Neutral Citation No. [2015] NIQB 65 | *Ref:* **TRE9718**

Judgment: approved by the Court for handing down | *Delivered:* **10/07/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

Newry Chamber of Commerce and Trade's Application [2015] NIQB 65

IN THE MATTER OF AN APPLICATION BY NEWRY CHAMBER OF COMMERCE AND TRADE FOR JUDICIAL REVIEW
and
IN THE MATTER OF A DECISION BY THE DEPARTMENT OF ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE) ON 19 AUGUST 2014 TO APPROVE PLANNING APPLICATION REF: P/2009/0163/F

_____

TREACY J

I N D E X

Section:	**Para No:**	**Page No:**
• Introduction	1–2	2
• Background	3–40	2–7
• Order 53 Statement	41–43	7–16
• Legal Principles	44	16–17
• Ground 1 – Failure to comply with the Habitats Regulations	45–70	17–23
• Ground 2 – Failure to comply with the EIA Regulations	71–76	24–25
• Ground 4 – Failure to conduct adequate inquiry into retail impact on Newry City Centre	77–94	25–29
• Ground 5 – Irrational approach to consideration of economic benefits	95–106	29–32
• Ground 6 – Failure properly to advertise proposals pursuant to the Planning (NI) Order 1991	107–119	32–36
• Ground 7 – Failure to refer the application to the Executive Committee of the Assembly	120–137	36–40
• Conclusion	138	40

Introduction

[1] By this application the applicant challenges the grant of full planning permission on 14 August 2014 by the respondent in relation to land at Carnbane Way Newry ("the land") for the "comprehensive mixed use development to include 1 No. food store, 70 No. light industrial/business units, 1 No. gatehouse, 1 No. coffee shop, residential use (14 units), car parking, general landscaping and general site works" ("the Permission").

[2] The applicant is a company limited by guarantee. Its membership is drawn from the business community in Newry whose interests it represents. Its activity has included promoting the physical development and regeneration of the City and its commercial centre. The applicant, with other traders, strongly objected to the proposals, on grounds including their conflict with Planning Policy Statement 5 (Retailing and Town Centres), in particular their likely impact on the vitality and viability of Newry City Centre.

Background

[3] The relevant factual background and the history of the consideration of the planning application are set out at length in the affidavit of Philip Stinson, Principal Planning Officer within the DOE, Planning and Local Government Group. Between paras 4-49 he rehearses the decision making process and the circumstances in which the Department reversed its earlier position and concluded that permission should be granted for the Planning Application.

[4] Planning Application reference P/2009/0163/F ("the planning application") was received by the Department on 12 February 2009. Its description was amended on 19 February 2009. The planning applicant was the Hill Partnership. The application described the development in the following terms:

> "Comprehensive mixed use development to include: 1 No. food store and automated petrol filling station, 1 no. 10 screen cinema complex, 5 No. restaurant units, 4 No. office blocks, 66 No. light industrial/business units, 1 No. coffee shop, residential use (29 Units), landscaped parkland, car parking, general landscaping and general site works."

[5] A positive EIA determination was made on 19 February 2009. The application was accompanied by a number of environmental reports and the planning applicant requested this to be treated as the environmental statement, subject to the submission of a non-technical summary to fulfil the requirements of Schedule 4 of the Planning (Environmental Impact Assessment) (NI) Regulations 1999. The non-technical summary was submitted on 18 March 2009 to complete the environmental statement.

[6] The application was advertised in the Newry Reporter and the Armagh & Down Observer on 5 March 2009, the Mourne Observer and the Rathfriland Outlook on 4 March 2009 in accordance with statutory requirements. The description of the development used in the advertisements was that contained in the planning application. A separate advertisement under Regulation 12 the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 was placed in the same newspapers on 29 April 2009 and 30 April 2009 and additionally in the Crossmaglen Examiner on 28 April 2009.

[7] The application was considered by the Department to be a major planning application for the purposes of Article 31 of the Planning (NI) Order 1991. It considered that the application would, if permitted involve a substantial departure from the development plan for the area to which it relates, affect the whole of a neighbourhood and consist of or include the construction, formation, laying out, or alteration of a means of access to a trunk road or of any other development of land within 67 metres of the middle of such a road, or of the nearest part of a special road. The Department therefore, on 7 April 2009, served Notice under Article 31 of the Order on the Hill Partnership. Article 31 was thereafter applied to the said application.

[8] A retail impact assessment was received by the Department on 15 July 2009.

[9] The Department received an Economic Impact Assessment on 21 October 2009 prepared by PriceWaterhouseCoopers on behalf of the planning applicant. The Department then undertook consultation with DRD Economics Branch (on 23 October 2013) who provided comments on the assessment on 22 February 2010. Subsequently PriceWaterhouseCoopers provided a response to the comments made by DRD Economics Branch on 3 March 2010.

[10] The Strategic Planning Division ('SPD') in a Development Management Report ('DMR') on the 26th May 2010 recommended that the application be refused. This was endorsed by the Management Board with a recommendation to refuse the application forwarded to the then Minister for his consideration on 28 May 2010. The recommendation was based on the grounds that the proposal would have a detrimental retail impact on the vitality and viability of Newry city centre by undermining its convenience shopping function, there was a viable alternative site within the draft town centre boundary, there would be a loss of investment in Newry City Centre and prematurity as the site was within an area designated as an LLPA within the draft Banbridge Newry and Mourne Area Plan 2015 which the proposal would adversely impact upon.

[11] The Minister requested on 9 July 2010 that the application be deferred until such time when the Department was in a better position to advise on the availability of an alternative site located within the draft Newry city centre.

[12] SPD prepared an addendum to the DMR on 16 March 2011 the purpose of which was to provide an update on the alternative site, highlight potential cumulative retail impact and outline the changes to the planning policy context since the previous submission to the Minister of 28 May 2010 and provide a

recommendation on the application. The DMR recommended refusal and this was endorsed by the Management Board. A further reason for refusal was added to those previously recommended in the DMR of 26 May 2010 based on PPS 4 Planning & Economic Development that came into effect in November 2010. The proposal was considered to be contrary to PPS4 as the application proposed Class B1 (a) office use on a site zoned for industry in the draft plan.

[13] At a meeting on 15 August 2011 between the Department and the planning applicant's representatives, the Department highlighted areas of concern in relation to retail impact including cumulative retail impact, impact on the LLPA, conflict with PPS4 and assessment of alternative sites. There was a further meeting between the Department and the planning applicant and his representatives on 16 December 2011. The meeting was to discuss the Departments concerns with the application including the proposed offices, PPS5, the loss of open space and the impacts on the LLPA. At this meeting it was agreed that the planning applicant would look to revising the scheme. The Department accepted an amendment on 2 February 2012, removing elements from the development from that initially submitted and also increasing the number of light industrial units. The amended application described was described in the following terms:

> "Comprehensive mixed use development to include: 1 No. food store, 70 No. Light Industrial/Business Units, 1 No. Gatehouse, 1 No. Coffee Shop, Residential use (14 Units), car parking, general landscaping and general site works."

[14] The amended application was then advertised in the Newry Reporter, the Mourne Observer and the Rathfriland Outlook on 29 February 2012 in the Crossmaglen examiner on 28 Feb 2012 and in the Armagh and Down Observer on 3 March 2012. This was a combined Article 21 advertisement under The Planning (Northern Ireland) Order 1991 and Regulation 12 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999.

[15] The Department undertook a further round of consultation on the amended application. This included NIEA Natural Environment Division (NIEA NED) (previously NIEA Natural Heritage), NIEA Water Management Unit ("WMU"), DRD Economics Branch and Invest NI.

[16] NIEA NED undertook a Test of Likely Significance ("ToLS") and provided consultation replies to the Department on 13 June 2012 and 4 July 2012.

[17] DRD Economics Branch replied on 17 February 2012 stating that their previous response of 19 February 2010 still stood. Invest NI replied on 28 March 2012. NIEA WMU replied on 29 May 2012.

[18] The planning applicant wrote to the Department on 27 Dec 2012 requesting that the application be held pending the submission of updated retail impact data.

[19] Mary MacIntyre, the then Director of SPD provided a submission to the

Minister on 11 April 2013 updating him on the position of the application. This advised that the application had been amended to address the Department's concerns in relation to the impact on the LLPA, loss of open space, retail impact of the development on Newry City Centre and removal of the proposed offices. It also highlighted that application P/2009/1490/F would cumulatively increase retail impact on the centre and there was a viable alternative site.

[20] On 23 August 2013 the planning applicant wrote to the Department advising that he would not be submitting any further information and requested the Department progress with the determination of the application.

[21] In submissions to the Minister on 9 October 2013 and 15 October 2013, SPD advised that they had made a recommendation to a former Environment Minister that the application be refused and that the former Minister asked that the application be deferred. The submission outlined that the application had been amended to address the concerns in relation to the impact on the LLPA, loss of open space, retail impact of the development on Newry City Centre and the removal of the proposed offices. It stated that the retail impact on Newry city centre remained an issue and that there was a potential alternative site within the city centre. The submission also highlighted that the retail impact assessment may have to be updated from the previous report of May 2010.

[22] The Minister and a representative from SPD met with the planning applicant and his representatives on 8 November 2013. The submission to the Minister prior to this meeting again set out that the Department had previously recommended to a previous Minister that the application be refused. It again reiterated that retail impact on Newry city centre remained an issue and that there was a potential alternative site within the city centre. The submission also highlighted that the retail impact assessment may have to be updated from the previous report of May 2010. At this meeting the planning applicant set out the background to the application including the Department's concerns with the original application and how the application had been amended to address these.

[23] A Development Management Report was prepared with a recommendation to approve signed 12 May 2014. Senior Management endorsed the recommendation and a submission was made to the Minister accordingly on 13 May 2014 with a covering memo from the Acting Director of SPD, Simon Kirk.

[24] The Department considered that the amendment to the application removed previous concern with regard to impact on the draft LLPA designation (BNMAP had been adopted at this point). Removal of the offices meant no further conflict with PPS4 and it lessened the impact on the open space. It was clear from the submissions to the Minister on 9 October 2013 and 15 October 2013 that the application had a previous recommendation for refusal and also highlighted the previous concerns of SPD. The Department considered that the amendment was significant and altered the material considerations and balance of the overall planning decision. The Department undertook a comprehensive review of the application rather than solely focusing on the elements that the amendment

addressed.

[25] On 29 May 2014 the Minister's office advised SPD that the Minister had seen the submission of 13 May 2014 and had approved it. The Minister announced his intention to approve the application in the press on 30 May 2014.

[26] The Notice of Opinion to approve issued on 10 June 2014. The planning applicant accepted the Notice of Opinion to approve on 12 June 2014.

[27] On 11 June 2014, Newry & Mourne District Council wrote to the Minister to advise that following a Council meeting on 5 June 2014 that the council no longer supported the application, they expressed their objection to the granting of permission and requested that the Minister reconsider his decision.

[28] The Applicant wrote to the Minster on 30 May 2014 requesting a meeting to discuss the implications of his decision in addition to the meeting already scheduled with the Minister with representatives of Newry Chamber.

[29] Margaret Ritchie MLA MP requested a meeting with the Minister, which was scheduled for 16 June 2014, to include the Applicant and Northern Ireland Independent Retail Trade Association, to discuss the Minister's approval of the proposed development.

[30] Deborah King wrote to the Minister on 12 June highlighting the issues they wished to raise with the Minister at the meeting on 16 June 2014.

[31] Colleen Savage on behalf of Parker Green International - Dr W G O'Hare wrote to the Minister on 12 June 2014 objecting to the application providing quantitative evidence in respect of the assessment of loss of investment and requesting that the new information be considered.

[32] Prior to his meeting on 16 June 2014, Mr Stinson briefed the Minister on the current position with the application in light of the representations that had been received.

[33] At the meeting of 16 June 2014 the Minister was passed a letter from A&L Goodbody who act on behalf of ABP Food Group – Greenbank Industrial Estate which objected to the proposal on the grounds of loss of investment. The Minister was also passed a copy of the report which highlighted the areas that they wished to discuss with the Minister. The Minister also accepted an invitation to visit the area with representatives from the bodies present.

[34] Councillor William Burns wrote to the Minister on 14 June 2014 supporting his decision to grant planning permission for the proposed development.

[35] The Hill Partnership wrote to the Minister on 17 June 2014 advising that they felt there was overwhelming public support for the application. Councillor Jack Patterson wrote to the Minister on 17 June 2014 affirming his support for the application. Councillor Michael Carr as Group Leader of the SDLP Group in Newry & Mourne District Council wrote to the Minister on 27 June 2014 to reaffirm the Party's support for the proposed development & decision to grant approval.

David Taylor wrote to the Minister on 21 July 2014 on behalf of the Ulster Unionist Party Grouping reaffirming his party's support for the application and encouraging the Minister to stand by the decision to approve the application.

[36] Prior to his site visit on 21 July 2014 Mr Stinson again briefed the Minister, at a meeting to discuss all Article 31 applications at that time, on the latest position and advised of any new matters that had been raised in the intervening period. The Minister then met with representatives from the Applicant on 25 July 2014, in Newry.

[37] The Minister also met with Hill Partnership representatives on 24 July 2015.

[38] The Applicant wrote to the Minster on 28 July 2014 following the Minister's visit to Newry on 25 July 2014 highlighting their grounds for objection (loss of investment, loss of jobs, retail impact and potential incremental erosion of use of industrial units).

[39] An Addendum to the Development Management Report dated 19 August 2014 was prepared outlining the issues raised in the interim from the DMR of 13 May 2014. The case officer also produced a series of notes to inform the Addendum to the DMR.

[40] A submission dated 19 August 2014 was made to the Minister to determine if planning permission to approve should be issued. The Minister's office replied on 19 August 2014 confirming that the Minister had seen and read the submission and the Addendum of 19 August 2014 and was content for the application to proceed to approval. The Decision Notice issued on 19 August 2014.

Order 53 Statement

[41] The applicant sought the following relief:

> a. an order of certiorari to bring up to the Honourable Court and quash the decision of the Respondent dated 19th August 2014 (ref. P/2009/0163/F)
>
> b. a declaration that the Respondent acted in breach of the EIA Regulations by failing to assess the cumulative effects of the proposals;
>
> c. a declaration that the Respondent acted in breach of the Habitats Regulations by failing to assess whether the proposals would, in combination with other projects, be likely to have a significant effect on the Carlingford Lough SPA;
>
> d. a declaration that the said decision is unlawful, ultra vires and of no force or effect;

e. an order for mandamus to compel the Respondent to adjudicate upon and re-determine the application for planning permission (ref. P/2009/0163/F) in a proper and lawful manner;

..."

[42] The grounds on which the above relief is sought are in summary:

(i) **Ground 1** – that the Respondent acted unlawfully and in breach of 'the Habitats Regulations' by failing to consider the in-combination effects of the proposals and other projects;

(ii) **Ground 2** – that the Respondent acted unlawfully and in breach of 'the EIA regulations' by failing to assess the cumulative effect of the proposals;

(iii) **Ground 3** is no longer pursued;

(iv) **Ground 4 -** the Respondent failed to grapple properly with the question of the impact that the proposals would have on the city centre of Newry in accordance with PPS5;

(v) **Ground 5 –** that the respondent acted irrationally in giving determinative weight to claim to the claimed economic benefits;

(vi) **Ground 6** – the respondent failed to adhere to the requirements of 'the 1991 Planning Order' by failing to refer to the proposed bridge over the River Newry when advertising the application;

(vii) **Ground 7 –** that the Respondent erred in failing to refer the application as a significant or controversial matter to the Executive Committee under the Northern Ireland Act 1998.

[43] I set out below how each of the grounds pleaded were set out in the Order 53 Statement:

"Ground 1: failure to comply with the Habitats Regulations

2. The Respondent acted unlawfully and in breach of the Habitats Regulations by failing to consider the in-combination effects of the proposals and other projects:

a. Regulations 43(1) and 49(1) of the Habitat Regulations required the Respondent, before granting the impugned permission, to consider whether it was likely to have a significant effect on the Carlingford Lough SPA (either alone or in combination with

other plans or projects) and if so to make an appropriate assessment of the implications for the site in view of that site's conservation objectives;

b. the ecological assessment within the environmental statement acknowledged that such an assessment would have to be carried out;

c. NIEA prepared a test of likely significance ("TOLS") dated 22nd May 2012 which acknowledged the potentially significant effects of the proposals arising from polluting matter entering the Newry River or Canal and flowing into the SPA;

d. The TOLS concluded that the relative distance of the land from the SPA and the tidal nature of the Lough would make dilution and mixing highly likely such that significant effects would be unlikely to arise; and that "in combination effects are considered unlikely";

e. However, the assessment failed to identify whether or if so to what extent other projects were taken into account as part of the necessary in-combination assessment; and in particular failed to consider the implications of projects which were granted permission after the TOLS was carried out, including the development of a Tesco food store at Downshire Road, an extension to the Quays shopping centre and the approved redevelopment of land at the Greenbank Industrial Estate;

f. The Respondent failed to base its decision on sufficient information or inquiry about whether the proposals would have significant in-combination effects on the SPA to require an appropriate assessment.

Ground 2: failure to comply with the EIA Regulations

3. The Respondent acted unlawfully and in breach of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 (as amended)("the EIA Regulations") by failing to assess the cumulative effects of the proposals:

a. Regulation 4(1) of the EIA Regulations prohibits the grant of planning permission for EIA development without consideration of environmental information;
b. By Regulation 2(2) and Part 1 of Schedule 4, environmental information includes the "environmental statement," which means a statement that includes "a description of the likely significant effects of the development on the environment, which should cover the direct effects and any…cumulative… effects";
c. The Respondent erred in granting the impugned Permission in reliance upon an environmental statement which failed to assess the potential effect of the proposed development in cumulation with other development;
    i. the ecological assessment within the addendum to the environmental statement acknowledged that the application site is ecologically connected with the Carlingford Lough SPA;
    ii. it stated that that proposals had the potential to mobilise large quantities of sediment within the Newry River during the construction phase, with associated effects on the SPA, but that these could be mitigated by appropriate construction methods;
    iii. however the assessment did not consider the potential cumulative effects on the Newry River arising from other permitted developments in the vicinity of the River, including those identified above;
d. The Respondent erred by failing to base its decision on sufficient information or inquiry about whether the proposals would be likely to have significant cumulative environmental effects, including the effects of such other permitted developments in the vicinity of the River.

Ground 3: Misdirection regarding potential loss of investment in Newry city centre

4. The Respondent misdirected itself in concluding that the proposals would not be likely to cause a significant loss of investment in Newry city centre:

a. PPS5 advises at paragraph 41 that proposals for food superstores on sites outside town centres may be acceptable provided that they satisfy all the criteria set out in paragraph 39, including a requirement that the development "is unlikely to lead to a significant loss of investment in existing centres";
b. The Respondent had before it explicit and unequivocal evidence from the Quays Shopping Centre, which stated that the proposals would "undoubtedly preclude" the development of an approved extension to that Centre, involving 7794 sqm of additional comparison floor space which was stated to represent a total development and investment cost of £25million, generating up to 150 construction jobs and 200 retail jobs;
c. Officers of the Respondent had earlier concluded in May 2010 that the loss of investment in the expansion of the Quays was "a potential effect of this proposal";
d. Officers had also concluded that they did not know whether the permission would lead to a loss of investment: "it is difficult to determine to what degree the presence of a food superstore would deter comparison operators from locating within the Quays";
e. In these circumstances it was unreasonable to conclude that the relevant criterion in PPS5 would be met.

Ground 4: Failure to conduct adequate inquiry into retail impact on Newry city centre

5. The Respondent failed to grapple properly with the question of the impact that the proposals would have on the city centre:

a. PPS5 includes at paragraph 39 a requirement that proposed development "is unlikely to have an adverse impact on the vitality and viability of an existing centre or undermine its convenience or comparison shopping function";
b. When considering the proposals in May 2010, Respondent officers concluded that the proposed food store on its own would cause an unacceptable 33% impact on the turnover of convenience stores with the city centre, based on turnover levels assessed as at a date of 2012;
c. When considering the proposals in March 2011, officers concluded that when account was taken of the permission for a food store on land at Downshire Road outside the town centre, the cumulative impact of the proposals would increase to an unacceptable 54%;
d. When considering the proposals in May 2014, following the construction of the Downshire Road food store, officers properly treated the Downshire Road as part of the existing retail provision within the relevant catchment area, as opposed to a scheme which would form part of a cumulative impact assessment;
e. However, the conclusion that the proposals would have a 14% impact on the city centre failed to consider whether the assumed turnovers of existing stores within the city centre were realistic given:
    i. the implementation of the permission for the food store at Downshire Road, in particular when compared with the turnover levels which were previously assumed without that food store having been built; and
    ii. the level of available expenditure within the identified catchment area.

Ground 5: Irrational approach to consideration of economic benefits

6. The Respondent acted irrationally in giving determinative weight to the claimed economic benefits:

a. The developer provided an economic impact assessment in support of the application which purported to set out the job creation held in prospect by the proposals, along with the wider contributions that they would make to the local economy;
b. Economics Branch advised on 22nd February 2010 that the claimed benefits "do not appear to be location specific"; that they "would not be at all sure regarding the robustness of the overall figures" relating to net employment; that "a lot of the wider economic and social benefits quoted are aspirational in nature and the [economic impact assessment] recognises that these may not come about"; and that the analysis did not necessarily support the conclusion that the development would not represent a threat to the viability of retailers in the city centre;
c. The economic impact assessment was supplemented by an addendum in January 2012;
d. Economics Branch considered the said addendum and advised that their earlier comments remained applicable;
e. The final Development Management Report of May 2014 only referred to the comments of Economics Branch in an appendix which summarised consultation responses and did not address the concerns which had been raised;
f. In any event, in circumstances when it had been accepted that the impacts on the city centre were beyond what would normally be considered acceptable, and when it was acknowledged that there was a viable alternative site for at least the food store element of the proposals, it was unreasonable to attach significant weight to

the claimed economic benefits given the concerns expressed by Economics Branch;

g. Further or alternatively, it was irrational to conclude that the economic benefits outweighed the retail disadvantages of the proposals when the Respondent had not considered:
   i. the relative economic benefits of locating the food store on the alternative viable site; or;
   ii. the relationship between the claimed net economic impact of the food store in the economic impact assessment and the trade diversions which were assumed by the retail impact assessment.

Ground 6: Failure properly to advertise proposals pursuant to the Planning (NI) Order 1991

7. The Respondent failed to adhere to the requirements of the 1991 Order by failing to refer to the proposed bridge over the River Newry when advertising the application:

a. The plans accompanying the application show a bridge over the river which is intended to connect the proposed light industrial units on the north-eastern side of the river with the remainder of the site, including the food store and the main egress from the site;
b. Article 21(1) of the 1991 Order provides that where an application for planning permission is made to the Respondent, the Respondent shall publish notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated;
c. The purpose of this provision is to ensure that people living in the locality are informed of the substance of what is proposed; and a proper notice is one that brings home to the mind of a reasonably intelligent and careful reader the nature of any building or other operations (or any material change of use) for which permission is sought;

d. The advertisements issued by the Respondent failed to include reference to the bridge and thereby failed to give proper notice of the proposed development.

Ground 7: failure to refer the application to the Executive Committee of the Assembly

8. The Respondent erred in failing to refer the application as a significant or controversial matter to the Executive Committee:

a. Section 20(4) of the Northern Ireland Act 1998 provides that the Executive Committee of the Assembly shall have the function of discussing and agreeing upon "significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Belfast Agreement";
b. Paragraph 2.4 of the Ministerial Code provides that any matter which is significant or controversial (and is clearly outside the scope of the said agreed programme) shall be brought to the attention of the Executive Committee by the responsible minister to be considered by the Committee;
c. Paragraph 20 of Strand One relates to a programme incorporating an agreed budget linked to policies and programmes and is not applicable;
d. The proposals are significant: they involve a major scale of development, including a substantial food store, 70 light industrial units and 14 new dwellings, along with a new bridge across the River Newry. The Article 31 designation in this case confirmed that the proposals would affect the entire neighbourhood;
e. The proposals are controversial, as demonstrated by:
    i. the high level of objections to them, including two petitions with 688 and 76 signatures respectively and 86 letters of objection;
    ii. the lodging of objections by the Applicant, the Northern Ireland

Independent Retail Trade Association and the operators of Buttercrane Shopping Centre, the Quays Shopping Centre, the operators of Greenbank Industrial Estate, Supervalu and Fiveways local centre;

iii. the location of the proposals outside the city centre, which is protected in retail planning policy terms;

iv. the acceptance, through the Article 31 designation, that the proposals would involve a substantial breach of the development plan for the area;

v. the higher than usually acceptable retail impacts on that protected centre;

vi. the availability of a viable alternative site within the city centre;

vii. the identified risk of loss of investment in the city centre in the event permission was granted."

Legal Principles

[44] The legal principles governing the role of planners and the role of the courts in planning cases have been set out in a number of leading authorities including by Girvan J in Re Bow Street Mall's and Others Applications [2006] NIQB 28 at [43], by the Supreme Court in Tesco Stores Limited v Dundee City Council [2012]UKSC 13 and most recently by the English High Court in Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) at 19. These principles may be summarised as follows:

(i) Deciding on the weight to be attached to the factors influencing a planning outcome is integral to reaching the planning judgement and this function lies within the exclusive discretion of the planning authority. It may attach such weight as it (rationally) chooses to any factor including no weight at all. The Court will not interfere with the exercise of the planners' discretion on the weighting of the factors, provided it is rational in the *Wednesbury* sense.

(ii) Planning policies are broad guidance documents intended to assist planners in the exercise of their discretion and to encourage consistency of approach to planning applications, but they do not guarantee identical results even in similar cases. Planning policies are one factor which planners must weigh in the balance when making their planning judgement. The application of a planning policy in any case is a matter within the discretion of the planning authority, but if there is a dispute about the meaning of a policy this is a matter for the court to decide in accordance with the language used, read in its proper context.

(iii) Planning authorities are obliged to collect the information they need to be able to exercise their discretion in a rational way. A court must be satisfied that the planner has asked himself the right question when addressing his task and that he took reasonable steps to find the information required to answer the question correctly.

(iv) The planning decisions issued to parties must be fit for purpose which requires that they must state the outcome in an intelligible way and give adequate reasons to explain why the case was decided as it was. In stating these reasons the planner is entitled to proceed on the basis that the parties understand the issues between them and are familiar with the arguments and evidence advanced by each side. It is therefore unnecessary for the decision to repeat every argument and rehearse each piece of evidence. What is required is a clear explanation of how the main issues in the dispute were decided by the planner and why they were decided in that way.

(v) It follows from the above that the role of the court in planning cases is limited to reviewing the legality of the decision making process. The court will not conduct an appeal against the planner's judgement: it will not substitute its judgement on the weight to be attached to the relevant factors in place of the planner's judgement on that question. It will however review the legality of the planning process on the basis of the well understood principles of public law where a case is made out that the planner has made an error of reviewable kind.

Ground [1] – Failure to comply with the Habitats Regulations

[45] Council Directive 92/43/EEC (as amended) ("the Habitats Directive") deals with the conservation of natural habitats and of wild flora and fauna. Article 3(1) provides for the establishment of a network of areas to enable natural habitat types and species' habitats to be maintained or restored at a favourable conservation status. These areas include SPAs classified pursuant to the Birds Directive**.**

[46] Reg 43 of the Habitat Regulations (which reflects the requirements of Art6.3 of the Habitats Directive) provides as follows:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives;…

> (5) in the light of the conclusions of the assessment, and subject to regulation 44, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site".

[47] A European site is defined to include a SPA, classified pursuant to the Birds Directive: see Reg9(1)(d).

[48] Reg44(1) (which reflects Art6.4 of the Directive) provides:

> "(1) If it is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest which, subject to paragraph (2), may be of a social or economic nature, the competent authority may agree to the plan or project notwithstanding a negative assessment of the implications for the site".

[49] Reg 49(1) applies these regulations to a decision to grant planning permission.

[50] The interpretation of these provisions was considered by Weatherup J in Sandale Developments [2010] NIQB 43 as follows:

> "[19] The European Court of Justice considered the interpretation of Article 6.3 of the Habitats Directive in Waddenzee [2005] All ER (EC) 353. In relation to the requirement in the first sentence of Article 6.3 for an appropriate assessment of the implications of a plan or project, this is conditional on it being likely to have a significant effect on the site. The triggering of the environmental protection mechanism follows from the mere probability that such an effect attaches to the plan or project, a probability or a risk that the plan or project will have significant effects on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of the objective information that the plan or project will have significant effects on the site concerned. In case of doubt as to the absence of significant effects such an assessment must be carried out. Thus any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded on the basis of objective information that it will have a significant effect on that site (Paragraphs 39 to 45).

> [20] The significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. Thus where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by such a plan or project (Paragraphs 46 to 49)".

[51] The applicant submitted that the Respondent acted unlawfully and in breach of the Habitats Regulations by failing to consider the in-combination effects of the proposals and other projects. Regs 43(1) and 49(1) of the Habitat Regulations required the Respondent, before granting the impugned permission, to consider whether it was likely to have a significant effect on the Carlingford Lough SPA (either alone or in combination with other plans or projects) and if so to make an appropriate assessment of the implications for the site in view of that site's conservation objectives. NIEA prepared a test of likely significance ("TOLS") dated 22 May 2012. The TOLS concluded that the relative distance of the land from the SPA and the tidal nature of the Lough would make dilution and mixing highly likely such that significant effects would be unlikely to arise; and that "in combination effects are considered unlikely". However, the applicant contended that the assessment failed to identify whether or if so to what extent other projects were taken into account as part of the necessary in-combination assessment; and in particular failed to consider the implications of projects which were granted permission after the ToLS was carried out, including the development of a Tesco food store at Downshire Road, an extension to the Quays shopping centre and the approved redevelopment of land at the Greenbank Industrial Estate. The applicant submitted that the Respondent failed to base its decision on sufficient information or inquiry about whether the proposals would have significant in-combination effects on the SPA to require an appropriate assessment.

[52] In her affidavit Eimear Reeve, Higher Scientific Officer in the Natural Environment Division of the Northern Ireland Environment Agency ("NIEA"), sets out and documents the assessment carried out in respect of the planning application. The screening test, referred to as the *test of likely significance* ("ToLS"), under reg. 43(1) of the Habitats Regulations was carried out and approached on a precautionary basis and a low threshold was applied. The evidence establishes even that low threshold was not met.

[53] The only potential effect resulting from the proposal identified was "Pollution resulting from construction activities leading to pollution of SPA habitats".

[54] With respect to the Sandwich Tern and the Common Tern, inter alia, the main breeding areas being 23.5km and 22.1km away respectively "distance combined with the tidal nature of the Carlingford Lough area and the associated mixing and

dilution of this action makes significant effects on this feature unlikely." With respect to the Light-bellied Brent Goose inter alia: "The main area of eel grass within Carlingford Lough is located at Mill Bay, approximately 22.7km south east of the application site. As a result of distance and likely unsuitability of the area for significant activities from this species, significant effects from disturbance are considered unlikely."

[55] Overall, "Effects are considered unlikely to be significant to Carlingford Lough SPA features through a combination of distance, affected area and the nature of the features", "In-combination effects are considered unlikely", "Effects considered unlikely to be significant" alone or in-combination with other projects or plans. The NIEA responded to consultation accordingly. The Respondent acted on that expert advice from the competent authority. I accept that this was plainly a course that was open to the decision maker as a matter of planning.

[56] As already noted above the Applicant however challenges the validity of the assessment by reference to the age of the assessment at the time that the final decision was taken and on the basis that the in-combination effects of three other permissions granted after the TolS but before the grant of planning permission were not taken into account.

[57] I agree with the Respondent that the age of the assessment as a factor in and of itself is irrelevant. The central question is whether the assessment was adequate and reliance upon it reasonable. As the Respondent pointed out other than the issue of the subsequent three permissions, the applicant does not suggest that the assessment is otherwise inadequate or out of date.

[58] With regard to the three permissions relied upon by the Applicant this is addressed by Ms Eimear Reeve in her affidavit. She explains why they were not specifically considered at the time. She deposes to her clear expert opinion that nothing the Applicant raises in this respect changes NIEA's position that the impugned development will not have any significant effect in-combination with other plans or projects. At the end of her affidavit that she states is "satisfied that there will be no in-combination or cumulative adverse effects from P/2006/0163/F on the Carlingford Lough SPA".

[59] Furthermore, specific prevention measures were put in place by way of conditions placed on the permission as recommended by the planning applicant, NIEA NED and WMU – conditions 30, 38, 40 and 48. Conditions 44 and 48 of the Permission are also relevant since their purpose is to "minimise the risk of pollution occurring during the construction phase" and to "prevent pollution of watercourses".

[60] Ms Reeve lucidly articulates the reasons for NIEA's conclusions in respect of in-combination effects. In particular in considering each of the three subsequent permissions she concluded in the first two instances (P/2009/1490/F and P/2012/0757/F) that they would have **no** adverse effect on the SPA individually, in-combination or cumulatively and in the last instance (P/2012/0504/F) that "the only potential impacts from the proposal would be on bat roosts."

[61] Thus as there is **no** individual impact from two of the permissions and the only potential impact from the third is to Bat roosts there could logically be no in combination effects with the impugned permission, in respect of which the only potential effect was "Pollution resulting from construction activities leading to pollution of SPA habitats".

[62] Ms Reeve further explains NIEA's position by reference to the proposal's distance from the SPA, the lack of direct disturbance to the qualifying features, and the fact that "any impacts from mobilised sediment from construction works on the supporting habitat of the qualifying features will be negated as a result of tidal nature of Carlingford Lough (the associated mixing) and distance (dilution factors)".

[63] As a result of the matters referred to by the NIEA including the 18 km distance involved it is considered that there will be no adverse effects on the SPA. The development will not therefore contribute to any in-combination effects with other developments, including the particular developments relied upon by the Applicant.

[64] I am in agreement with the Respondent that these are matters of expert judgment which cannot legitimately be condemned as unreasonable. Furthermore, this is not a matter for an impermissible merits debate before this court. The decision maker was entitled in the circumstances to accept and act upon the independent expert view of the statutory consultee. The NIEA, the Rivers Agency, and the Loughs Agency were all consulted on the planning application. Each confirmed that they had no objection to the development. The Respondent was entitled to give considerable weight to the non objections of these statutory bodies. In Ashdown Forest Economic Development v Wealden [2014] EWHC 406 (Admin) per Sales J at [110]: "A decision maker is entitled, indeed obliged, to give the views of statutory consultees such as Natural England great weight". To similar effect Beatson J in Shadwell Estates v Breckland DC [2013] EWHC 12 (Admin) at [72] said:

> "a decision-maker should give the views of statutory consultees …"great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons"".

The belated attempts to undermine NIEA's conclusions by Mr Goodwin are misconceived. His submissions for example regarding mixing and dilution factors disregards the primary considerations upon which the NIEA's conclusion were based namely distance and lack of direct disturbance to the qualifying features. Furthermore, as the Notice Party points out this is an entirely new point that did not feature in the very detailed Order 53 Statement nor was it mentioned in the original grounding affidavits. The points advanced by Mr Goodwin are based on a "study" relating to the Humber Estuary without any attempt to explain how Carlingford Lough and Humber Estuary are in any way comparable.

[65] In this context it is pertinent to recall the following passage from Sullivan LJ in R (Boggis) v Natural England [2010] P T S R 725 at [37]:

> "37 In my judgment a breach of article 6(3) of the Habitats Directive is not established merely because, sometime after the "plan or project" has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information that the plan or project will have significant effects on the site concerned". Whether a breach of article 6(3) is alleged in infraction proceedings before the ECJ by the European Commission (see Commission of the European Communities v Italian Republic (Case C-179/06) [2007] ECR I-8131 , para 39), or in domestic proceedings before the courts in member states, a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered.
>
> 38 In the present case there was no such evidence prior to confirmation. It simply did not occur to anyone, including the claimants, that there was a risk to the SPA which required an assessment under article 6(3). Nor was there such evidence after confirmation. The question was not whether there might be physical effects on Easton Broad if the claimants' sea defences to the south were not maintained, but whether such physical effects were "likely to undermine the conservation objectives" of the SPA: see the Waddenzee case, paras 47 and 48, which must be read together with the approach to likelihood in paras 43 and 44. Professor Vincent very properly disclaimed any expertise in nature conservation. It follows that, even if the notification/confirmation of the SSSI was a plan or project for the purposes of article 6(3), there was no breach of that article."

[66] At no stage prior to the Permission did the applicant put forward "credible evidence that there was a real, rather than a hypothetical, risk which should have been considered". As the Notice party observed no evidence was provided by any party to the NIEA or the Respondent setting out a case that the three subsequent permissions might have made a difference to the NIEA's earlier conclusion that the

impugned development would not have a likely significant effect on the SPA. Furthermore, at the time of Mr Goodwin's 1st affidavit no specific potential in-combination effects had occurred to him by that stage. His 2nd affidavit makes a number of criticisms none of which were put to the decision-maker or formed the basis of any objection. If there was any substance to the criticisms in public law terms, which in my view there is not, they could and ordinarily should have been made prior to the grant of permission.

[67] Mr Goodwin's attempt to raise at this late stage issues about the capacity of Newry Waste Water Treatment Works ("WWTW") is similarly misguided and is another attempt to argue the merits of the case rather than the lawfulness of the decision. This is also an entirely new point which did not feature in the Order 53 Statement nor did it feature in the original affidavits. Moreover Mr Goodwin failed to mention that Northern Ireland Water, the statutory undertaker responsible for the WWTW did not object to the application. Even if the WWTW were to reach capacity at some point in the future NIW would be obliged to provide additional capacity pursuant to their statutory duties and would have permitted development powers to do so. It also ignores the fact that Northern Ireland Water Limited did not object to the proposal.

[68] I hold that the screening ToLS carried out in this instance and relied upon by the Department meets the requirements of reg43.

[69] Further, even if an error could be established, I agree with the Respondent that any issue arising has been resolved for the reasons set out by Ms Reeve with regard to the 3 subsequent permissions. The Respondent submitted correctly that the position here is similar to that in the HS2 litigation in England, where Ouseley J in R (Buckinghamshire County Council and others) v Secretary of State for Transport [2013] EWHC 481 (Admin) (a point not pursued on appeal to the Court of Appeal or Supreme Court) considered whether there had been adequate Habitats screening for the DNS (contended to be a "plan" for these purposes). Ouseley J held at [234] that Natural England's subsequent confirmation of its position justified the refusal of relief even if there had been a prior deficiency in screening:

> "234. Even if Mr Elvin were right that the DNS did constitute a plan, and an appropriate assessment had been required as a result of the screening process, I would refuse relief in the exercise of my discretion. I regard it as obvious that the Natural England letters show that the test in the Dutch cockle-pickers case has been satisfied in relation to the SWLW SPA. Quashing the decision on that ground would produce no different a result on the absence of likely significant effects, even if the public have not been consulted on the letters."

[70] Since no doubt remains about the lack of any significant effects caused by the impugned development alone or in-combination with any other plans or projects no

good purpose would be served in the circumstances by quashing the Permission.

Ground 2: failure to comply with the EIA Regulations

[71] The applicant contended that the Respondent acted unlawfully and in breach of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 (as amended) ("the EIA Regulations") by failing to assess the cumulative effects of the proposals. Reg 4(1) of the EIA Regulations prohibits the grant of planning permission for EIA development without consideration of environmental information. By Regulation 2(2) and Part 1 of Schedule 4, environmental information includes the "environmental statement," which means a statement that includes "a description of the likely significant effects of the development on the environment, which should cover the direct effects and any…cumulative… effects". It was submitted that the Respondent erred in granting the impugned Permission in reliance upon an environmental statement which failed to assess the potential effect of the proposed development in cumulation with other development. The ecological assessment within the addendum to the environmental statement acknowledged that the application site is ecologically connected with the Carlingford Lough SPA. It stated that that proposal had the potential to mobilise large quantities of sediment within the Newry River during the construction phase, with associated effects on the SPA, but that these could be mitigated by appropriate construction methods. However, the applicant asserted that the assessment did not consider the potential cumulative effects on the Newry River arising from other permitted developments in the vicinity of the River, including those identified above. The Respondent it is argued erred by failing to base its decision on sufficient information or inquiry about whether the proposals would be likely to have significant cumulative environmental effects, including the effects of such other permitted developments in the vicinity of the River.

[72] This ground restates ground 1 but in the context of the EIA regulations. It is in essence the same point and must be rejected for the same reasons.

[73] Compliance with EIA requirements does not require perfection: see R (Blewett) v Derbyshire County Council [2004] Env LR 29 at [32]-[42].

[74] Mr Stinson addresses the information the Respondent had regard to in reaching its decision in this regard. In particular, he confirms that in reaching its decision the Department had the benefit of the Environmental Statement, the comments of NIEA Natural Environment Division and Water Management Unit. The Department was and is content that it had sufficient environmental information before it in making its decision.

[75] Ms Reeve addresses the EIA issues from the perspective of NIEA and confirmed that cumulative as well as in-combination effects were considered and that NIEA remains satisfied that there will be no in-combination or cumulative adverse effects from the impugned permission on the Carlingford Lough SPA.

[76] Further, it should be noted that the EIA regime specifically provides for consultation of the public on the ES (see Article 6 of the EIA Directive and

Regulation 16 of the EIA Regulations) and the taking into account of the public's consultation responses by the decision-maker prior to a decision being taken (see Article 8 of the EIA Directive and Regulation 4(2) of the EIA Regulations taken together with the definition of *"environmental information"* in Regulation 2(2)); and there is express power conferred upon the decision-maker to require further environmental information from the developer if the consultation responses persuade him the ES is insufficient (see Regulation 18 of the EIA Regulations). The consultation process for EIA Development is thus designed by statute to enable the public to inform the decision-maker of all points which they consider relevant prior to the grant of permission so that the decision-maker can then take them into account prior to reaching a decision. It would frustrate that purpose if a member of the public could come to Court after the event and seek the quashing of a planning permission for EIA Development based upon points of which he did not inform the decision-maker during the statutory consultation process. This is precisely what the Applicant seeks to do in the present case.

Ground 4: Failure to conduct adequate inquiry into retail impact on Newry city centre

[77] The applicant submitted that the Respondent failed to grapple properly with the question of the impact that the proposals would have on the city centre. PPS5 includes at para 39 a requirement that proposed development "is unlikely to have an adverse impact on the vitality and viability of an existing centre or undermine its convenience or comparison shopping function". When considering the proposals in May 2010, Respondent officers concluded that the proposed food store on its own would cause an unacceptable 33% impact on the turnover of convenience stores with the city centre, based on turnover levels assessed as at a date of 2012. When considering the proposals in March 2011, officers concluded that when account was taken of the permission for a food store on land at Downshire Road outside the town centre, the cumulative impact of the proposals would increase to an unacceptable 54%. When considering the proposals in May 2014, following the construction of the Downshire Road food store, officers properly treated the Downshire Road as part of the existing retail provision within the relevant catchment area, as opposed to a scheme which would form part of a cumulative impact assessment. However, the applicant contended that the conclusion that the proposals would have a 14% impact on the city centre failed to consider whether the assumed turnovers of existing stores within the city centre were realistic taking account of (i) the implementation of the permission for the food store at Downshire Road, in particular when compared with the turnover levels which were previously assumed without that food store having been built and (ii) the level of available expenditure within the identified catchment area.

[78] Para 39 of PPS5 states that "Major proposals for comparison shopping or mixed retailing will only be permitted in out-of centre locations where the Department is satisfied that suitable town centre sites are not available and where the development satisfies all the following criteria: … is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience

or comparison shopping function; …".

[79] The Department in accordance with its practice, undertook its own retail impact assessment ("RIA") to determine whether the Development was likely to have an adverse impact on the vitality and viability of existing centres or undermine its convenience or comparison shopping function. There is no policy/legislative requirement to undertake a RIA or any guidance as to how an assessment should be undertaken.

[80] Mr Stinson avers that the purpose of undertaking the RIA is "to establish an understanding of the trading patterns within a defined catchment area and the likely level of impact upon those existing centres/stores as the result of introducing a major retail proposal to the defined area". The policy test provided by PPS5 para 39 criterion 3 is whether a new development "is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping function". The retail impact exercise was not a capacity test to determine whether there is need for additional floor space within the catchment area. It is not a capacity test, which would consider the link between the existing available expenditure within a catchment and the turnover of the existing stores within that catchment to determine whether a defined catchment has the ability to support a new development. The purpose of the RIA was to assess how much trade would be diverted from the existing stores in the city centre in order to assist the Respondent in determining whether the impact would adversely affect the city centre's vitality and viability or its shopping function.

[81] The RIA assessment methodology is underpinned by assumptions relating to the turnover of the proposed development and the turnover of existing centre/stores and, by taking account of a range of factors, the Respondent estimates the trade that the proposed development will divert from inside/outside the defined catchment area and from the existing centre/stores. It is an aid to decision-making within the wider planning policy tests within PPS5 but is not an exact science. The RIA provides estimates of potential impacts which may then be taken into account and balanced with other material planning considerations.

[82] I accept the Respondents submission that the key question is whether the Retail Impact Assessment relied upon by the Respondent is adequate. There are a variety of methodologies that can be employed to assess retail impact.

[83] I also accept that it was not necessary that the Respondent adopt any other methodology provided that the methodology adopted was a reasonable one. Philip Stinson describes the methodology applied by the Respondent the principal stages of which were summarised in the Respondent's skeleton as follows:

(i) Selection of an appropriate base and design year on which to make the assessment. The base year is generally the year the application is being assessed and the design year normally follows 3 years from that. This is to allow construction of the development and for it to establish a normal trading pattern after opening.

(ii) Determining a catchment for the proposed development broken down into 0-5 minute drive time isochrones of the area where the proposed store is likely to influence. The size of the catchment will be influenced by the nature of the development, the geographical location and proximity to exiting retail offers.

(iii) Calculating the population within the defined catchment based on the latest Census information produced by Northern Ireland Statistics and Research Agency (NISRA) which would then be projected forward to the base year and the design year from the date of the most recent Census. Projection figures are again provided by NISRA.

(iv) Calculating the total available expenditure within the catchment, using published sources to determine expenditure per capita/head which will again be projected forward to the base year and the design year. This incorporates an allowance for special forms of trading like internet shopping.

(v) The turnover of the proposed development is estimated by multiplying its net retail floor space by a sales density/turnover figure that is derived from published sources and making a judgement on the likely level of trade the new store will achieve. This is generally based on calculating an average between similar stores to that which is proposed and is based on the turnovers published at the time of the Department's assessment.

(vi) Estimating the turnover of the existing centres/stores in the catchment at the base and design years using the turnovers of the centres/stores are estimated using published sources. The Department adopts a source that provides the average sales density/turnover of companies within the United Kingdom, which is published on an annual basis. Factors such as observational site visits to the stores (to assess product offer, pricing, busyness, offers/deals) can help determine the attractiveness of the store and assist in finalising an estimate on the turnover of the store and determine whether it is likely to be trading above, below or at, the company average. If there is no turnover within the published source, the Department will then use an average figure from comparable retailers.

(vii) Estimate the proportion of trade the proposed development will draw from within the defined catchment and outside the defined catchment and estimate how much of the trade will be diverted from the existing centres/stores to the proposed development.

(viii) Calculate the diverted trade as a percentage of each competing centre/stores turnover (level of impact).

(ix) Where there are committed out of centre retail developments within the catchment of the proposal or overlapping catchments then cumulative retail impact of these will be considered in conjunction with the proposed development.

[84] The results of this assessment can then be used to consider the potential

impact of a development (PPS5 para39, criterion 3).

[85] The Respondent's RIA Retail is summarised in the Final DMR in the sections beginning "Retail Impact of the Proposal" and including in particular the sections "Is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping function", "Trade Diversion and Retail Impact (Convenience Goods)" and "Trade Diversion and Retail Impact (Comparison Goods)", read together with the Retail Impact Tables at Appendix 6 to the DMR.

[86] In considering vitality and viability it is stated that Newry is a main hub and is the South Eastern City gateway, strategically located on the Eastern seaboard corridor Belfast–Dublin. The strong presence of national and multi-national multiples with regard to both convenience and comparison goods is noted. Catchment Area, Population and Available Expenditure, Proposal Floor space and Turnover and Existing Retail Provision are all addressed.

[87] In terms of convenience retail impact the DMR set out from the outset that "the majority of trade will be drawn from Newry City Centre and provision located outside the city centre attracting those who already carry out their main food shopping in Newry." Trade draw from the Republic of Ireland was noted and the individual stores from which it was anticipated the majority of trade would be drawn were identified. It was estimated that just over 48% of the proposal turnover would be diverted from stores within Newry City Centre and a further 37.7% being drawn from the Newry remainder, resulting in a retail impact of 14% upon the City Centre. The cumulative effect of Tesco Bridgewater Retail Park was also considered.

[88] In terms of comparison good shopping the analysis concluded that the estimated retail impacts of the trade diverted from existing comparison retail provision to the proposal would not be detrimental.

[89] A number of other matters are then addressed, including the facts that Newry City Centre convenience retailing was not underpinned by one main individual retailer and that the vast majority of its main food convenience retailers were located within the city centre, before the final remarks on retail impact conclude:

> "The Department estimate a convenience retail impact of 14% on Newry City Centre with the cumulative convenience retail impact similar. This is beyond the margins of what would normally be considered acceptable by the Department."

[90] Mr Stinson in his affidavit sets out various matters related to the assessment carried out in this case from para 86 including:

(i) The use of site visits "to understand the likely level of turnover within the key city centre stores" and the conclusion "that it was appropriate to apply company averages for the city centre stores as an appropriate base for the purposes of this assessment".

(ii) The effect of use of the published source on turnovers in the RIA in comparison to those assumed in the earlier assessment work.

(iii) Trade draw from outside the catchment including the Republic of Ireland.

(iv) Different treatment of Tesco Downshire Road in the updated RIA when it had by then opened and settled into a settled trading pattern.

(v) Although 14% was considered "to be beyond the margins of what would normally be considered acceptable" having regard to the fact that "Newry City Centre wasn't underpinned by one main convenience retailer and had the benefit of having the majority of its main convenience retailers, including nationals and multi-nationals operating in its City Centre" "the Department took the view that this added strength to the City Centre and made it more capable of withstanding competition and marking it out as a destination that was likely to continue to function without significant harm to/undermining its convenience shopping function".

[91] The Respondent correctly submitted that the fact that the Applicant might suggest or promote an alternative methodology or refinements to the methodology applied by the Respondent is neither here nor there. The question for this court is whether the Respondent has acted in a *Wednesbury* unreasonable fashion in adopting the methodology that it did. As the Respondent put it there is scope for legitimate division of expert opinion in this regard.

[92] In carrying out the RIA I accept that a reasonable methodology was applied and a rational assessment made. The applicant has not established that the high threshold of *Wednesbury* unreasonableness has been crossed. Appropriate turnover levels were used in circumstances in which the Department did not have access to actual turnover figures for individual stores.

[93] I accept that an appropriate methodology was used, a proper assessment was undertaken and retail impact was properly considered in the balance in making the impugned decision. In my view the Respondent through the vehicle of the RIA properly undertook an assessment of trade diversion using appropriate assumptions as to turnover of the proposed and existing stores concluding that there would be an impact of 14%, accepted that such a diversion would not normally be acceptable. The Respondent then considered a number of additional factors and as a matter of planning judgement arrived at the conclusion that the development would not have an adverse impact on the on the vitality and vitality of the city centre or undermine its shopping function.

[94] The challenge to the Department's assessment is in reality a thinly disguised impermissible merits challenge to the assessment undertaken by the decision maker. This ground of challenge is also dismissed.

Ground 5: Irrational approach to consideration of economic benefits

[95] The applicant contended that the Respondent acted irrationally in giving determinative weight to the claimed economic benefits. The developer provided an

economic impact assessment in support of the application which purported to set out the job creation held in prospect by the proposals, along with the wider contributions that they would make to the local economy. Economics Branch advised on 22 February 2010 that the claimed benefits "do not appear to be location specific"; that they "would not be at all sure regarding the robustness of the overall figures" relating to net employment; that "a lot of the wider economic and social benefits quoted are aspirational in nature and the [economic impact assessment] recognises that these may not come about"; and that the analysis did not necessarily support the conclusion that the development would not represent a threat to the viability of retailers in the city centre. The economic impact assessment was supplemented by an addendum in January 2012. Economics Branch considered the said addendum and advised that their earlier comments remained applicable. The final Development Management Report of May 2014 referred to the comments of Economics Branch in an appendix which summarised consultation responses and did not the applicant submitted address the concerns which had been raised. The applicant contended that in any event in circumstances when it had been accepted that the impacts on the city centre were beyond what would normally be considered acceptable, and when it was acknowledged that there was a viable alternative site for at least the food store element of the proposals, it was unreasonable to attach significant weight to the claimed economic benefits given the concerns expressed by Economics Branch. Further or alternatively, it was irrational to conclude that the economic benefits outweighed the retail disadvantages of the proposals when the Respondent had not considered the relative economic benefits of locating the food store on the alternative viable site or the relationship between the claimed net economic impact of the food store in the economic impact assessment and the trade diversions which were assumed by the retail impact assessment.

[96] The Economic Benefits are addressed in the DMR in the section headed "Economic Considerations". They are summarised at section 5 of the DMR as follows:

> "The development is expected to provide economic benefits both in construction industry and to the local population creating in the region of 400 full time jobs once operational and with 273 FT jobs of these jobs attributed to the food store. Both of these figures would be reduced, taking account of displacement, to 275 and 165 jobs respectively. During the construction phase it is estimated that the project will create a total of 358 full time equivalent jobs of these of 275 from the Newry area."

[97] Mr Stinson noted at para 99 of his affidavit:

> "The Department did not conduct a forensic examination of the purported economic benefits. Rather it adopted a strategic approach in considering the potential for job creation with this application on

> this particular site. The context for this is set out in section 3 of the DMR (p. 3 & 4). The key points of the planning applicant's Economic Assessments are included in the DMR under 'economic considerations' further along in section 3 of the DMR (p21-24). The Economics Branch and Invest NI comments are summarised in Appendix 5 of the DMR. The summary of the Economics Branch comments identifies the potential shortcomings in the reports submitted by the applicant. Invest NI had no objection to the development in principle and welcomed the inclusion of a significant element of industrial provision and the potential for several of the other proposed uses to generate employment for the city."

[98] The Applicant argues that the Respondent has acted irrationally in its consideration of the economic benefits of the proposal, having regard in particular to the comments of Economics Branch dated 22 February 2010. The Applicant further challenges the weight attached to the economic benefits, and the overall balancing exercise carried out. Alleged failures to consider the relative economic benefits of locating the food store on an alternative site and the relationship between the net economic impact of the food store in the economic impact assessment and the assumed trade diversions in the RTS.

[99] It is common case that the comments of Economics Branch were appended to the DMR of May 2014. The said comments were taken into account and are set out in Appendix 5.

[100] Furthermore as Mr Stinson further deposes:

> "The Department does not consider that it was necessary to specifically address the comments of Economics Branch. These had been documented in the DMR. The Department had to be balance the advice of Economics Branch with the views of Invest NI and the information provided by the applicant in arriving at its conclusion."

[101] The potential alternative site was also properly considered in the DMR (and is addressed at para 104 of Mr Stinson's affidavit):

> "As outlined above the Department had no evidence to suggest that the Greenbank Development would not go ahead. Whilst this was identified in the DMR as a potential alternative site, determining weight was not given to this factor and the job creation potential of that site would remain, particularly as it had permission granted for much larger

development with a diverse range of uses."

[102] The conclusion in the DMR expressed the view that "on balance the limited potential retail impact on Newry City Centre, the potential viable alternative site, the loss of open space and the limited change to the landscape character, and the shortfall in parking provision, is outweighed by the potential economic benefits of the development and the proposed measures to mitigate and enhance the landscape and heritage value of the overall site (to be secured through appropriate conditions)."

[103] The conclusion went on to recommend that "In order to realise the economic benefit of the overall development appropriate phasing conditions should be considered to secure delivery of a proportion of the industrial elements."

[104] I accept that this was on any showing a decision on the merits for the decision-maker and the weight to be attached to such benefits is primarily a matter for the decision maker.

[105] As the parties acknowledge it is well-established that a challenge of irrationality to a planning judgment, and the weight to be attached to a specific factor, is a very high hurdle to overcome. See eg Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 W L R 759 at 780 H per Lord Hoffman.

[106] I accept the respondents primary submission that relevant matters have been taken into account. The weight to be attached to the evidence and the balancing of relevant considerations are matters properly falling to the Respondent to determine, challengeable only on *Wednesbury* grounds. The Department's balancing of the relevant factors and the conclusions are unimpeachable on *Wednesbury* grounds.

Ground 6: Failure properly to advertise proposals pursuant to the Planning (NI) Order 1991

[107] The applicant submitted that the Respondent failed to adhere to the requirements of the 1991 Order by failing to refer to the proposed bridge over the River Newry when advertising the application. The plans accompanying the application show a bridge over the river which is intended to connect the proposed light industrial units on the north-eastern side of the river with the remainder of the site, including the food store and the main egress from the site. Art1(1) of the 1991 Order provides that where an application for planning permission is made to the Respondent, the Respondent shall publish notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated. The purpose of this provision is to ensure that people living in the locality are informed of the substance of what is proposed; and a proper notice is one that brings home to the mind of a reasonably intelligent and careful reader the nature of any building or other operations (or any material change of use) for which permission is sought. The applicant contended that the advertisements issued by the Respondent failed to include reference to the bridge and thereby failed to give proper notice of the proposed development.

[108] Art 21 of the 1991 Order stipulates:

> "Publication of notices of applications
>
> 21.- (1) Subject to paragraph (2), where an application for planning permission is made to the Department, the Department—
>
> (a) shall publish notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated; and
>
> (b) shall, where it maintains a website for the purpose of advertisement of applications, publish the notice on that website; and
>
> (c) shall not determine the application before the expiration of 14 days from the date on which the notice is first published in a newspaper in pursuance of sub-paragraph (a) or is first published on the website, whichever is the later."

[109] Reg 12 of the EIA Regulations provides:

> "Publicity where an environmental statement is submitted
>
> 12. Where an environmental statement is submitted, the developer shall make it available to the public, and the Department shall, when it receives the environmental statement-
>
> (a) publish notice of the application for planning permission or subsequent application by local advertisement, allowing the public a period of 4 weeks from the date on which the notice is first published, in which to make representations;
>
> (b) state in the notice that—
>
> (i) the application for planning permission or subsequent application is accompanied by an environmental statement; and,
>
> (ii) in the case of a subsequent application, that a copy of the planning permission and supporting documents for the development in respect of which the application has been made may be inspected by members of the public at all reasonable hours at the relevant office of the Department;
>
> (c) give in the notice, a postal address (within the locality in which the land proposed to be developed

> is situated) at which copies of the environmental statement may be obtained from the developer, so long as stocks last, and if a charge is to be made for a copy, state the amount of the charge; and
>
> (d) where it is aware of any particular person who is or is likely to be affected by, or has an interest in, the application for planning permission or subsequent application, and who is unlikely to become aware of it by means of a local advertisement, send a notice to such person containing the details set out in paragraphs (a)–(c) and the address of the relevant office of the Department."

[110] The Applicant relies on the comments of Murray J in the case of Morelli v DOE (NI) [1976] NI 159. In that case the advertisement was found to be defective because it "made no reference whatever to an important part of the development for which permission was sought in the First Application viz. the change of use from a café to an amusement arcade." (Morelli at para19.)

[111] In that case an application for "Structural alterations to existing café to amusement arcade" had in fact been advertised as "Structural alterations to Existing Dwelling" (Morelli, paras2 and 3). This was plainly misleading on the face of it and when a subsequent application was advertised properly referencing "Change of use from restaurant to Amusement Area" it "produced a crop of objections and adverse comments from members of the public" (Morelli, para10).

[112] In McHenry's Application [2007] NIQB 22 the attention of the Court was drawn inter alia to Morelli and to the later case of Thallon v DOE (NI) [1982] NI 26. In considering the question of advertisement on that application for leave Gillen J quoted Thallon with approval:

> "(7) On the substantive issue as to whether or not the applicant has an arguable case, I consider that the gravamen of the legal issue in this case is captured by Hutton J (as he then was) in Thallon's case where, in the context of the similarly worded Planning (NI) Order 1972, and dealing with the misleading advertisement the Judge said at page 26:
>
> > "The purpose of a notice published pursuant to Article 15(a) (of the 1972 Order) is to give interested members of the public proper notice of the planning application, and this purpose is not carried out if the notice is seriously misleading as to the nature of the development proposed, whether or not the planning application itself contains the inaccuracy which is published in the notes. I therefore hold that

> because the notice which the Department purported to publish pursuant to Article 15(a) was seriously misleading, the planning permission of 1977 was invalid. I have held the notice in this case to be seriously misleading; I consider that some minor inaccuracy in a notice which does not mislead the public would not render the notice a nullity and the subsequent permission invalid …".
>
> (8) The issue in this case therefore to be argued is whether the error in the map was seriously misleading and would frustrate the purpose of the contents of Article 21 or whether it could be characterised as a minor inaccuracy which did not mislead the public. …"

[113] In Doyle's (Ellen) Application [2014] NIQB 82 this court held at [10] that :

> "The clear legislative purpose underpinning Art 21 and Art 32(6) of the 1991 Order is that following the prescribed public advertisement any member of the public with an interest in the application/appeal has been given a reasonable opportunity to become aware of it and make representations if they so wish."

[114] I accept that purpose was met here. I also accept the Respondents contention that it is not necessary to meet that purpose that the advertisement should refer in detail to every element of a proposal, including all of its ancillary elements.

[115] The Department advertised the application upon receipt, in accordance with the publicity requirements of EIA Regulations 1999. This set out clearly the primary description of the development. When an amendment was made which involved not only a significant reduction to some elements of the overall development but also an increase in the number of light industrial units, that was also advertised in accordance with the legislative requirements, highlighting that an amended scheme had been received and that 70 industrial units were proposed.

[116] In each instance the description identified the primary elements and land uses for which planning permission was being sought. The Applicant focuses on the fact that the advertisements made no reference to the bridge in the relevant advertisements. However, the bridge is not a primary element of the development such as to require explicit reference in advertisement. The advertisement was accurate and sufficient to cause those living in the locality or with a potential interest to be aware of the substance of the application following its advertisement.

[117] The advertisement was not misleading at all, still less was it seriously misleading. It did not frustrate the purpose of Article 21. In fact it was sufficient to

the extent that various parties who wished to object to the application became aware of it and made objections.

[118] In any event per Morelli the advertisement in this case did ensure that people were informed of the substance of what was proposed and did bring home to an intelligent and careful reader the nature of the works for which permission was sought.

[119] In agreement with the submissions of the Notice Party I observe that Art 21(1) does not require the advertisement to specify every individual element of the development which the application proposes. The provision simply refers to notice of "the application" being given. In the case of large-scale proposals which involve numerous individual sub-components, I agree that it would be unworkable for every individual sub-component to be listed in the advertisement. It is consistent with the statutory purpose underpinning Art 21 for the advertisement to set out the primary elements of the proposed development since the reader will be able to obtain the full details of the proposal and the predicted impacts by checking the Respondents website or viewing the planning file. This is what happened in the present case and no conceivable prejudice arises to the applicant. In truth this is a completely threadbare ground and I reject this ground of challenge.

Ground 7: Failure to refer the application to the Executive Committee of the Assembly

[120] The applicant submitted that the Respondent erred in failing to refer the application as a significant or controversial matter to the Executive Committee. Section 20(4) of the Northern Ireland Act 1998 provides that the Executive Committee of the Assembly shall have the function of discussing and agreeing upon "significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Belfast Agreement". Para2.4 of the Ministerial Code provides that any matter which is significant or controversial (and is clearly outside the scope of the said agreed programme) shall be brought to the attention of the Executive Committee by the responsible minister to be considered by the Committee. Para20 of Strand One relates to a programme incorporating an agreed budget linked to policies and programmes and is not applicable. "The proposals are significant: they involve a major scale of development, including a substantial food store, 70 light industrial units and 14 new dwellings, along with a new bridge across the River Newry. The Article 31 designation in this case confirmed that the proposals would affect the entire neighbourhood. The proposals are controversial, as demonstrated by the high level of objections to them, including two petitions with 688 and 76 signatures respectively and 86 letters of objection; the lodging of objections by the Applicant, the Northern Ireland Independent Retail Trade Association and the operators of Buttercrane Shopping Centre, the Quays Shopping Centre, the operators of Greenbank Industrial Estate, Supervalu and Fiveways local centre; the location of the proposals outside the city centre, which is protected in retail planning policy terms; the acceptance, through the Article 31 designation, that the proposals would involve a substantial breach of the development plan for the area; the higher than usually acceptable retail impacts on

that protected centre; the availability of a viable alternative site within the city centre; the identified risk of loss of investment in the city centre in the event permission was granted."

[121] As we have just seen from the above summary of the applicants submissions under this heading the applicant seeks to characterise the determination of this application as a matter which is "significant or controversial" within the terms of s20(4) of the Northern Ireland Act 1998 and paragraph 2.4 of the Ministerial Code.

[122] Section 20 of the Northern Ireland Act 1998 ("the 1998 Act") provides:

> "(1) There shall be an Executive Committee of each Assembly consisting of the First Minister, the deputy First Minister and the Northern Ireland Ministers.
>
> (2) The First Minister and the deputy First Minister shall be chairmen of the Committee.
>
> (3) The Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement.
>
> (4) The Committee shall also have the function of discussing and agreeing upon—
>
> > (a) significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of that Agreement;
> >
> > (b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters that should be considered by the Executive Committee."

[123] Para 2.4 of the Ministerial Code provides, where relevant:

> "Any matter which:
> …
>
> (v) is significant or controversial and is clearly outside the scope of the agreed programme referred to in para. 20 of Strand One of the Belfast Agreement; [or]
>
> (vi) is significant or controversial and which has been determined by the First Minister and deputy First Minister acting jointly to be a matter that should be considered by the Executive Committee…
>
> shall be brought to the attention of the Executive Committee by the responsible Minister to be

considered by the Committee."

[124] Para 20 of Strand One of the Belfast Agreement states:

> "20. 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 Assembly Committees, on a cross-community basis."

[125] In submissions of 13 May 2014 and 29 August 2014 officials twice advised the Minister that there was "no need to consult with the Executive Committee".

[126] In terms of "significance", the Applicant relies on the scale of the food store, the overall development and the designation of the proposals under article 31 of the 1991 Order.

[127] I agree with the Respondent that the size of the store or the nature of the development confuses physical size and significance, and they are not significant in terms of the Northern Ireland Act. The fact that the application was designated as an Article 31 application, and the reasons for decision, do not point to that conclusion either. If the applicant's analysis were correct no Art 31 case could be determined by the Minister but everyone would have to go before the Assembly.

[128] As to whether the development is "controversial", the Applicant relies upon local petitions, the objections to the proposal and a submission that proposals located outside a city centre and the availability of an alternative site within the city centre also reflect controversy in and of themselves.

[129] Objections in the context of planning applications are not uncommon or controversial. Objections from multiple local retailers, objection letters and petitions in the context of commercial applications are not so uncommon either as to be considered controversial such that the Executive Committee of the Assembly should be discussing and agreeing upon them.

[130] The possibility of an application for a development outside the city centre when there is a potential alternative site within the city centre is a matter which is anticipated in policy terms. It is not controversial.

[131] As Morgan J held in Central Craigavon Limited's Application [2010] NIQB 73 (emphasis added):

> "[26] The question, therefore, is whether the adoption of draft PPS 5 by the Department gave rise to an obligation under the Ministerial Code to refer the matter to the Executive for decision. The first basis upon which this was argued was that the decision was clearly significant and controversial. At this time there was no agreed programme for

> government and an issue arose as to whether it could be said that the decision to issue the policy was clearly outside the agreed programme. The statutory scheme deprives a Minister of the executive authority which they would otherwise be entitled to exercise. In those circumstances any ambiguity ought to favour giving validity to the Ministerial decision. Not every significant or controversial decision was automatically to be referred to the Executive. I do not accept, therefore, that even if this decision was significant or controversial that it was within sub-paragraph 5 of paragraph 2.4 of the Code since it cannot be said that it was clearly outside any agreed programme. I am also inclined to the view that in any event the adoption of the policy was not of itself significant or controversial. This policy had been promulgated by DRD in July 2006 and had not apparently raised any interest at Executive level. When the letter from the two Ministers was sent to Executive colleagues there was no enquiry or suggestion of controversy. Whether or not something is controversial or significant in this context must refer to those matters which members of the Executive might believe to be so. The evidence does not indicate that this draft PPS raised any such concern."

[132] Although that decision was the subject of appeal (Central Craigavon Ltd's Application [2011] NICA 17) the Court of Appeal declined to consider the issue as the matter had by that stage become academic (paragraph 19).

[133] The Applicant's reliance on JR65's Application [2013] NIQB 101 is misconceived. The context of that case was wholly different from that of the present case. It was concerned with the lifetime ban on males who have had sex with other males donating blood. In JR 65 at para150 the court stated:

> "The issue at hand is both controversial (it has generated much publicity and public debate, and views on the issue are highly polarised) and cross-cutting (it is acknowledged in the SaBTO report that it touches on equality issues, it further deals with the implementation of EU Directives) and as such the Minister had no authority to act without bringing it to the attention of the Executive Committee (see section 28A(10) of the 1998 Act and the Ministerial Code set out above)."

[134] The applicant's reliance on that case serves to reveal the equally threadbare

nature of this ground and merely underlines the fact that this case is not properly considered significant or controversial such that it required referral to the Executive Committee of the Assembly.

[135] In any event the matter is not "clearly outside" the "agreed programme referred to in para 20 of Strand One of the Belfast Agreement."

[136] As the Respondent pointed out the current Programme for Government 2011-2015 published by the Northern Ireland Executive includes as part of "Priority 1: Growing a Sustainable Economy and Investing in the Future" the key commitment at page 32 that a certain percentage (60% in 2012/13, 75% in 2013/14 & 90% in 2014/15) of large scale investment planning decisions would be made within 6 months and that "applications with job creation potential" would be "given additional weight".

[137] I agree with the Respondent that given the job creation potential of the impugned application it is not reasonably arguable that the decision fell outside the agreed programme. Accordingly the grant of the permission was outside the material scope of s20(4)(a) of the 1998 Act. Furthermore the grant of permission was not within any category of decisions which the FM or DFM had determined to be matters that should be considered by the Executive Committee. Accordingly, the grant of permission was outside the material scope of s20(4)(b) of the 1998 Act. Thus it follows that even if, contrary to my earlier conclusion, the grant of permission was "significant or controversial" there was no obligation to refer the matter to the Executive Committee.

Conclusion

[138] For the above reasons none of the grounds of challenge have been established and the application must be dismissed. The Respondent and the Notice Party raised the issue of delay, lack of promptitude and prejudice in respect of the non EU grounds. For the reasons set out in the Notice Party's skeleton argument I accept that there has been culpable delay and that no good reason has been offered to justify any extension of time.