present and their population size and vegetation characteristics." (AB/6/2587)

It goes on to state that for the assessment of significance of potential impacts upon the conservation objectives of each site identified the following should be considered (amongst others), disturbance to qualifying species and distribution of species within the site.

[96] Under "description of the project" it dealt with, for instance, culverts in the following terms:

> "A number of culverts are proposed for the smaller watercourses within the Foyle catchment, as the provision of clear-span structures throughout the proposed scheme is both unfeasible and not cost-effective. All culvert structures proposed are box culverts, with additional design mitigation provided where the presence of significant migratory fish species have been identified to ensure migration through the structure is not inhibited. The mitigation provided includes appropriate orientation of the culvert to allow light into the culvert and keep the culvert perpendicular to the water course, the avoidance of shooting velocities, provision of resting areas upstream and downstream and provision of in-channel features to aid free passage. The mitigation also includes retention or reinstatement of a natural riverbed substrate composition." (AB/6/2591)

[97] During the course of the hearing a culvert schedule was handed into me which identifies the location of the culverts, their dimensions and environmental requirements. It is this information and other references to culverts which was subsequently criticised by Mr McCartney of the Loughs Agency during the course of the inquiry.

(d) The Fresh Water Fish Directive

[98] The screening report in the chapter "Assessment of Potential Impacts" and under the heading "Pollution and Sub-lethal Pollution" stated:

> "Furthermore, the mitigation identifies a limit of 50mg/l with regards to sediment concentration of discharges, which falls within the generally acceptable concentrations for Atlantic salmon for

> short periods identified by Alabaster and Lloyd (1982) and within the limit identified by the NIEA (Northern Ireland Environment Agency). As a result, the potential for impacts in consideration with the proposed scheme design and mitigation proposed are unlikely to result in significant impacts upon Atlantic salmon or their conservation objectives." (AB/6/2603-2604)

It was accepted during the hearing that "discharges" is a reference to discharges at outfalls so that at the point of discharge the sediment concentration could be 50mg per litre. The screening report states that this sediment concentration falls within the generally acceptable concentration for Atlantic salmon for "short periods". During the hearing I enquired as to, and it is still not clear whether, this was a short period during construction or during a short period as the salmon pass the discharge point. This ambiguity was not resolved.

[99] Directive 2006/44/EC of 6 September 2006 on the quality of fresh waters needing protection or improvement in order to support fish life ("the Fresh Water Fish Directive") provides that (the Department) shall endeavour to respect a value in respect of suspended solids of less than or equal to 25mg per litre in salmonid waters taking into account the principle that implementation of measures taken pursuant to the Directive may on no account lead, either directly or indirectly, to increased pollution of freshwater (A/1/253). It is contended on behalf of the applicants that the stated mitigation level set by the Department of 50mg per litre in the screening report is in breach of the Fresh Water Fish Directive and in any event must create a doubt as to the efficacy of the proposed mitigation (see *Waddenzee*) thus requiring an appropriate assessment because the Department could not have been able to exclude the risk of a significant effect on the basis of objective information.

(e) The evidence of the Lough's Agency

[100] On 12 May 2011 Mr McCartney of the Loughs Agency gave evidence to the inquiry (T/1/544-560). The Loughs Agency is an Agency of the Foyle, Carlingford and Irish Lights Commission established as one of the cross-border bodies under the 1998 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland. The Loughs Agency has a number of functions which are set out in the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999, the British-Irish Agreement Act 1999, the Foyle Fisheries Act (Northern Ireland) 1952 (as amended) and the Foyle Fisheries Act 1952 (as amended).

[101] In his evidence-in-chief to the inquiry in relation to the River Foyle and River Finn Special Areas of Conservation Mr McCartney raised a number of issues which I summarise.

(a) The population of Atlantic salmon are in decline and they are more in need of protection now than in 1952 when the Loughs Agency was set up.

(b) In 2008 the Loughs Agency first met and had a lengthy discussion with the Department's consultants, Mouchel, in relation to the scheme. That there were three issues which the Loughs Agency wanted to have clearly defined and clearly laid out by this, that is the inquiry, stage of the proposal, namely:-

    (i) Integrated drainage systems, urban drainage systems and sustainable drainage systems.

    (ii) Contingency plans in the event of problems, particularly during the construction phase.

    (iii) Earthwork management plans dealing in particular with the stripping of overburden sites and the clearing of sites for construction.

    That these had not been sufficiently addressed.

(c) In 2009 the Agency responded to the public consultation and mooted the idea of having telemetry alarms for suspended solids. There had been some indication of telemetry but where, when and how it is to be used and the trigger levels had not been discussed or agreed.

(d) That Atlantic Salmon cut redds which are salmon nests. These are highly susceptible to covering by siltation which prevents the next generation of salmon hatching out. That any significant amount of siltation in the system cannot be afforded.

(e) That a project of this size carries with it a significant risk of siltation and that it would only be by looking at detailed earthworks management plans and agreeing these well in advance of construction that the species could be protected.

(f) The joint management earthwork plans are not in the current environmental statement in a detail that is sufficient for the Agency to agree with.

(g) That the Agency has carried out works in river rehabilitation right through the length of this scheme to change the structure of the river to enhance and protect the species. That there are sections of the scheme that run alongside and impinge on works that have already been done.

This has not been recognised or determined within the environmental statement.

(h) The Loughs Agency's own publication on the timing of the works of construction was not mentioned in the environmental statement. Timing being seen in the context that the needs of migratory salmon occur at different times in different parts of the scheme giving very narrow windows of working.

(i) That the Loughs Agency had raised for consideration the construction of emergency pollution bunkers to be left alongside the road to be used by both the emergency services and the fisheries authorities in the event of vehicle spillages. Bunkers of this nature have been used by the Highways Agency in Scotland along some Scottish rivers. This was not included in the environmental statement.

(j) That there are 130 culverts planned. That culverts have the potential to prevent the migration of fish and the Agency needs to have full details of the design on a site by site basis.

(k) That there are some 103 diversions planned. That channel realignments are of "very very considerable concern" to the Loughs Agency. There are still no details of the channel realignments.

(l) That the limit of river suspended solids of 50 mgs per litre contained in the Department's mitigation (during the construction phase) is contrary to the requirements of the Fresh Water Fish Directive. That it is not acceptable to the Loughs Agency. That the target mitigation for suspended solids should be zero disturbance and it can be achieved.

(m) There needs to be proper like for like replacement of salmonid habitat. So if the salmonid habitat, particularly nursery habitat, is being removed during this programme that it must be replaced like for like and the replacement should be close to the location of the lost habitat. In order to replace on a like for like basis the value of habitats needs to be determined in advance.

(n) The outfalls, of which 87 have been documented, have been modelled and evaluated but not on a cumulative basis, so the cumulative effect of the extra suspended solids that would be generated from the road has not been taken into account.

(o) That there has been no evaluation of an increase in salination in the upper sections of the river. That given the sensitive ecology in the upper section to the river it needs to be considered.

(p) That silt traps and bypass separators at mainline outfalls were part of the proposed mitigation in the environmental statement rather than sustainable urban drainage systems or drainage systems. That the Loughs Agency have a concern, based on past experience, that once silt traps and bypass separators have been installed there has not been a maintenance programme so that the silt traps once full of silt are not emptied and become ineffective.

(q) That there is no maintenance programme for flow attenuation points. The flow of water (into the river) may be attenuated by the use of wetlands and ponds but they have to be maintained. This requires identification of the appropriate maintenance standards and the identification of the body or person who is to carry out the maintenance. Absent appropriate maintenance the flow attenuation points will be adversely effected.

(r) That the bottom reaches of the River Finn have "a very very vulnerable salmon population" and that minimal movement of ground water may have a major impact on the river. Of particular concern was the section of the River Finn on the Nursery Road where previously Strabane District Council had a municipal landfill site. In order to make an informed decision as to whether to pump, channel or divert ground water that may be in or around that site, a full evaluation of ground water needs to be carried out to determine what pollutants may be in it. There are also similar types of concern as to derelict industrial development sites near the Upper Foyle in and around Strabane.

(s) That the Loughs Agency is fighting a difficult battle against invasive plant species right throughout the river stretches and the river catchments. That there appeared to be no screening measures in relation to invasive species when importing aggregate and soil for the construction of the road.

(t) That the Loughs Agency had experience of schemes in Northern Ireland that had been "very very bad for the environment and have very very significant impacts". That in contrast one road project at Newtownstewart was managed without any problems. That these types of projects can be done "if engineered properly".

[102] As can be seen Mr McCartney, on behalf of the Loughs Agency, had a number of concerns as to significant effects of the scheme. It was also a feature of Mr McCartney's evidence, to which he returned on a number of occasions, that detail was important and was required before it could be determined whether the scheme would not have significant effects. For instance, Mr McCartney stated that he needed to look at *detailed* earthwork management plans, *details* of channel realignment, and site by site *details* of culverts. The scheme could be engineered

properly but in order to determine whether it had been detail was needed and without detail he could not exclude significant effects.

[103] In cross-examination Mr McCartney was not challenged by the Department in relation to his specific concerns such as, for instance, the effects of siltation, that the mitigation limit of 50 mgs per litre was in excess of the Fresh Water Fish Directive, that the cumulative effect of all the extra suspended solids from the outfalls had not been evaluated, that sustainable urban drainage should be used rather than inserting silt traps and bypass separators. He was not challenged in relation to his evidence that proper mitigation had not been defined to ensure emptying of silt traps once full of silt or that there had been previous failures in this area. Nor was he challenged as to the lack of any detail in respect of maintaining flow attenuation, wetlands and ponds to an appropriate standard. Effectively none of his specific concerns were challenged by the Department nor was his proposition that detail was required before an assessment could be made excluding significant effects.

[104] In cross-examination Mr McCartney was referred to a letter dated 21 January 2011 from the Agency to the Department (AR/4/1308) in which it was said:

> "The Loughs Agency would generally support the proposed mitigation measures as outlined in the 'road drainage and the water environment section of the environmental statement'."

It is to be noted that the support in that passage was qualified by the use of the word "generally". At no stage has the Loughs Agency stated that there will not be significant effects on the Special Areas of Conservation. Mr McCartney was asked in cross-examination whether that passage still applied. He said:-

> "Yes. The Loughs Agency does support the reference holistically to the proposal. What we don't have is the specific details, and while we holistically support best practice, you know the support has to be limited to actually when we see, I suppose, what is called the devil in the detail, until we actually see what it is going to do site by site. …"

Again in that reply Mr McCartney returned to the theme of his evidence that without details of the proposed remedial measures he remained in serious doubt as to the efficacy of the remedial measures and accordingly could not exclude likely significant effects. Again he was not challenged in relation to that proposition nor was there any suggestion made to him that, contrary to his evidence, there was sufficient detail upon which a view could properly be formed that the remedial measures would without doubt lead to the conclusion that there would be no significant effects.

[105] The inspectors in their report recorded the evidence of Mr McCartney in the following way:-

> "Summary of Objection
>
> - Need for sustainable drainage systems and post construction managements systems;
> - Need for a contingency plan to deal with problems during construction affecting salmon;
> - Insufficient detail in the Environmental Statement re earthworks management plan;
> - Need for consent applications to be made as early as possible in respect of the hundreds of river crossings, outfalls, culverts and diversions calling for site by site investigations;
> - Need for emergency pollution bunkers for vehicle spillage post construction;
> - Need to review the proposed mitigation measures re river suspended solids which exceed the maximum permitted under the Habitats Directive;
> - Need to replace any salmonoid habitat removed;
> - Need to investigate possible salination in upper reaches of rivers;
> - Need for a plan to deal with groundwater seepage and groundwater pumping;
> - Need for screening of imported aggregate and soil;
> - The need for a bond to be put in place to enable immediate implementation of remedial work following pollution damage."

[106] The inspectors also recorded the Department's response as being:

> "The Department stated that the detail relating to the issues raised was not available at this stage. However it gave an absolute guarantee that it would consult with the Agency and provide particulars of plans and specific details of culverts, etc and that nothing would be constructed without information to and input from the Agency of all relevant matters affecting its responsibilities."

[107] The inspectors then commented:

- "We find it unusual that a statutory agency felt it necessary to attend the inquiry in order to obtain the assurances given;
- However, we expect that consultation would continue in arriving at agreements on all the issues raised."

(f) The response of the Department in these proceedings

[108] The respondent contends that at no stage did anyone on behalf of the Loughs Agency state that they considered the screening exercise to be defective and accordingly that it is an appropriate inference to be drawn that they did not consider it was defective. That the Loughs Agency did not in its correspondence state that there was a breach of the Habitats Directive and accordingly that it is an appropriate inference to be drawn that they did not consider that there was any breach of the Habitats Directive. The applicants contend that at no stage did anyone on behalf of the Loughs Agency state that they considered the screening exercise to be appropriate and that during his evidence Mr McCartney, of the Loughs Agency, expressly stated, without being challenged, that he believed part of the proposal was contrary to the Habitats Directive (T/1/94). Furthermore that there were express references by him to what he stated were inadequacies in the Environmental Statement (T/1/90, 91, 92 and 93). I reject the suggestion that it is an appropriate inference that the Loughs Agency considered the screening exercise to be appropriate. I also find that there was an express suggestion on behalf of the Loughs Agency that there was a breach of the Habitats Directive.

[109] In addition the Department contended that the Loughs Agency did not in fact disagree with the screening conclusion that there would be no likely significant effect on *the integrity* of the sites but rather that the Loughs Agency's concerns related solely to the *impact on the species,* not to the impact on the integrity of the Special Areas of Conservation (see paragraph 44 of the respondent's skeleton argument dated 6 February 2013 and Section L of the third affidavit of Paul Reid, an employee of Mouchel (AR/4/133-138)). Accordingly, that it was not necessary for the Department to challenge either at the inquiry or by implication in these judicial review proceedings the detailed evidence given by Mr McCartney.

[110] Factually the question arises as to whether the Department is correct in its assertion that Mr McCartney of the Loughs Agency was confining his evidence to impact on the species rather than likely significant effects on the integrity of the sites. I do not consider that Mr McCartney was confining his evidence to impact on the species rather than the integrity of the sites. If one takes one example of siltation, Mr McCartney explained in his evidence how salmon redds, that is salmon nests, are susceptible to siltation and how that impact on the integrity of the site effects the species by preventing the next generation of salmon hatching out, (T/1/546-547). Further examples are that the integrity of the site could also be affected by ground water from the landfill site or from derelict industrial sites, by increased salination,

by increased flows of water, by inadequate and inappropriate culverts, and by loss of habitats. Accordingly, I reject the suggestion that the Department's failure to respond to these specific points was on the basis that Mr McCartney was confining himself purely to effects on the species rather than likely significant effects on the integrity of the sites.

(g) Conclusions in relation to this part of the judgment

[111] Mr McCartney of the Loughs Agency, which Agency is charged with the primary responsibility for the Foyle and the Finn, gave evidence at the inquiry. The substance of his evidence was not challenged and remains unchallenged. The evidence raised doubts as to the efficacy of the remedial measures and consequently, if the remedial measures were not effective, likely significant effects on the integrity of the Foyle and the Finn Special Areas of Conservation. In view of that unchallenged evidence and as a matter of rationality the risk of likely significant effects on the integrity of the Special Areas of Conservation cannot be excluded on the basis of objective information. Accordingly, an appropriate assessment should have been, but was not, carried out under the Habitats Directive.

[112] Also on the basis of the unchallenged evidence of Mr McCartney, I conclude that the Department was in doubt as to the efficacy of the mitigation measures on the integrity of the site or, that if they were not, it would be irrational for them not to have been in such doubt.

[113] I also consider that the Department has misunderstood and misdirected itself as to the evidence of the Loughs Agency, incorrectly interpreting it as confined to an impact on the species rather than the integrity of the sites. Accordingly the Department has taken into account a factor which it ought not to have taken into account and on that ground also I am minded to quash the decision.

[114] I also consider that the stage had come at which declining to conduct an appropriate assessment pre-empted the very form of inquiry contemplated by the Habitats Directive and the purpose of the Directive was frustrated.

[115] It was accepted by the Department during the hearing that, if there was a finding of a failure to carry out an appropriate assessment, there were no grounds in the exercise of discretion for not quashing the decision. I indicate now that I am minded to make an order quashing the decision but in view of the fact that the submissions in relation to the exercise of discretion were not informed by the decisions that I have made in relation to the other areas of challenge I will afford the respondent an opportunity of either confirming the previous concession in relation to the exercise of discretion or making further submissions.

Part six

Strategic Environmental Assessment Directive

(a) Introduction

[116] The applicants contend that there has been a failure by the Department to comply with Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ("the Strategic Environmental Assessment Directive") (A/1/382) in that no environmental assessment was made of the plan or programme to construct a dual carriageway. Article 5 of the Directive states that where an environmental assessment is required an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. Under the Strategic Environmental Assessment Directive reasonable alternatives must be considered. This is in contrast to the Environmental Impact Assessment Directive which does not require consideration of reasonable alternatives.

[117] The applicant contends that the decision at the fifth plenary meeting of the North/ South Ministerial Council on 17 July 2007 was to construct a dual carriageway (AR/1/136). That the Irish Government announced its intention to contribute £400 million towards the construction costs and that the Northern Ireland Executive confirmed its acceptance in principle to taking forward the provision of a dual carriageway as the improvement to the A5. That this acceptance in principle of taking forward the major project of providing a dual carriageway standard on the A5 route within Northern Ireland was then incorporated into subsequent plans or programmes of the Northern Ireland Executive, setting the framework for future development consent of the scheme, namely the provision of a dual carriageway, without any environmental report under the Strategic Environmental Assessment Directive. That if there had been an environmental report then alternatives to a dual carriageway, including the applicants' alternative scheme, would have been required to be considered.

[118] The documents which the applicants contend are the plans and programmes which set the framework for future development consent of the scheme are:-

(a) The Northern Ireland Programme for Government 2008-2011 (AB/5/2325)

(b) The Investment Strategy for Northern Ireland 2008/2018 (AB/5/2360)

(c) The Department for Regional Development Investment Delivery Plan for Roads 2008 (AB/5/2337)

It is common case that each of those documents was not subject to an environmental report under the Strategic Environmental Assessment Directive.

[119] The respondents contend that none of the documents were plans or programmes which required an environmental report in accordance with the Strategic Environmental Assessment Directive. That the Investment Delivery Plan for Roads 2008 is a financial or budget plan or programme and therefore excluded from the Directive. In the alternative that:

> "any alleged defects in terms of SEA should have been the subject of challenge to the relevant documents within the normal judicial review timescales."

That the:

> "relevant documents were adopted 5 or more years ago and this is not an appropriate means of challenge because to bring such a late challenge would undermine the normal time limits applicable under Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980 and self evidently cause prejudice since decisions have been made having regard to them, including the (scheme). By its alternative ground (the applicants) simply seeks to evade the time limits in Order 53 by re-formulating its claim in terms (of the Department) failing to carry out SEA before placing weight on the documents. This is a thinly disguised attempt to challenge out of time."

It was also stated that:

> "The aspects of the claim based on SEA are out of time for challenge and therefore an abuse of process"

Further:

> "… even a challenge based on a breach of EU law brought within time … does not require the impugned decision to be quashed in all cases, a fortiori where the decision has stood unchallenged for 5 years and the national time limits have expired."

(b) Legal principles

[120] The European Commission has produced guidance on the implementation of the Strategic Environmental Assessment Directive (A/1 Tab 21). The Directive aims to plug a gap in that a strategic decision may have been made in advance of an Environmental Impact Assessment and may limit the option for significant change at

that later stage. The purpose of the Strategic Environmental Assessment Directive is to require a high level assessment of a plan or programme which sets the context for the making of decisions on individual projects and thus complements the EIA Directive. In the foreword to its guidance it is stated that:

> "The Strategic Environmental Assessment (SEA) Directive is an important step forward in European environmental law. At the moment, major projects likely to have an impact on the environment must be assessed under Directive 85/337/EEC. However, this assessment takes place at a stage when options for significant change are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector on geographical area. The SEA Directive – 2001/42/EC – plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken into account while plans are actually being developed, and in due course adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account.
>
> Whilst the concept of Strategic Environmental Assessment is relatively straightforward, implementation of the Directive sets Member States a considerable challenge. It goes to the heart of much public-sector decision-making. In many cases it will require more structured planning and consultation procedures. Proposals will have to be more systematically assessed against environmental criteria to determine the likely effects and those of viable alternatives. There will be difficult questions of interpretation, but when properly applied, these assessments will help produce decisions that are better informed. This in turn will result in a better quality of life in a more sustainable environment, now and for generations to come."

[121] Article 2 of the Strategic Environmental Assessment Directive provides that "plans and programmes"

> "shall mean plans and programmes … which are subject to preparation and/or adoption by an authority at national, regional or local level … and

> which are required by legislative, regulatory or administrative provisions."

Article 3(8) provides that "financial or budget plans and programmes" are not subject to the Strategic Environmental Assessment Directive.

[122] The requirement to carry out an environmental assessment is contained in Articles 3(1) and (2) which provide that:

> "an environmental assessment shall be carried out for plans and programmes … which are likely to have significant environmental effects … which are prepared for … transport … town and country planning or land use and which set the framework for future development consent of projects listed in Annex 1 … to (the EIA Directive)."

[123] The Scheme is a project listed in Annex 1 to the EIA Directive and accordingly if any of the documents identified by the applicants are plans and programmes which are subject to preparation and/or adoption by an authority at national, regional or local level and which are required by legislative, regulatory or administrative provisions and if any of them set the framework for future development then, unless they are financial or budget plans and programmes, an environmental report ought to have been, but was not, carried out.

[124] Definition needs to be brought to:

a) What constitutes a plan and programme;

b) What constitutes "required" in the phrase required by legislative, regulatory or administrative provisions;

c) What constitutes a "framework" for future development consent;

d) What constitutes a "financial or budget" plan or programme;

e) Whether the Directive applies to any plan or programme of which the first preparatory act was before 21 July 2004.

[125] What constitutes a plan or programme was considered in *Central Craigavon Ltd v Department of the Environment for Northern Ireland* [2011] NICA 17. Girvan LJ, delivering the judgment of the Court of Appeal, distinguished a policy on the one hand which was specifically omitted from the text and a plan or programme on the other. A policy could in certain circumstances constitute a plan or programme giving rise to a framework depending on its precise provisions and context. The label attached to the document would not be determinative. The ECJ in the case of

Inter Environment Brussels ASBL and Others v Region of Brussels (C-567/10) in considering the meaning of the word "required" noted the Directive's aim:

> "… of establishing a procedure for scrutinising measures likely to have significant effects on the environment, … and *normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures*" (emphasis added).

A plan or programme normally concerns a multiplicity of projects but this is not an absolute requirement.

[126] The question as to what constitutes "required" in the phrase "required by legislative, regulatory or administrative provisions" was considered by the Court of Appeal in *Central Craigavon Ltd v Department of the Environment for Northern Ireland* in 2011. The Court of Appeal held that the word required means that there must be an obligation or duty on the authority to produce the plan or programme. However, subsequently the ECJ in the case of *Inter Environment Brussels ASBL and Others v Region of Brussels* (C-567/10) decided on 22 March 2012, had to consider an argument that Article 2 did not apply whenever a plan or programme was not compulsory pursuant to legislative regulatory or administrative provisions, and that such plans or programmes that are not compulsory would never require an environmental assessment pursuant to the Directive. The ECJ rejected that as the proper interpretation of Article 2 saying:

> "28. It must be stated that an interpretation which would result in excluding from the scope of the Directive to 001/42 all plans and programmes … whose adoption is in the various national legal systems regulated by rules of law solely because their adoption is not compulsory and in all circumstances cannot be upheld …
>
> 31. It follows that *plans and programmes whose adoption is regulated by National legislative or regulatory provisions which determines the competent authority adopting them and the procedures for preparing them must be regarded as "required"* within the meaning and for the application of Directive 2001/42 and accordingly subject to an assessment on their environmental effectives in the circumstances which it lays down." (emphasis added)

The respondent accepts that I am bound to apply the judgment of the ECJ.

[127] Sections 16A, 18 and 19 of the Northern Ireland Act 1998 as amended provide for a pledge of office. Schedule 4 requires the Ministers to pledge to participate with colleagues in the preparation of a Programme for Government and to comply with the Ministerial Code of Conduct. Paragraph 2.3 of the Ministerial Code says:

> "The Executive Committee will provide a forum for
>
> > (i) – (iv) …
> > (v) agreement each year on (and review as necessary of) a programme incorporating an agreed budget linked to policies and programmes (Programme for Government);"

In addition Section 20(3) of the Northern Ireland Act 1998 as amended states that the Executive Committee has the functions set out *inter alia* in paragraph 20 of Strand One of the Belfast Agreement. Paragraph 20 provides that the Executive Committee will seek to agree each year, and review as necessary, a programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly after scrutiny in the Assembly Committees, on a cross-community basis."

Accordingly, I am satisfied that all of the documents identified by the applicants are required by legislative, regulatory or administrative provisions within the meaning prescribed by the ECJ in *Inter Environment Brussels ASBL and Others v Region of Brussels*.

[128] What constitutes a framework was also considered in *Central Craigavon Ltd v Department of the Environment for Northern Ireland.* Girvan LJ noted that the appellant relied on the opinion of Advocate General Kokott delivered on 4 March 2010 in *Terre Wallonne ASBL* (C-105/09) and *Inter-Environnement Wallonie ASBL* v *Région Wallonne* (C-110/09) in which at paragraph [67] the Advocate General stated:

> "To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources."

Girvan LJ continued:

> "In the context of that case there was no question but that the relevant action programme contained a high degree of detailed precision as to the steps to be taken under the programme introduced pursuant to the Nitrates Directive. *Insofar as the Advocate General may*

> *have suggested that anything which might influence a subsequent development consent constituted a framework we would respectfully differ from that conclusion.* She was not however addressing anything other than whether the particular programme fell within Article 2(2). The ECJ accepted that it did and did not consider it necessary to adopt the wording of the Advocate General's formulation." (emphasis added)

[129] The ECJ in the case of *Inter Environment Brussels ASBL and Others v Region of Brussels* (C-567/10) in considering the meaning of the word "required" noted the Directive's aim:

> "… of establishing a procedure for scrutinising measures likely to have significant effects on the environment, *which define the criteria and the detailed rules for the development of land …*" (emphasis added)

[130] A plan or programme which "might" influence subsequent development consent does not set a framework. To set a framework a plan or programme has to prospectively influence a development consent and has to define criteria and the detailed rules for the development of land. However, the degree of detail may be limited by the high strategic level of the plan or programme.

[131] What constitutes a financial or budget plan or programme? The Commission's guidance at 3.6.3 states:

> "Budgetary plans and programmes would include the annual budgets of authorities at national, regional or local level. Financial plans and programmes could include ones which describe how some project or activity should be financed, or how grants or subsidies should be distributed"

[132] The respondent accepts that the decision as to whether a document is a plan or programme, whether it is a financial or budget plan or programme or whether it sets the framework for future development consent is for the court rather than a decision by a Minister subject to review to the *Wednesbury* standard, otherwise one could have widely differing assessments of, for instance, what is and what is not a plan or programme.

[133] The respondent states, *inter alia*, that this challenge being out of time is an abuse of process. No authority was relied on in support of the proposition that this amounts to an abuse of process. In *Lough Neagh Exploration Ltd v Morrice and another* [1999] NI 258, at page 286 letter a, it was stated that:

> "The boundaries of what may constitute an abuse of process of the court are not fixed. The categories are not closed and considerations of public policy and the interests of justice may be very material,"

The passage in Lord Diplock's speech in *Hunter v Chief Constable of West Midlands* [1982] AC 529 at 536 underlines this point:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless, be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

[134] In relation to delay and its effect on discretionary relief I rely on the principles set out in "Judicial Review in Northern Ireland, A Practitioner's Guide" by Larkin and Scoffield at paragraph 14.51 and "Judicial Review in Northern Ireland" by Gordon Anthony at paragraphs 1.07 and 8.08. In *R v Secretary of State for Trade and Industry* [1998] Env LR 415 Laws J emphasised the discretion to refuse relief on the basis of delay in judicial review applications in the following terms:

> "This is an inevitable function of the fact that the judicial review court, being primarily concerned with the maintenance of the rule of law by the imposition of objective legal standards upon the conduct of public bodies, has to adapt a flexible but principled approach to its own jurisdiction. Its decisions will constrain the actions of elected government, sometimes bringing potential uncertainty and added cost to good administration. And from time to time its judgments may impose heavy burdens on third parties. This is a price which often has to be paid for the rule of law to be vindicated. But because of these deep consequences which touch the public interest, the court in its discretion

> – whether so directed by rules of court or not – will impose a strict discipline in proceedings before it. It is marked by an insistence that applicants identify the real substance of their complaint and then act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage. The rule of law is not threatened, but strengthened, by such a discipline."

[135] The next question is whether the Directive applies to any plan or programme of which the first preparatory act was before 21 July 2004. Article 13 of the Strategic Environmental Assessment Directive required Member States to bring into force laws, regulations and administrative provisions necessary to comply with the Directive by 21 July 2004. In compliance with that obligation the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 came into operation in Northern Ireland on 22 July 2004. Those Regulations and the Strategic Environmental Assessment Directive do not apply to a plan or programme of which the first formal preparatory act was before 21 July 2004. The 2005 Regional Strategic Transport Network Plan is excluded from the provisions of the Strategic Environmental Assessment Directive on the basis that the first formal preparatory acts for that plan were before 21 July 2004.

(c) Factual background

[136] I have set out in part two of this judgment at paragraphs [22] to [24] some of the material parts of the Northern Ireland Executive's *"Investment Strategy for Northern Ireland 2008/2018,"* the Department's 2008 *"Investment Delivery Plan (IDP) for Roads"* and 2008 *"Northern Ireland Programme for Government 2008-2011"* ("the documents")

(d) Conclusion as to whether an environmental report ought to have been carried out under the Strategic Environmental Assessment Directive

[137] I consider that each of the documents incorporate the criteria of a dual carriageway for the A5 without specifying the exact route. The *"Investment Delivery Plan (IDP) for Roads"* is a delivery plan rather than a "financial plan or budget." All of these documents define one criteria namely a dual carriageway. I consider that the acceptance in principle of the Northern Ireland Executive on 17 July 2007 was then incorporated into these plans and programmes and prospectively defined the framework for future development consent of the scheme in that the upgrade to the A5 would be by way of a dual carriageway, excluding any alternatives. That is evident from incorporating the criteria into, amongst others, a "Programme for Government." After the plans and programmes were published, it is not plausible

for any public servant to have given consideration to anything other than a dual carriageway. That prospective assessment is confirmed by what subsequently occurred by way of the impact of the documents on the environmental statement, the inquiry, the decision of the inspectors and the content of the adoption statement.

[138] In so far as the environmental statement is concerned it considered alternatives (AB/3/1163) but all the alternatives considered were alternative routes for a dual carriageway. The "2+1" alternative scheme now proposed by the applicants was not considered in the environmental statement nor was any other alternative that was not a dual carriageway.

[139] At the inquiry it was stated on behalf of the Department that:-

> "Because the A5 arises out of the Investment Delivery Plan which, in terms, is a financial plan or budget and, as such, not subject to an SEA (T/3/1619)."

That is an acknowledgment that the scheme arises out of, (that is the framework was set in), the Investment Delivery Plan. As is apparent I do not accept that it is the only plan or programme which set the framework nor do I accept that the Investment Delivery Plan was a financial plan or budget. However, for present purposes the Department was acknowledging the framework set by the Investment Delivery Plan. This acknowledgement was also reflected in the evidence of Mr Loughrey at the inquiry. He was asked:-

> "I would put it to you that the £0.4 billion tied you to one type of solution and precluded you from looking more extensively to other possible solutions?"

Mr Loughrey replied:-

> "It certainly moved us towards a dual carriageway solution and that aligns with our key objectives and the statement in investment and delivery plan for roads that states that we are proceeding to upgrade all key transport corridors to dual carriageway status." (T/1/198)

[140] The conclusion of the inspectors at the public inquiry also supports the view that the plans and programmes set the framework for future development consent of the scheme prescribing a dual carriageway and ruling out all other options. In their report the inspectors record the Department's response to an objection by Ms Elizabeth Simpson that an upgrade to the existing A5 would be adequate in the following terms:

> "Online widening can be more difficult and expensive than offline due mainly to the need to accommodate the many existing accesses.
>
> The sub-standard alignment of the existing A5, alterations to the utilities, traffic disruption and delays during construction and increased safety risks to road users and construction workers are significant factors which mitigate against online widening. The land take for a two plus one road is actually greater than that required for a dual carriageway due to the need to provide parallel roads to accommodate accesses. *In any case, the brief from the Programme for Government is for a dual carriageway.* It is the objective to develop a high standard dual carriageway and the standard required could not be secured by using the main street in Aughnacloy with as many accesses." (emphasis added)

The comments from the inspectors were:

> "*The Programme for Government proscribed (SIC) a dual carriageway, and that ruled out other options that were proposed; so we could consider that the Departmental response adequately addressed this objection.*" (emphasis added)

[141] The Department in its adoption statement recognised the "Strategic Context/Policy" as part of the "Basis of Decision." It states that the "need to upgrade key transport corridors, such as the A5 is included in many policy and other documents." The adoption statement then refers to, amongst others, the Programme for Government/Investment Strategy for Northern Ireland and the Investment Delivery Plan (IDP) for Roads which the applicant contends are plans or programmes within the SEA Directive (AB/2/1075).

[142] I consider that an environmental report ought to have been, but was not, carried out under the Strategic Environmental Assessment Directive in relation to the Northern Ireland Programme for Government 2008-2011 (AB/5/2325), the Investment Strategy for Northern Ireland 2008/2018 (AB/5/2360) and the Department for Regional Development Investment Delivery Plan for Roads 2008 (AB/5/2337).

(f) Delay

[143] Each of the documents was prepared in 2008. The validity of each of the documents could have been, but was not, challenged in 2008. These proceedings

were commenced on 10 September 2012 (AR/1/8). The plans and programmes setting the framework for future development consent of the scheme have meant that all the substantial preparatory works costing many tens of millions of pounds have been undertaken by the respondent on the basis of the criteria of a dual carriageway. The applicants accepted at the inquiry that "tens of millions of pounds" had been spent (T/3/1296). I note that the applicants were legally represented by counsel at the inquiry (T/3/1211, and 1293-97). I infer that by at the latest the date of the inquiry the applicants had decided not to bring a judicial review application. There has been substantial prejudice caused by virtue of the applicants deciding not to challenge at an earlier and appropriate stage the validity of the plans and programmes. A judicial review challenge in the period leading up to the inquiry may have faced difficulties in relation to the time within which the challenge should have been made but I can see no reason as to why the challenge was not mounted at the very latest at that earlier stage. Instead the inquiry proceeded between May and July 2011 and the inspectors delivered a lengthy and detailed report on 24 February 2012. There is an obligation on objectors to investigate at an appropriate stage. I consider that this part of the challenge is an attempt to evade the ordinary judicial review time limits and that there has been substantial prejudice caused by the delay in mounting this aspect of the challenge.

(g) Later plans which do include the A5 have been subject to an environmental report under the Strategic Environmental Assessment Directive

[144] It is apparent from Mr Loughrey's 5th affidavit sworn on 19 February 2013 that later plans, namely the Regional Development Strategy 2035 covering the period 2012 – 2035, published in March 2012, and the revised Regional Transportation Strategy – "A New Approach to Regional Transportation" - have been subject to an environmental report under the Strategic Environmental Assessment Directive. That the revised Regional Transportation Strategy highlights the "need to complete the work identified in the current Regional Strategic Transport Network Transport Plan and Strategic Road Improvement Programme. That the Strategic Road Improvement Programme included dualling the A5. The consultation was held in relation to the revised Regional Transportation Strategy between March and June 2011 and the applicants did not respond to this SEA consultation.

[145] That is also a factor which on its own, quite irrespective of delay, would impact on the exercise of discretion in relation to the granting of any relief.

(h) Conclusion in respect of this part of the judgment

[146] I have made it clear in this judgment that an environmental report ought to have been, but was not, carried out under the Strategic Environmental Assessment Directive in relation to the various plans and programmes. I do not consider that any further purpose would be served by granting a declaration and in the exercise of discretion I decline all other relief.

Part seven

Adequacy of the Environmental Statement

(a) Introduction

[147] The scheme falls within Annex I paragraph 7(c) of the Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("the Environmental Impact Assessment Directive" otherwise known as the "EIA Directive") (A/1/199). Accordingly there is a mandatory obligation under Article 5 of the EIA Directive for the scheme to be made subject to an assessment in accordance with Articles 5-10.

[148] The applicants contend that the public inquiry found that the environmental statement was inadequate (AB/2/995). The inadequacies which it is submitted that the inquiry found were in respect of:-

(a) Noise mitigation (AB/2/691 and AB/2/994).

(b) Gas emission rates (AB/2/994).

(c) The agricultural impact assessment (AB/2/692-693).

(d) The testing of material to used in the construction of the scheme which is to be sourced from Cavanacaw Goldmine (AB/2/695 and 995).

(e) The Doogary alternative.

(f) The lack of details as to the link with the N2.

(g) The test procedures relating to gas emission rates.

[149] The applicants also contend that the scheme that was subject to an environmental statement and which was scrutinised at the inquiry is different from the phased scheme for which consent was given by the Minister in the decision. The scheme was for the construction of the entire length of the A5 between Aughnacloy and New Buildings, whereas now there is to be phased construction of less than half the scheme with, it is submitted, no dates supported by any credible evidence for the construction of the deferred sections. That in order to address this change in the scheme the Department commissioned a screening report from its consultants, Mouchel, to consider whether there was a change in the environmental impact by virtue of the phasing of the scheme. The applicants submit that this screening opinion ought to have been, but was not, made public, that it failed to assess the length of the delay to the deferred sections and, in the light of that anticipated delay, to assess as best as one could the environmental changes that would occur over the period of delay. It is submitted that a screening report is inappropriate to an Annex

I scheme. Those schemes falling within Annex II of the EIA Directive are either screened in or out of an Environmental Impact Assessment. So it is submitted that the phased scheme, falling as it does within Annex I, should automatically have been subject to an environmental statement regardless of whether it was or was not a major departure from the scheme. It was submitted that if the phased scheme did not involve significant changes then the developer would not have to do much work in relation to a new environmental statement. Alternatively, the applicants submit that the screening report was inadequate, failing to address the impacts on population and property, and that there was a failure to consult with the applicants in relation to a phased schemed as opposed to "the scheme".

[150] The applicants also contend that the scheme was part of a larger scheme involving upgrading the N2 in the Republic of Ireland and, accordingly, that the environmental statement was inadequate as it did not cover the scheme both north and south of the border.

[151] Furthermore, the applicants have a number of other detailed criticisms of the environmental statement.

(b) Legal principles

[152] The Directive was transposed into national law by the Roads (Environmental Impact Assessment) Regulations (Northern Ireland) 1999.

[153] Article 5 of the Directive requires the developer to provide the information specified in Annex IV (an environmental statement) which includes, for instance, a description of the physical characteristics of the whole project and the land use requirements during the construction and operational phases. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors. The environmental statement also provides a description of the likely significant effects of the proposed project on the environment resulting from the existence of the project, the use of natural resources and the emission of pollutants, the creation of nuisances and the elimination of waste. This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long term, permanent, temporary, positive and negative effects of the project.

[154] The next stage in the process is set out in Article 6 which requires information to be made available to the public and that the public shall be given early and effective opportunities to participate in the environmental decision-making procedures. The detailed arrangements for informing the public and for consulting the public concerned (for example by written submission or by way of a public inquiry) shall be determined by the Member States. In relation to the scheme the method adopted was a public inquiry.

[155] Article 7 provides for notification in trans-boundary cases.

[156] Article 8 provides that:-

> "The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure."

[157] The decision as to whether an environmental statement is adequate, either for the scheme or for the phased scheme, is for the Minister subject to *Wednesbury* reasonableness, see the judgment of Laws LJ in *Bowen-West v SSCLG* [2012] Env LR 22, at paragraphs [32]-[35]. The question as to whether the Department could rationally consider the environmental statement to be an environmental statement at all in circumstances where there are disagreements or deficiencies was considered by Ouseley J in *R v Islington LBC ex parte Bedford & Clare* [2003] EnvLR 22. At paragraph 203 he stated:

> "It is inevitable that those who are opposed to the development will disagree with, and criticise, the appraisal, and find topics which matter to them or which can be said to matter, which have been omitted or to their minds inadequately dealt with. Some or all of the criticism may have force on the planning merits. But that does not come close to showing that there is an error of law on the local planning authority's part in treating the document as an environmental statement or that there was a breach of duty … on the local authority's part in granting planning permission on the basis of that environmental statement."

I consider that to be the correct approach. The environmental statement must be prepared by the developer and should contain sufficient information about the impacts of the development upon the environment. Thereafter the Department must make an assessment of those impacts and the sufficiency of all the environmental information gathered as a result of the Environmental Impact Assessment and in so doing determine whether it requires more information to be able to make an assessment. This is a matter for its own judgment, subject to *Wednesbury* review.

[158] An environmental statement is the start of an Environmental Impact Assessment process which involves the public being informed and, in this case, a public inquiry being held. It is the totality of the evidence assembled which forms the basis of the decision. This process of gathering environmental information and the test to be applied has been considered by Sullivan J in *R (Blewett) v Derbyshire County Council* [2004] ENV LR 29 at paragraphs [41]-[42] and [68] of his judgment:-

"41. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Schedule 4 to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council ex parte Brown* [2000] 1 AC 397, at page 404, the purpose is "to ensure that planning decisions which may affect the environment are made on the basis of full information". In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (*Tew* was an example of such a case), but they are likely to be few and far between.

42. It would be of no advantage to anyone concerned with the development process - applicants, objectors or local authorities - if environmental statements were drafted on a purely "defensive basis", mentioning every possible scrap of environmental information just in case someone might consider it significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail.

68. I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed

> to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Schedule 4 it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of "full information", but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the "environmental information" of which the environmental statement will be but a part."

Accordingly it is important to distinguish between what is in the environmental statement and the sum total of the information that is available to the Minister following the public inquiry.

[159] Article 5(1) and Annex IV of the Directive places an onus on the developer to provide a description of the aspects of the environment likely to be significantly "affected by the proposed project including in particular population … (and) material assets ….". The construction of a dual carriageway through predominantly agricultural land will affect population and material assets. This will also engage Article 8 of the ECHR, the right to respect for private and family life, and Article 1 of the First Protocol of the ECHR, entitlement to the peaceful enjoyment of possessions. However, it is important not to conflate the Environmental Impact Assessment process with the decision-making process under Article 8 and Article 1 of the First Protocol. Ultimately all the decisions have to be made by the Minister. The test as to whether the environmental statement is adequate is for the Minister, subject to review on a *Wednesbury* basis. A decision under Article 8 and Article 1 of the First Protocol of the ECHR is again for the Minister. For instance, the right to respect for private and family life is a qualified right, see Article 8(2). The interference with the right to respect for private and family life has to be

(a) in accordance with law,

(b) it has to pursue a legitimate aim, and

(c) it has to be necessary in a democratic society.

The last question of being necessary in a democratic society requires consideration as to whether the decision is proportionate and strikes a fair balance between the competing public and private interests. The concept of proportionality requires the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. The concept of proportionality requires attention to be directed to the relevant weight accorded to the interests and considerations. However, the intensity of that review will depend on the subject matter in hand. In law context is everything. Along with the concept of proportionality goes that of the margin of appreciation, frequently referred to as deference or, perhaps more aptly, latitude. The primary decision-maker on matters of policy, judgment and discretion is the Minister. A public authority should be left with room to make legitimate choices; the width of latitude and the intensity of the review which it dictates can change depending on the context and the circumstances. This case, which engages strategic issues at the highest level effecting the economy, permits a considerable degree of latitude to the Minister.

[160] In construing the decision letter and the inspector's report I seek to adopt a straightforward, down- to- earth reading without excessive legalisms, see *Southbucks DC v Porter (No. 2)* [2004] 1 WLR 1953, at paragraphs [32] and [33] (A/4/Tab 68) and *Seddon Properties Limited and Another v Secretary of Statement for the Environment and Another* (1981) 42 P & LR 26 (8/4/1223).

[161] There may be a series of environment impact assessments where a consent procedure comprises a number of stages and where, for example, a fresh Environmental Impact Assessment may be required at a later stage, see *R (Barker) v Bromley LBC* [2007] 1 AC at paragraphs 23-25.

(c) The submission that the inspectors found that the environmental statement was inadequate.

[162] It would be relevant to the Minister's decision if the inspectors had found that the environmental statement was inadequate. The applicants contend that, on the true construction of the inspectors' report, they found that the environmental statement was inadequate. The inspectors' report is in three volumes running to some 580 pages. The short passage upon which the applicants rely is to be found in chapter 4, under the heading "Conclusions and Recommendations". The inspectors state:-

> "We consider that subject to the foregoing the environmental statement has dealt comprehensively

> and adequately with the issues that would arise if the scheme were to be implemented."

So it is submitted the inspectors found that the "foregoing" matters were not comprehensively or adequately dealt with within the environmental statement and, accordingly, the environmental statement, whilst adequate in other respects, was found by the inspectors to be inadequate.

[163] I do not consider that to be the correct construction of the inspectors' report. They recommended that the A5 Western Transport Corridor Scheme should proceed as proposed by the Department. They would not have made that recommendation if they had considered that the environmental statement was inadequate. Rather they made recommendations based on matters which had arisen at the inquiry, which added to or qualified what was said in the environmental statement. In the event the entire process led them to the conclusion that the scheme should proceed rather than stating that the environmental statement was defective or that there should be a new environmental statement.

[164] I am supported in that conclusion not only by considering the language used by the inspectors but also by considering in detail all the "foregoing" matters to which they referred. I will take the agricultural impact assessment as an example. The applicants suggest that one basis upon which the inspectors found that the environmental statement was inadequate is in respect of the agricultural impact assessment. The environmental statement considered some 202 agricultural holdings potentially affected by the scheme (AB/3/1612) with detailed sheets in relation to each holding. Examples of the sheets are at AB/3/1612-1620F. There was an assessment of the impact on each owner and those impacts were assessed as neutral, slight adverse, moderate adverse, or substantial adverse (AB/3/1596-1611). The assessments were in an appendix to the environmental statement but the details of the impacts were then summarised in the body of the environmental statement which also made it clear that where a landowner rents their land out in conacre the impacts have always been deemed to be slight adverse to reflect the short term nature of the conacre rental system (AB/3/1462, 1464-6). I am satisfied there was a vast amount of detail in the environmental statement.

[165] The environmental statement was published and those concerned were able to read and comment on the assessments, including giving evidence at the inquiry (AB/2/543-544, 545-6, 692-3, 715-6 and 734-748).

[166] As a result of the inquiry process and in their report the inspectors stated:-

> "We accept that in percentage terms any impact on the overall agricultural industry would be minimal. However in the absence of appropriate evidence we are unable to assess whether the loss of agricultural

> land would have an impact on the local economy although we expect that it may."

The inspectors also commented:-

> "We accept that many objectors have grounds for challenging the agricultural impact assessment and its value within the environmental statement. In some cases:
>
> - A copy of the data or report had not been delivered to affected landowners;
> - Verification of the data had been sketchy;
> - Viability of farms had been assessed relative to the overall area rather than in economic terms;
> - The importance to a farm business of conacre land held over a long period had not been fully taken into account;
> - Buyer security impacts had not been fully addressed.
>
> It was also contended that in England and Wales a loss of less than 2% of land was classified as 'slight adverse' and anything over 10% as 'major adverse'. Much higher thresholds are apparently being applied in Northern Ireland but we were unable to access any authority for this which degrades the effect on landowners who would lose part of their land. The current grading should be reviewed, codified and notified to all concerned."

[167] The inspectors then went on to make a recommendation as follows:-

> "We recommend that the Department carries out a review of the agricultural impact assessments to determine whether the impact of the scheme on all affected farms has been adequately addressed. We recommend also that the Department carries out a review of the impact of mitigation and accommodation works on the Department of Agriculture and Rural Developments bio security code."

[168] I consider that it is unrealistic that an environmental statement should be comprehensive as at the date of its publication. Rather the Environmental Impact Assessment process should be sufficient through consultation and the gathering of information to be taken into account by the decision-maker. I consider that the information available to the Minister was sufficient. For instance, the Agriculture Impact Assessment contained within the environmental statement underestimated the impact on individual farms when land was let in conacre. That was known as a result of the inquiry and the inspector's report and was taken into account by the Minister as part of the information at the stage of his decision. Another instance is that the Minister was aware that there may be an impact on the local economy. That was also contained in the inspectors' report and was considered and taken into account by the Minister. It does not mean, and I reject the suggestion, that the decision by the Minister that the environmental statement as supplemented by consultations and information gathered was adequate was irrational nor does it mean that the inspectors had found that the environmental statement was defective.

(d) Environment Impact Assessment limited to this scheme as opposed to encompassing the upgrade to the N2 in the Republic of Ireland.

[169] The applicants submit that the scheme is part of a larger project including the proposal for an upgrade of the N2 from the border south of Aughnacloy to Dublin. That the scheme is in reality properly to be regarded as an integral part of an inevitably more substantial project, encompassing both the scheme and the upgrade to the N2. That the more substantial project should have been subject to an environmental statement and an Environmental Impact Assessment process under the EIA Directive.

[170] The definition of project in Article 1(2) is in broad terms:

> "(a) `project' means:
>
> - the execution of construction works or other installations or schemes,
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;"

What is a project is a matter of fact and judgment.

[171] In this case the Department has proceeded on the basis that there are two projects, one in Northern Ireland and the other in the Republic of Ireland. The project in the Republic of Ireland has been deferred. The applicants have not brought forward evidence establishing a high degree of planning in relation to the project in the Republic of Ireland. The deferral of the project in the Republic of Ireland emphasises that the delivery of the scheme in Northern Ireland is not

dependent on the delivery of the project in the Republic of Ireland. The scheme in Northern Ireland is of strategic importance in Northern Ireland even leaving out of account the improvement of the N2 in the Republic of Ireland (see paragraphs 2.2 and 2.3 of the Adoption Statement (AB/2/1077-1079).) The two projects are not dependent on each other. Both projects may meet EU transport policy but I consider that this does not alter the Department's or the Minister's decision that the "project" within the EIA Directive is the scheme.

[172] The decision as to what a project is and whether the Environmental Impact Assessment for the development consent properly encompasses the project (as opposed to part of it) is a scoping exercise which allows considerable discretion to the decision-maker, the Minister. For the reasons advanced by the Department I do not consider that the decision that the scheme is the project is irrational.

(e) Environmental Impact Assessment was of the scheme rather than of a phased scheme.

[173] It was contended on behalf of the applicants that the deferred section of the scheme may never be constructed. I reject that contention for the following reasons:-

(a) There is a clear commitment by the Executive and by the Irish Government to the scheme. Those commitments are of considerable weight.

(b) The commitments of both the Executive and the Irish Government are longstanding.

(c) The strength of the commitments can be assessed by virtue of the obvious major public benefits to be provided by the scheme, both to the community in Northern Ireland and to the community in the Republic of Ireland.

(d) The scheme has major benefits for the community within Northern Ireland so it can be seen as a major goal quite irrespective of what occurs in the Republic of Ireland.

[174] I consider that the timing of the deferred section of the scheme is different from what was originally envisaged but that it will still proceed. There is a degree of uncertainty as to when it will proceed. It has been acknowledged by Mr Elvin that the date of 2025 for opening of the deferred sections is not based on any evidence such as budgetary evidence. However, given the importance of the scheme to the economy of Northern Ireland I do not consider that the timescale suggested on behalf of the applicants of 100 years or 200 years is remotely accurate or that the 2025 date is entirely worthless. I consider that it will proceed within a reasonable but unspecified period of time.

[175] The scheme has been subjected to an Environmental Impact Assessment. This is not a situation of the Department avoiding an Environmental Impact Assessment. Ordinarily the concern in relation to phasing (or subdivision of a larger project) is that an Environmental Impact Assessment is not carried out and is avoided. That is the opposite of this case where an Environmental Impact Assessment has been carried out for the scheme. In addition, after it became known that the scheme was to be phased, the Department engaged Mouchel to carry out an exercise referred to as "screening". In fact this was an assessment whether the environmental statement needed an addendum to deal with the phasing of the scheme. That report concluded that there was unlikely to be significant effects and that an additional addendum environmental statement was unnecessary. The decision was then for the Minister subject to review to the *Wednesbury* standard. If in the event the Environmental Impact Assessment is out of date by the time the deferred sections are brought forward then a further Environmental Impact Assessment can be undertaken in connection with the process for making Vesting Orders in relation to the deferred sections. The deferred sections of the scheme cannot proceed without Vesting Orders and at that stage a decision can be made as to whether a further Environment Impact Assessment is required, subject to judicial review by the courts on *Wednesbury* grounds.

[176] I do not consider that the decision of the Minister that there was a sufficient Environmental Impact Assessment of the phased scheme was irrational.

(f) The submission that the environmental assessment was inadequate in relation to its consideration of badgers.

[177] The applicants contend that there was an inadequate assessment in the environmental statement, at the inquiry and in the inspectors' report of the effect of the scheme on badgers. The environmental statement referred to badgers in Chapter 11 (AB/3/1365, 1384-1385 and 1400). I consider this to be a fair and thorough assessment, set out in the environmental statement. Dr O'Neill, the expert retained by the applicants for the purposes of these proceedings, did not give evidence before the inquiry and there was no ecological evidence presented to the inquiry by the applicants in relation to badgers. For the purposes of these proceedings the applicants rely on the evidence of Dr O'Neill (AR/4/80-88). That evidence was answered by the respondent in the evidence from Paul Reid (AR/4/131-133). I accept the explanations advanced by the respondent.

[178] The Environmental Impact Assessment was appropriate and it was not irrational for the Minister to rely on it. In any event even if there was any deficiency I would not in the exercise of discretion grant any relief.

(g) Conclusion in respect of this part of the judgment

[179] None of the grounds in this part of the judgment have been made out by the applicants.

Part eight

Human Rights and compulsory acquisition of property.

[180] The applicants submit that in respect of the compulsory acquisition of property the test to be applied under domestic law is more stringent than under Article 1 of the First Protocol of the ECHR. The skeleton argument on behalf of the applicants, at paragraphs 20-24 and 32-39, sets out the suggested domestic law test that a Vesting Order should not be made unless there is a compelling case in the public interest. The applicants submit that before a decision to vest is made that it should be demonstrated that there is a reasonable prospect of the scheme going ahead. It is submitted that the deferred sections will not be constructed for many years and that there is no reasonable prospect of them proceeding. That in any event a further environmental statement will be required in relation to the deferred sections and, accordingly, it could not be said that there is a reasonable prospect of the scheme proceeding, because at the stage of the further environmental statement there may be environmental reasons why the deferred section should not proceed. Furthermore, that the acquiring authority, the Department, has not been able to ensure that all necessary resources are likely to be available for the deferred sections within a reasonable time.

[181] The respondents submit that the Department did in fact properly consider whether there was a compelling case in the public interest for the scheme. That this is evident from the inspectors' report and the Department's responses to the objectors which both recognised in terms that the public interest had to be balanced against adverse impacts on the individuals. That the inspectors were satisfied that the Department had taken into account the impact of the scheme on the human rights of individuals affected. That the inspectors and the Department had in mind, and applied, the correct test, namely to consider whether there was a compelling case in the public interest justifying compulsory acquisition. That compliance with human rights legislation does not require the decision-maker to follow a particular process or consciously to balance competing rights and interests: the only question for the court is whether the substantive outcome is proportionate, see *R (SB) v Governors of Denbigh High School Belfast* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin* [2007] 1 WLR 1420. That the commitments of the Irish Government and the Executive to delivering the scheme, and the demonstrable public benefits to be obtained from the scheme from both the perspective of the Irish Government and the perspective of the Executive are such that the scheme is attractive to both governments so that the deferred sections will be brought forward within a reasonable time scale.

[182] The respondent also relied on the decision of Wilkie J in *Walker & Brian v Blackburn* [2008] EWHC 62 (Admin) in support of the proposition that the approach to weighing public against private rights does not require an immensely detailed approach to the identification of the individual private rights and that it is sufficient

if the rights are considered broadly, understanding the nature of the rights with which it is proposed to interfere. Wilkie J stated:

> "51. Furthermore, the Secretary of State contends that there is no requirement upon a decision maker such as the Secretary of State to consider each case individually once the view has properly been taken on the basis of a compelling case in the public interest that all the land had to be acquired in order to enable a scheme to be put into effect … .
>
> 52. The Borough Council made similar submissions.
>
> …
>
> 54. In my judgment, the Secretary of State and Borough Council are correct in their submissions. …"

[183] I accept the reasons advanced by the respondent. The public interest in the scheme is of major significance. I decline to make any finding in favour of the applicants in relation to this part of the judgment.

Part nine

Overall conclusion.

[184] I reject the overwhelming majority of the applicants' grounds of challenge.

[185] In respect of the ground of challenge based on the Habitats Directive I have indicated that, subject to any further submissions in relation to discretion, I am minded to quash the decision of the Minister on the basis, in short form, that it was irrational to conclude that there was no doubt as to the efficacy of the mitigation measures in respect of the River Foyle and River Finn Special Areas of Conservation and, accordingly, that an appropriate assessment under the Habitats Directive ought to have been, but was not, carried out.

[186] In relation to the issue of costs I will hear counsel both generally as to costs and specifically as to whether the costs involved in these proceedings were unnecessarily increased by the number of issues which were raised by the applicants.

Part ten

Outcome of the further hearing

[187] The outcome of the further hearing was that the decision was quashed and the respondent was ordered to pay all the costs of the application.