

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF THE FORESHORE ACT 1933, AS AMENDED

BETWEEN

MÁIRE UÍ MHUIRNÍN

APPLICANT

AND

MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT

RESPONDENT

AND

THE MARINE INSTITUTE

NOTICE PARTY

AND

SUSTAINABLE ENERGY AUTHORITY OF IRELAND (BY ORDER)

NOTICE PARTY

JUDGMENT of Mr. Justice Quinn delivered on the 5th day of December, 2019

1. On 15th December, 2017 the Respondent published notice that he had determined (“the Determination”) to grant a Foreshore Lease to the First Notice Party, the Marine Institute, pursuant to s.2 of the Foreshore Act 1933 for the installation of a ¼ scale renewable energy wind wave and tidal test facility, at a location 2.8 km from the pier at Spiddal, Co. Galway, at a point which is 1.3 km from the shore at its nearest point east of Spiddal. The proposed facility is described as the Galway Bay Marine and Renewable Energy Test Site (“the Test Site”).
2. The Applicant lives at the sea shore near Spiddal. By order of Meenan J. made on 12 March, 2018, she was granted leave to apply for judicial review of the Determination to grant a Foreshore Lease on the grounds of alleged failure to comply, *inter alia*, with provisions of the Environmental Impact Assessment Directive (2011/92/EU) and the Habitats Directive (92/43/EEC)
3. Since 2006 there has operated at the same location a ¼ scale wave energy Test Site for prototype wave energy converters, a Foreshore Lease having been granted for this facility in 2006 by the then Department of Communications, Marine and Natural Resources. The site is operated by the Second Notice Party, Sustainable Energy Authority of Ireland, (“SEAI”), and the First Notice Party, the Marine Institute. It is described as the “Galway Bay ¼ Scale Wave Energy Test Site” or “The Original Test Site” and was for testing only wave energy devices.
4. The description “1/4 scale” refers to both the Test Site conditions which are gentler than those in which a commercial operation would function and to the devices to be tested which are a maximum of one quarter the size of a commercial sized device. The Test Site the subject of the Determination was for an upgrade of the original site which would allow for the testing for a wider range of marine renewable energy devices suitable for testing not only wave energy but also wind and tide devices.

5. The site is said to cover an area of 37 hectares in total, although the physical dimension of the station itself at its longest and widest points is 563m x 670m.
6. In April 2015 a telecommunications cable was installed between the original Test Site and a shore station via Spiddal pier. Its installation was sanctioned under a separate foreshore licence granted by the Respondent. This cable supplies power to the original Test Site and will allow data transfer for testing marine technology and renewable ocean energy devices. This is referred to as the Galway Bay Cable. Whilst electrical power is supplied to the site via this sub – sea cable, there will be no capacity to export power to the national grid from any device deployed at the site.

Grounds for this application

7. The principal grounds of this Application are as follows: -
 - (1) That the decision was contrary to the Environment Impact Assessment Directive 2011/92/EU (“the EIA Directive”). It is claimed that the Respondent failed to carry out adequate screening for environmental impact assessment in accordance with Annex III to the EIA Directive and/or failed to assess the accumulation of the proposed activity pursuant to the Foreshore Lease with other existing and/or approved and/or reasonably foreseeable projects.
 - (2) That the decision of the Respondent is contrary to Directive 92/43/EEC of 21 May, 1992, on the conservation of natural habitats and of wild fauna and flora, as amended (“The Habitats Directive”). It is alleged that the Respondent unlawfully assessed mitigation measures when carrying out Stage 1 screening for appropriate assessment contrary to Article 6(3) of the Habitats Directive and contrary to established case law of the Court of Justice of the European Union and the courts of the State.
 - (3) That the Respondent did not adequately consider and/or assess the best available scientific information, in particular, by a failure to assess submissions or observations made by the National Parks and Wildlife Service. (The Statement of Grounds referred also to a failure to assess submissions of Bird Watch Ireland and Inland Fisheries Ireland, but the submission as regards those two bodies was not pursued at the hearing).
 - (4) That the Respondent erred on the face of the record by reciting the test for Stage 2 Appropriate Assessment pursuant to the Habitats Directive when no Natura Impact Statement (“NIS”) had been submitted by the Notice Party. The Notice of Determination recorded a conclusion that the proposed development would not adversely affect the integrity of any European site, a conclusion which can only be made after an appropriate assessment had been undertaken.
8. In the Statement of Grounds, the Applicant had sought a declaration that the Respondent erred and acted in breach of the Foreshore Act 1933 in granting a Foreshore Lease to the

Notice Party without a Foreshore Site Investigation Licence having been granted to the Notice Party in advance. This matter was not pursued at the hearing.

9. In the Statement of Grounds, the Applicant had also sought a declaration that in discharging functions under the Act and determining applications for Foreshore Leases the principle of curial deference does not apply as the Respondent is not vested with special skills, competence or expertise in adjudicating applications for Foreshore Leases. The Order granting leave to apply for judicial review did not extend to this ground

The Notice Parties

10. The Second Named Notice Party, Sustainable Energy Authority of Ireland, ("the SEAI"), is a body established pursuant to s.4 of the Sustainable Energy Act 2002. Its functions are to promote and assist environmentally and economically sustainable production supply and use of energy, to promote and assist energy efficiency and renewable sources and to promote and assist research, development and demonstration of technologies connected with the development of environmentally and economically sustainable energy production. SEAI has overall responsibility for the Original Test Site and is intended to have overall responsibility for the expanded Test Site.
11. The Marine Institute was established under the Marine Institute Act 1991. It is a state agency responsible for marine research technology and innovation and the provision of scientific and technical advice to government to assist in the development of policy and to support sustainable development of marine resources.
12. The Marine Institute operates the Original Test Site under a service level agreement with SEAI. It is the applicant for and the grantee of the Foreshore Lease and it is intended that it would operate the Test Site.

The Application for Foreshore Lease

13. The application for the Foreshore Lease was submitted by the Marine Institute on 11 February, 2016. The application form itself is quite basic, but the completed form is supported by a series of reports made by the Marine Institute itself and by consultants retained by it.
14. On 6th April, 2016 a revised application was made with some modifications to the height of the proposed wind turbine blades.

Application Form

15. The form states that the purpose of the application is to allow for the upgrade of the Original Site infrastructure and the deployment of a wider range of renewable energy devices and novel marine sensors and technologies. No increase in the scale of the site was sought. The application allows for a maximum of three test devices at any given time, each subject to a maximum deployment duration of eighteen months. Those devices would include wave, tidal and floating wind devices. The Test Site is proposed to be structured into three berths to allow for up to three prototype devices to be deployed and tested at any one time, with only one floating wind device permitted at one time. It was said that there will be no construction activity undertaken above or below sea level.

16. Basic information is given concerning boating activity in the area, concerning noise levels, and in response to the question concerning visual impact, the following information is provided: -

"In clear viewing conditions, the proposed Galway Bay Marine and Renewable Energy Test Site will be a noticeable concentration of variant, but apparently associated, structures covering a small geometric section of Galway Bay. The structures may appear slightly ambiguous compared to vessels and structures that might be more familiar in the marine environment this far offshore.

Given that the proposed Galway Bay Marine and Renewable Energy Test Site does not represent significant bulk; visual impacts will result almost entirely from visual "intrusion" rather than visual "obstruction". The proposed structures may contribute a minor degree of visual clutter to the seaward view. Nonetheless, this is a living and working section of coastline that hosts an array of structures and land uses and it is not considered that the Galway Bay Marine and Renewable Energy Test Site conflicts with the character and values associated with the coastal vistas in this area.

Important ameliorating factors are the temporary nature of the installations for the devices and the fact that it will be uncommon for all of the structures to be in place at any one time. Overall, it is not considered that the proposed Galway Bay Marine and Renewable Energy Test Site will give rise to any significant impacts".

17. Reference is then made to the visual impact assessment accompanying the environmental report submitted with the application.

Financial details

18. It is said that the annual output will be zero and that the Test Site will not be connected to the national grid.
19. The intended capital cost of the venture is €1,000,000 and the source is government funding.
20. The principal reports accompanying the application were the following: -
- i. August 2015 – Environmental Screening Report – author: the Marine Institute.
 - ii. November 2015 – Environmental Screening Report Addendum 1 – author: the Marine Institute.
 - iii. November 2015 – Appropriate Assessment Stage 1 Screening Report – author: Aquafact International Services Limited, on behalf of Marine Institute.
 - iv. February 2016 – Environmental Report.
21. The Application Form requests details of any authorisation concerning the generation and supply of electricity. The response is that this is "not applicable – no construction activity

will be undertaken – no electricity will be supplied to the national grid”. It is said that there will be a maximum of three scaled prototype devices at any one time.

Other information

22. In its supporting reports the Marine Institute describes the new Test Site as an upgrade of the infrastructure and service offered to existing end users and others. It describes the proposed long-term developments at the site as follows: -

- An upgrade of cardinal marks to allow for safer navigation.
- Data buoys to provide wave measurements.
- Buoys for testing marine technologies and scientific sensors.
- A sea station which will provide power to and dissipate power from, ocean energy devices as well as provide data communications to shore.
- An acoustic array for monitoring underwater sound.
- Interlocking modular gravity bases.
- A variety of scientific sensors and instruments.
- Cables which will connect the instrument sensors and ocean energy devices.

23. The proposed upgrade of the site would enable periodic deployments of up to three individual devices for test and evaluation purposes for a maximum period of eighteen months. The devices will be broadly as follows:

- Surface ocean energy converters.
- Sub-surface ocean energy converters.
- Seabed ocean energy converters.
- Prototype floating wind turbines.
- Novel marine technologies and scientific sensors.

24. The site is structured into three berths designed to allow a maximum of three prototype ocean energy converters to be deployed and tested at any one time and a fourth berth dedicated to a cabled observatory and related projects. The reports contain detailed and graphic illustrated descriptions of the platform and of the types of devices intended to be tested.

Consultation Process

25. Following the submission of the application two consultation processes were undertaken, a public consultation process and a process of consultation with prescribed bodies.

26. In connection with the public consultation, notices were placed in national and regional press, and 555 responses were received.
27. The Minister also consulted with 20 prescribed bodies which included the following: -
- National Parks and Wildlife Service
 - The Environmental Protection Agency
 - The Sea Fisheries Protection Authority
 - The Marine Safety Office
 - The Commissioner of Irish Lights
 - Bord Iasca Mhara
 - Met Éireann
 - The Heritage Council
 - Geological Survey of Ireland
 - The Health and Safety Authority
 - The Commission for Energy Regulation
 - Inland Fisheries Ireland
 - Birdwatch Ireland
 - Galway County Council
 - Certain Government departments.
28. With the exception of the Heritage Council, submissions were received from all of the prescribed bodies. These included no objections in principle to the proposed development although a number of key issues were raised and considered.
29. Following the receipt of submissions, the Marine Institute produced a report in November 2016 summarising the submissions received and responding to them. In that report the Marine Institute identified 18 topics and 102 different issues associated with those topics. It addresses the submissions made under each of those topics and in respect of each of the 102 different issues. The 18 topics identified included the following: -
- Accuracy of information issues
 - Appropriate assessment issues
 - Conflict of interest issues

- Environmental impact assessment issues
- Galway Development Plan issues
- Grid connection issues
- Health concern issues
- Lease issues
- Location issues
- Noise issues
- Pollution precautionary principle
- Public consultation
- Tourism
- Visual impact
- Wildlife issues

Marine Licence Vetting Committee

30. The next stage in the process was the consideration of the application by the Marine Licence Vetting Committee (“the Committee”). The Committee is a multidisciplinary committee convened by the Respondent for the purpose of undertaking technical assessments on his behalf of applications made under the Foreshore Act 1993 and to make recommendations on the determination of such applications. Its role in relation to such applications is comparable to that of an Inspector in matters referred to An Bord Pleanála.
31. The Committee was chaired by a Mr. Richard Cronin, a senior adviser from the Water and Marine Advisory Unit at the Department of Housing, Planning, Community and Local Government. The Committee also comprised senior personnel from the Water and Marine Advisory Unit of the Respondent’s Department, the Environmental Planning Policy Section, the Marine Safety Directorate of the Department of Transport, Tourism and Sport, the Underwater Archaeology Unit at the Department of Arts, Heritage, Regional Rural and Gaeltacht Affairs, the Sea Fisheries Protection Authority, and Inland Fisheries Ireland.
32. On 6 July 2017, the Committee completed its report and stated as follows:

“This Test Site is not a commercial power generating venture and there will be no capacity to export power from any wave, tidal or floating wind energy device that might be deployed at the site ...

The Committee recommends that this lease should be granted subject to Site Specific Conditions in Appendix C, including the following restrictions applying to the proposed development:

- | | | |
|-----|------------------------------------|----------|
| (a) | Test device site area | 35 years |
| (b) | Test and Demonstration Devices | 10 years |
| (c) | Site Infrastructure with Test Site | 35 years |

...

Based on the information submitted, consultations and assessments undertaken, Site Specific Conditions, the Committee is satisfied that the proposed development works on the foreshore in its substance and scale and at this location are not likely to have significant negative effects on human health and safety, the marine environment, or designated Natura sites in the area".

33. The report of the Committee has three appendices as follows: -
- (i) An Environmental Impact Screening Statement Report dated 6 March 2017.
 - (ii) An "Appropriate Assessment Report" dated 15 March 2017.
 - (iii) Site specific conditions recommended.

The content and text of this Report and its Appendices are of central importance in the determination of these proceedings and I shall return to them in more detail.

34. The Committee referred also to the application documents considered by it comprising a total of 16 documents. These included the several reports which were submitted by the Marine Institute in support of and accompanying the application form itself, notably the following: -
- 1. Environmental Report (prepared by the Marine Institute (SEAI) and SmartBay (a firm of consultants retained by the Marine Institute), dated February 2016.
 - 2. Environmental Impact and Mitigation Desk Study for the Galway Bay Marine and Renewable Energy Test Site(prepared by Aquafact International Services consultants retained by the Marine Institute) dated October 2015.
 - 3. A Marine Environmental Appraisal of an Ocean Energy Test Site in inner Galway Bay (prepared by Aquafact International Services Limited) dated April 2010.
 - 4. An Appropriate Assessment ("AA") Stage 1 Screening Report (prepared by Aquafact International Services Limited) dated November 2015.
 - 5. An Environmental Screening Report dated August 2015 prepared by the Marine Institute.

6. An Environmental Screening Report Addendum 1 dated November 2015 prepared by the Marine Institute.

Departmental recommendation and Respondent's approval

35. On 1 August 2017, the Respondent signed an Approval of the application, on foot of a Recommendation dated 18 July 2017 and signed by Mr. Robert Hickey of the Marine Planning and Foreshore Section of the Department.

36. The Recommendation recorded that "*Having regard to: -*

- *The nature and scale of the development as described in the application and the supporting documents supplied by the Marine Institute.*
- *The submissions received from the prescribed bodies.*
- *The public consultation undertaken.*
- *The public submissions received*
- *The EIA screening performed.*
- *The AA screening performed.*
- *The report and recommendations of the MLVC.*
- *The conditions to be attached to the foreshore consent.*
- *The provisions of the Foreshore Acts 1993 to 2014.*
- *Government policy supporting research and development in the Ocean Energy sector."*

it is considered that: -

- (a) The proposed development on the foreshore would not have a significant negative impact on the marine environment; and
- (b) The proposal is in the public interest.

"Accordingly, it is recommended that a Foreshore Lease be granted to the Marine Institute subject to the conditions recommended by the MLVC, the specified financial terms, and the Marine Institute meeting all Conditions Precedent".

Notice of Determination

37. Following the approval decision and certain negotiations concerning the terms of the lease, the Notice of Determination issued on 15 December 2017. By that notice the Minister gave public notice that he had determined pursuant to s. 2 of the Foreshore Act 1933 to grant the Foreshore Lease to the Marine Institute. The Notice of Determination recites the "Main Reasons and Considerations" as follows: -

“The Minister has had regard to the following matters in determining the application for a Foreshore Lease:

- The nature and scale of the development as described in the application and in the supporting documents supplied by the Marine Institute.*
- The submissions received from the prescribed bodies.*
- The public consultation undertaken.*
- The public submissions received.*
- The EIA screening performed.*
- The AA screening performed.*
- The report and recommendations of the MLVC.*
- The conditions to be attached to the foreshore consent.*
- The provisions of the Foreshore Acts 1933 – 2014, and*
- Government policy supporting research and development in the Ocean Energy sector.*

“Having regard to the foregoing, and in particular having regard to the lease conditions attached to the Foreshore Lease, and having agreed with the recommendation of the MLVC, the Minister is satisfied: -

- i. That the proposed development on the foreshore would not have significant adverse impacts on human health and safety, nor on the marine environment.*
- ii. That the proposed development on the foreshore would not adversely affect the integrity of any European site. (emphasis added)*
- iii. That it is in the public interest to grant the Foreshore Lease having regard to the purpose of the foreshore works.*

“The following information is available on the website of Department of Housing, Planning and Local Government at [Dept. website link given].

- i. Notice of Determination.*
- ii. Approval of the Minister to Grant the Foreshore Lease.*
- iii. Foreshore Lease as executed between the parties, including conditions attached to the determination (which form part of the Foreshore Lease).*

- iv. *MLVC report.*
- v. *Information on the public participation process, including copies of all submissions received.*
- vi. *Submissions made by prescribed bodies.*
- vii. *EIA Screening Report.*
- viii. *Appropriate Assessment Screening Report.*
- ix. *Application for a Foreshore Lease together with supporting documents supplied by the Marine Institute.*

This material may also be inspected free of charge at the following office of the Department: -

Marine Planning and Foreshore Section,

Department of Housing, Planning and Local Government,

Newtown Road, Wexford".

- 38. The notice contains a standard statement referring to the availability of and rules for judicial review and to the time limit of three months for any such application.
- 39. In these proceedings much of the focus is on the terms of the Notice of Determination by the Respondent, the Report of the Committee and on the substantive reports submitted by the Marine Institute to accompany its application. Before turning to those in more detail, it is appropriate to summarise the legislative context and purpose for which those reports were submitted.

Environmental Impact Assessment Directive

- 40. EU Council Directive 2011/92/EU of 13 December 2011 establishes the framework for Member States to legislate on the assessment of the effects of certain projects on the environment.

- 41. Article 2(1) provides as follows: -

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

Article 4 provides as follows: -

- “1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10. [an environmental impact assessment, EIA]
2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:
 - (a) a case-by-case examination; or
 - (b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b)“.

42. Article 4(3) provides that when a case by case examination is carried out or thresholds or criteria are set for the purpose of Article 4(2), the criteria set out in Annex III shall be taken into account
43. Annex II lists the categories of projects in respect of which an EIA is required only where Member States so decide by reference to criteria set out in Annex III. They are listed under categories such as agriculture, silviculture and aquaculture, energy, metal production and processing, the mineral industry, chemical industry, food industry, textiles, leather, wood and paper industry, certain infrastructure projects not mentioned in Annex 1, tourism and leisure, and certain other projects.
44. Annex 1 describes the categories of projects in respect of which an environmental impact assessment is mandatory in all cases. It refers to such projects as crude oil refineries, thermal power stations, nuclear power installations, smelting of cast iron and steel, extraction and processing of asbestos, chemical installations, certain transport infrastructures, certain waste disposal installations, dams, pipelines, and a range of other industrial plants and installations.
45. In relation to the energy industry Annex II includes at 3(h) “installations for hydroelectric energy production” and at 3(i) “installations for the harnessing of wind power for energy production (wind farms)“.
46. The selection criteria in Annex III include characteristics of projects, location of projects and characteristics of the potential impact. Under the heading “Characteristics of projects“, Annex 3 stipulates that regard must be had to -
 - “(a) the size of the project;
 - (b) the cumulation with other projects; (emphasis added)
 - (c) the use of natural resource;

- (d) *the production of waste;*
- (e) *pollution and nuisances;*
- (f) *the risk of accidents having regard in particular to substances or technologies used”.*

Foreshore Act 1933 as Amended

47. Section 13 A(i)(a) of the Foreshore Act provides as follows: -

“The appropriate Minister shall as part of his consideration of a relevant application, in accordance with para. (b) ensure that before a decision on the application is given projects likely to have significant effects on the environment by virtue, inter alia, of their nature size or location, are made subject to an environmental impact assessment”.

48. Section 13A(1)(b)(1) provides: -

“An environmental impact assessment shall be carried out by the appropriate Minister in respect of a relevant application for consent, where the proposed development would be of a class specified”.

In describing the “class specified” the section continues by referring to Part 1 and 2 of Schedule 5 to the Planning and Development Regulations 2001, which broadly correspond to Annex I and Annex II to the Directive. In relation to projects falling within Part 2 of Schedule 5 to the Regulations of 2001, section 13 A(b)(ii) provides as follows: -

“An environmental impact assessment shall be carried out by the appropriate Minister in respect of a proposed development where such development

- i. Would be of a class specified in Part 2 of Schedule 5 of the Planning and Development Regulations 2001 but does not exceed the relevant quantity area or other limits specified in that Part, and*
- ii. The appropriate Minister determines that the proposed development would be likely to have significant effects on the environment.” (emphasis added)*

Is the Test Site in a category of projects to which the EIA Directive applies?

49. The Respondent submits that the Test Site falls nowhere within the description of the categories of projects referred to in Annex 1 or Annex 2 to the Directive, or in Part 1 or Part 2 of Schedule 5 to the Regulations of 2001. In relation to Part 2 of Schedule 5, projects listed at 3(h) and (i) are as follows: -

“(h) Installations for hydroelectric energy production with an output of 20 megawatts or more, or where the new or extended superficial area of water impounded would be 30 hectares or more, or where there would be a 30 per cent change in the maximum, minimum or mean flows in the main river channel.

(i) *Installations for the harnessing of wind power for energy production (wind farms) with more than 5 turbines or having a total output greater than 5 megawatts.*"

50. In relation to 3(h) above, the Respondent submits firstly that the environmental Screening Report submitted by the Marine Institute identifies that the Test Site is not intended for energy production and secondly, that although the site is described as a 37-hectare site, only 0.12% of that area will in fact be occupied by structures or would be "impounded" within the meaning of 3(h).
51. The Respondent submits that the reports show that as regards 3(i), the Test Site will not be used for energy production and will not be a "wind farm".
52. Determination of the Respondent's submission that the Test Site is not a project within the categories referred to in s. 3 of Schedule 5 relating to the energy industry, turns on the proper meaning of the words and phrases used in s. 3(h) and (i).
53. As regards 3(h), the first question is whether the proposed site can be described as an "*installation for hydroelectric energy production*". It seems to me that on a plain reading of the schedule to the Regulations, a site which is a facility only for the testing of devices for the use of wind, wave and tide in the production of energy, where those who are developing such devices will have the facility to bring and have their devices tested, in each case for a maximum of eighteen months with no energy output to the national grid, cannot be described as "*installations for energy production with an output*" or even "*energy production*" at all. The evidence from reports submitted with the application for the lease show that there will be no power output to the grid. Any connection to the grid will be to source such energy as may be required from the grid and will not facilitate any "output" to the grid or at all. Therefore, I accept the Respondent's submission that the Test Site is not in this category of project.
54. I also accept the Respondent's submission regarding Category 3(i), which refers to "*installations for the harnessing of wind power for energy production (wind farms) with more than 5 turbines or having a total output greater than 5 megawatts*". The proposed Test Site is clearly not a wind farm and is never intended to become a wind farm, regardless of the quantities of output.
55. The Respondent submits also that even if the project could be characterised within 3(h) or 3(i), the relevant threshold has not been met.
56. As regards 3(h), although the site is described as a 37-hectare site, it is said that the structures which will be installed only occupy 0.12% of the entire area and therefore it cannot be said that an area of water is impounded which is 30 hectares or more. Secondly, the application stipulates that the intended output of the proposed station will be "zero" and therefore below the threshold of 20 megawatts.
57. As regards 3(i), there will always be less than 5 turbines and an output of less than 5 megawatts.

58. I accept all of these submissions and I find therefore that the Committee did not err when noting that the Test Site is not within any of the categories of projects referred to in Annex I or Annex II of the EIA Directive. This conclusion disposes of the matter as regards the EIA Directive. However, the parties made submissions in relation to the question of whether a sub-threshold project should be subject to an EIA having regard to para. 15 of the Regulations of 2001 which extends the definition as follows: -

“Any project listed in this Part which does not exceed a quantity, area or other limit specified in this part in respect of the relevant class of development but which would be likely to have significant effects on the environment, having regard to the criteria set out in Schedule 7”.

59. Schedule 7 to the Regulations replicates Annex 3 to the Directive in referring to the criteria for determining whether a development would or would not be likely to have a significant effect on the environment. It refers to criteria in respect of characteristics of proposed development, location of proposed development and characteristics of potential impacts. Under the heading *“characteristics of proposed development”* it refers to: -

- “ the size of the proposed development,*
- *the cumulation with other proposed development. (emphasis added)*
- *the nature of any associated demolition works,*
- *the use of natural resources,*
- *the production of waste,*
- *pollution and nuisances,*
- *the risk of accidents, having regard to substances or technologies used”.*

60. The Respondent submits that if the project is to fall within the categories of projects mentioned in Annex II, or if Paragraph 15 of the Regulations is to be applied to *“sub-threshold”* projects the Marine Institute nonetheless submitted an Environmental Report in line with the EIA Directive and Regulations made thereunder, and that the Committee made an informed conclusion that it was not considered likely that there will be any significant negative effects on the environment, when examined in conjunction with any proposed on-shore or foreshore development. I shall return later to that submission.

Habitats Directive

61. Council Directive 92/43 EEC of 21 May, 1992, provides for the establishment of a coherent European ecological network of special areas of conservation known as Natura 2000. The Directive obliges Member States to contribute to the creation of Natura 2000 by designating relevant sites as special areas of conservation, taking account of the objectives of the Directive.

62. Article 6 requires that for special areas of conservation, Member States shall establish necessary conservation measures and that Member States take appropriate steps to avoid in special areas of conservation the deterioration of natural habitats and the habitats of species as well as disturbance of species for which the areas have been designated.

63. Article 6(3) provides that Member States and competent national authorities within Member States shall not agree to any plan or consent to any plan or production or project unless certain conditions are fulfilled. Article 6(3) provides as follows: -

“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

64. The Directive is implemented in the State by the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. 477/2011), to which I shall refer as the Habitats Regulations.

65. Part 5 of these Regulations prescribes requirements for: -

“Screening for Appropriate Assessment and Appropriate Assessment of implications for European Sites”

66. Regulation 42. (1) provides as follows: -

“A screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the management of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the site, if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site.”

67. Regulation 42. (2) provides: -

“A public authority shall carry out a screening for Appropriate Assessment under paragraph (1) before consent for a plan or project is given, or a decision to undertake or adopt a plan or project is taken.”

68. Regulation 42. (6) provides: -

“The public authority shall determine that an Appropriate Assessment of a plan or project is required where the plan or project is not directly connected with or necessary to the management of the site as a European Site and if it cannot be excluded, on the basis of objective scientific information following screening under this Regulation, that the plan or project, individually or in combination with other plans or projects, will have a significant effect on a European site.”

69. Regulation 42. (7) conversely provides that no appropriate assessment shall be required if it can be excluded that the plan or project will have a significant effect on a European site.
70. The Regulation continues by prescribing the information required and enquiries to be made in performing an appropriate assessment, including the requirement for a Natura Impact Statement, and the Regulation provides that in certain circumstances the relevant authority may invite the submissions of members of the public or others.
71. Under Regulation 16, the relevant plan or project may only be authorised by a public authority after the appropriate assessment has been undertaken if it has been determined by that assessment that the plan or project will not adversely affect the integrity of a European site. In effect these regulations amplify step-by-step the approach required to comply with Article 6(3) of the Directive.
72. The provisions of the Directive have been the subject of extensive case law in this jurisdiction and at the Court of Justice of the European Union. For this case, the most relevant of these judgments is that of the CJEU in *People Over Wind and Sweetman v. Coillte Teoranta* (Case C-323/17) ECLI:EU:C:2018:244, (*“People Over Wind”*), delivered on 12 April 2018, where the court held that at the screening stage for Appropriate Assessment it is not appropriate to take into account measures intended to avoid or reduce the harmful effects of a plan or project. Such measures are referred to as *“mitigation measures”*. In this case, the Applicant claims that when carrying out the screening for appropriate assessment, the Respondent unlawfully assessed or took into account mitigation measures described in the application for the lease.
73. I propose to consider the application of the relevant legislation and caselaw by reference to each of the grounds advanced by the Applicant.

FIRST GROUND: EIA SCREENING

74. The Applicant contends that the Respondent failed to carry out adequate screening for EIA in accordance with Annex 3 to the EIA Directive. In particular, it is claimed that the Respondent failed to assess the cumulation of the proposed activity pursuant to the foreshore lease with other existing and/or approved and/or reasonably foreseeable projects.
75. I have found earlier in this judgment that the Test Site as described in the Marine Institute’s application is not within any of the categories of projects referred to in Annex I or Annex II of the Directive, or in Part 1 or Part 2 of Schedule 5 to the Regulations of

2001. That is sufficient to dispose of this ground. However, I have considered below the substance of the arguments made as regards consideration by the Committee of the matter of "*cumulative effects*".

76. There are two elements to this claim. Firstly, it is said that there was a failure to properly and adequately conduct an assessment of cumulative effects with certain existing developments, notably the Galway Bay cable, which is the fibre optic cable supplying power and a data transmission facility already from a shore – based location in Spiddal to the Original Test Site. Secondly, it is claimed that examination of "*cumulative effects with other projects*" as required by Annex 3 to the Directive, should not be limited to projects which are existing or in respect of which planning or other consent has already been granted, but should extend to projects which are reasonably foreseeable. In this regard, it is submitted that the failure to assess the cumulative effects in combination with the effects of a proposed extension to the Galway Harbour port, constitutes a failure to comply with the obligation to assess cumulative impact with other projects.
77. The Respondent submits that the extension of the word "other projects" to projects other than those which are existing/and or approved, is not required by the Directive itself or by the Regulations and that case law on this subject demonstrates that it is not appropriate for the screening body to embark on speculation or conjecture as to future developments which may or may not be material to this analysis.
78. Reference has been made to the judgment of Haughton J. in *Ratheniska Timahoe and Spink Substation Action Group v an Bord Pleanála* [2015] IEHC 18 where he held as follows: -

"Cumulative assessment surely requires that the development be assessed in the light of existing and permitted development in the relevant area. It cannot involve deliberation on possible future development which may be at the concept, design or the early planning stage and which may not yet have been authorised. There may be exceptional cases in which development which has not yet been permitted must be considered but as a general rule this would not seem necessary as it would enter on the realms of speculation. A case where it could arise, which is identified in the written submission of the Respondent, is where a project could be artificially sliced into several smaller projects so as to avoid thresholds for EIA purposes or in order to avoid possible objections based on cumulative effects. However, this is clearly not a proposed development where any such artificial slicing has taken place and no such argument was put by the Applicants". (emphasis added)

79. Reference was made also to the judgment of the English High Court, Linblom J. in *Hockley v. Essex County Council* [2013] EWHC 4051 where he held as follows: -

"There has to be a sensible limit to what a screening decision-maker is expected to do. This view is supported in the cases to which I have referred, notably, for example, in Bateman. Conjecture about future development on other sites that

might or might not act with the development in question to produce indirect, secondary or cumulative effects is not in the screening decision-makers remit".

80. The Respondent also submits that the decision as to which projects should properly be included in the assessment of cumulative impacts forms part of a substantive content of the EIA screening and therefore lies within the expertise of the decision maker. It is submitted that such a decision should in itself only be the subject of certiorari in the event of a manifest error within the meaning of *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39.
81. Reference has also been made to the provisions of the 2014 EI Directive, which amends the EIA Directive. It is accepted that its provisions had not entered into force when the application for this Lease was made and therefore that it has no direct application to the facts of this case. However, that Directive amends the reference to Annex 3 to extend the obligation to consider "cumulation with other existing and/or approved projects". It is submitted on behalf of the Respondent firstly that this is an amendment which goes further than the existing Annex III and secondly, which implies that the obligation to assess unapproved projects did not arise under the 2011 Directive. Insofar as relevant, it is submitted that even the amendment in the 2014 Directive does not go so far as to require an assessment of in – combination effects with projects which are "*reasonably foreseeable*".
82. As regards the extension to Galway Harbour, the Applicant refers to the fact that in January 2014 an application had been made to An Bord Pleanála for permission for a strategic infrastructure development for the Galway Harbour extension. One of the owners of harbour land named in that application is the Department of Environment Community and Local Government, who is now the Respondent herein, in respect of an area of 78.71 hectares being the foreshore and seabed to the south of the existing Galway Harbour Enterprise Park.
83. The Natura Impact Statement accompanying the Galway Harbour Extension application contains a reference to the original Test Site at Spiddal. It was also stated that the Galway Bay cable project was in the process of establishing the original Test Site facility as a cabled connection for developers.
84. As regards "*in combination effects*" that NIS states: "*due to the distance between the [original] Test Site and the Galway Harbour extension location, there will be no in – combination effects in possible future use of the site*".
85. No reliance is placed by the Respondent on this NIS, but its relevance is that inasmuch as the Respondent's department itself is one of the co-owners and party to the application in respect of the Galway Harbour extension, it is questionable whether the Respondent can credibly characterise that project as remote or not reasonably foreseeable. Having said this, it seems to me that the position in this regard is governed by the passage quoted above from the judgment of Haughton J. in *Ratheniska* and in particular where he states that cumulative assessment: -

“. . . cannot involve deliberation on possible future development which may be at the concept, design or the early planning stage and which may not yet have been authorised”.

86. The Applicant refers also to certain guidelines of the EU Commission which would extend to projects which are *“reasonably foreseeable”*. I accept the Respondent’s submission that these have not been made binding in this State and therefore the position is governed by the judgment in *Ratheniska* quoted above.
87. I now turn to consideration of the MLVC Committee report insofar as it relates to this subject.

MLVC report: 6 July 2017

88. The report of the Committee, including appendices, runs to 71 pages. Appendix A is the EIA Screening Report of the Committee dated 6 March, 2017. It firstly recites that it does not consider that the requirements of the EIA Directive are mandatory, stating that the Test Site is not a project referred to in Annex I or Annex II of the Directive. It continues by reciting that the objective of the Report is to “determine whether or not the proposed development is likely to have significant effects on the environment by virtue, inter alia, of their nature, size and location. Under the heading of Cumulative Impact, the Screening Report states as follows: -

“The proposed Galway Bay Marine and Renewable Energy Test Site is located 1.3 kilometres offshore of the Galway coastline and 2.4 kilometres overwater from the Spiddal area. Under a separate foreshore licence (FS 005751) a cable from the shore to the Test Site was installed for the purposes of environmental monitoring. Taken individually or together, the potential significant cumulative effects are not considered likely. The significant cumulative effects with any proposed onshore developments are not considered likely”.

89. In the main body of the report, the Committee summarises its finding from the EIS Screening Report as regards this subject by stating as follows: -

“In addition, it is not considered likely that there will be any significant cumulative negative effects on the environment when examined in conjunction with any proposed onshore or foreshore developments”.

90. These passages in the report itself and Appendix A, the EIS Screening Report are the conclusion of the Committee that significant cumulative effects are not considered likely. They do not include any description or discussion of the effects, if any, and their significance.
91. It has been submitted by the Respondent that reliance cannot be limited to the Committee report itself, and accordingly it is necessary to consider whether and the extent to which the reports submitted accompanying the application itself can be said to have addressed this matter.

August 2015 Environmental Screening Report

92. This Report was submitted by the Marine Institute. The question of "*cumulation with other proposed development*" is considered at s. 4.1.5 where the report states as follows: -

"The proposed Galway Bay Marine and Renewable Energy Test Site is located 1.3 kilometres offshore of the Co. Galway coastline and 2.4 kilometres overwater in an east south east direction from Spiddal. Consequently, significant cumulative effects with proposed onshore developments are not considered likely. The proposed Galway Bay Marine and Renewable Energy Test Site will connect to the Galway Bay cable, a sub – sea fibre optic cable providing a 3.5 KW power supply and data transmission facility running from a shore – based location in Spiddal to the cable end equipment to be located within the existing Test Site.

The purpose of the proposed Galway Bay Marine and Renewable Energy Test Site with the Galway Bay cable is to establish a national shared marine research, test and demonstration facility to catalyse and facilitate, through research, the commercial development of renewable technologies, environmental monitoring instrumentation and other marine technologies".

93. The conclusion that significant cumulative effects with onshore development are not considered likely appears from this Report to be based simply on the fact that the Test Site would be 1.3 km from the coastline and 2.4 km from Spiddal. No onshore developments are referenced.

94. *As regards the Galway Bay cable no description of potential adverse effects from cumulation are identified let alone assessed. The report states simply that the cable and the proposed Test Site will connect to the cable "...to establish a national shared marine research, test and demonstration facility...".*

February 2016 Environmental Report

95. This report was submitted by the Marine Institute, with the assistance of SEAI. Although the annexes to this report include the Applicant's Stage 1 Screening Report for the purposes of appropriate assessment by reference to the Habitats Directive, it is principally a report addressing not the requirements of the Habitats Directive but the question under the EIA Directive of whether the project will have significant adverse impacts on the environment.

96. The report runs to 280 pages plus appendices. It describes the intended project in comprehensive detail. It then analyses the potential impacts for the environment generally of the project under a range of headings such as "*Human Activity*", "*Flora and Fauna*", "*Water*", "*Seabed and Geology*", "*Air Quality*", "*Cultural Heritage*", "*Visual impact Assessment*" "*Material Assets*", "*Navigation*" "*Coastal Processes*". It contains a section addressing the interaction between these considerations and the management systems intended to address matters such as health, safety, the environment and quality of the site.

97. Section 15.5 is headed "*Cumulative Impacts*". It states as follows: -

“Cumulative impacts are those that result from incremental changes caused by other (past, present or reasonably foreseeable actions) together with changes directly arising from the project”.

It continues under 15.5.1 as follows: -

“Other Projects

Cumulative impacts may arise resulting from a combination of other projects in the general area or from the project components itself. There are a number of projects in planning which may occur during the lifetime of the Galway Bay Marine and Renewable Energy Test Site, these include: -

- Galway Port Development: Galway Harbour Company are proposing to redevelop the port of Galway. Phase 1 is the construction of two deepwater cruiser liner berths, a new channel, and a 20 – berth marina.*
- West Wave Project: West Wave is a proposed project to develop a small pre-commercial wave energy farm (about 5 MW) on the west coast of Ireland. The project is in development by ESB with government funding support at a site near Killard in Co. Clare.*
- Atlantic Marine Energy Test Site (AMETS): AMETS is being developed by Sustainable Energy Authority of Ireland (SEAI) for testing of full – scale wave energy converters in an open ocean environment. It is located to the west of Belmullet in Co. Mayo. The Test Site will provide a grid connected national test facility for WEC’s (wave energy converters) at the final stages of pre – commercial development.*

“The above projects are in the development phase and will require either planning permission or a Foreshore Lease/licence from the statutory authorities if they are to proceed; for that reason, no assessment of potential cumulative impacts can be made at this time. (emphasis added)

15.6 Conclusion: The interaction between impacts, indirect or cumulative, are primarily concerned with ecology, accidental events, vessel traffic, noise and fishing. The indirect and cumulative impacts are largely low and are considered non – cumulative”.

98. This section, although headed *“Cumulative Impacts”* does not attempt an assessment of the cumulative effects of the named projects, and relies on its own conclusion that because they are only in the development phase and will require either planning permission or a foreshore lease or licence no assessment can be made at this time.
99. The Applicant submits that this amounts to a recognition that there are projects identified as capable of having cumulative effects with the Test Site, and yet a decision made by the Marine Institute itself that no assessment be made of those cumulative effects.

100. As regards the projects said to be *"in the development phase and still requiring planning permission or Foreshore Licence"*. I find the approach taken by the Marine Institute that no assessment of potential cumulative impacts can be made at that time to be consistent with the approach approved by Haughton J. in *Ratheniska*.
101. The Committee Report does not, either in its main body or in Appendix A of the EIA Screening Report, expressly consider this particular point, or refer to the Galway Port Development, stating simply that *"significant cumulative effects with any proposed on-shore developments are not considered likely"*. However, it cites the February 2016 Environmental Report submitted, in which the Marine Institute refers to the Galway Port Development and other projects *"in planning"*, and which states that they have not been assessed for cumulative effects. The Committee having cited that Report, I find that its conclusion on this issue is also consistent with the principle in *Ratheniska*.
102. The Galway Bay Cable Project is considered under a different part of this report, namely, Section 15.3 headed *"Indirect Impacts"*. This refers to the *"Galway Bay Cable Project"*, which was installed in 2015 and is fully operational. The Cable End Equipment and subsea observatory is co – located with the proposed development.
103. This reference is not an assessment in itself of the cumulative effects with the Galway Bay Cable, but is intended only to identify that Project as one of a number of features of the site area with which the Test Site will have an indirect impact. The Report continues at 15.4 to conclude that

"...the level of environmental impact for all interactions is considered to be none, negligible or minor for both the installation and operational phase of the project."

This conclusion is the extent of the discussion of the Galway Bay Cable and it includes no detailed description of its possible cumulative effects with the Test Site or of the significance of them.

104. The connection with the Galway Bay Cable was also considered by the Committee under the heading *"Project Splitting"*. Having noted that the Cable has itself been the subject of a separate Foreshore Licence granted in 2015, the Committee considered the issue of the Cable and concluded as follows: -

"While the cable is capable of running as a stand-alone project, the Environmental Report submitted in support of this application includes the installation of the cable in the context of this application. The cable resulted in negligible temporary disturbance in the area immediately in the vicinity of the cable during the course of laying the cable approximately 7000mm below the sea floor and there are no permanent environmental effects of installing the cable or cable and equipment. The Committee is satisfied that even if taken as one combined project an EIS would not be required."

105. It seems to me that although the Galway Bay Cable was a project separately licensed, the Marine Institute and the Committee all treated it as so integral to the Test Site, and referenced it so numerous in the reports submitted, that the Committee regarded the information available in relation to it as sufficient for it to conclude both that *"even if taken as one project an EIS would not be required"* (page 34 of the Committee Report), and that *"taken individually or together the potential significant effects are not considered likely."* (page 46). I must conclude, therefore, that the Committee, as it was entitled to do, duly evaluated the potential cumulative effect of the Test Site with the Cable.

SECOND GROUND: MITIGATION MEASURES IN AA STAGE 1 SCREENING

106. The central complaint of the Applicant in relation to the Stage 1 Screening for Article 6(3) of the Habitats Directive is that the Respondent took into account in its analysis measures intended to avoid or reduce the harmful effects of the plan or project on the site. These are typically referred to as mitigation measures. In *People Over Wind*, the CJEU put beyond question the rule which is now universally accepted as applying when it held that in order to determine whether it is necessary to undertake an appropriate assessment of the implications of a plan or project for a Natura site it is not appropriate at the screening stage to take account of measures intended to avoid or reduce the harmful effects of the plan or project on that site. The judgment of the court explains the rationale for this as follows: -

"The fact that measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out".

The court continued: -

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

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

In that regard, the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned".

The Aquafact Report - November 2015

107. Before turning to the Respondent's determination and to the report of the Committee on which he relied, it is appropriate to refer to the report submitted by the Marine Institute in support of the application. This Report is cited by the Committee and the Respondent and was the subject of extensive reference and discussion by all parties at the hearing.
108. This is the "*Appropriate Assessment Stage 1 Screening Report*" written by Aquafact International Services Limited, consultants retained by the Marine Institute. The report is stated in its introduction to have two aims. The first is to inform the appropriate assessment process required by Article 6(3) of the Habitats Directive. The stated second aim is to assess the likely significance of the project on marine mammals, which is a separate requirement under Article 12 of the Habitats Directive.
109. Section 3 covers the Stage 1 appropriate assessment screening required for the purposes of Article 6(3). It contains a description of proposed activity at the site, a description of the implications of the investigation/development phase, and the operational phase and the decommissioning phase, and a description of the receiving environment. It identifies the relevant Natura sites and the characteristics of those sites and assesses the impact on harbour seals, (emphasis added) Atlantic salmon, sea lamprey, arctic tern, common tern, and of the other species which inhabit the sites. It concludes that: -

"There is no potential for significant effects from the proposed Test Site and Stage 2 appropriate assessment is not required".

By contrast with Section 4, described below, no mitigation measures are identified or considered in this section.

110. Section 4 contains the assessment of the likely significance of the proposal on marine mammals, addressing the Article 12 requirement to protect marine mammals. It contains a section headed 4.3; "*Mitigation and monitoring*". Having described the project and its potential effects on marine mammals, s. 4.3 continues: -

"A number of mitigation/ best practice measures are recommended to ensure minimal impact from the Test Site with marine mammals.

- *Presence of a trained experienced marine mammal observer (MMO) to implement the NPWS (National Parks and Wildlife Service) best practice guidelines when all work is taking place and to implement appropriate buffer zones in a good sea state.*
- *Target work to take place when porpoise presence is at its lowest, e.g. during the spring or early summer.*
- *If bow thrusters are required on installation vessels, they should be covered to prevent collision with marine mammals.*

- *Only carry out observations (and therefore work) during daylight hours (this will also minimise risk of bird and mammal collision with vessels).*
- *Carry out SAM at the site during and after the installation works to assess if avoidance behaviour is recorded and if so for how long it lasts.*
- *Design devices for minimal impact of collision risk.*
- *Plan operations efficiently to minimise the number of trips that the surface vessel must make.*
- *Avoid sensitive time periods for local receptors.*
- *Use low toxicity and biodegradable materials.*
- *Design infrastructure for minimum maintenance.*
- *Design devices to minimise risk of leakage of pollutants.*
- *Implementation of Shipboard Oil Pollution Emergency Plan (SOPEP).*

“It should be noted that the CEE hydrophone and acoustic array will facilitate the measurement of sound generated from experimental WEC devices and will facilitate the recording of cetacean vocalisations allowing SmartBay Ireland Limited to assess the impact on an ongoing basis. This monitoring will add to current scientific knowledge on noise impacts and it will add to the industry’s knowledge of potential impacts using scaled prototype devices in the Test Site”.

111. The summary states: *“The Marine Mammal Risk Assessment has identified that the proposed Test Site will have a low risk to marine mammals. Mitigation and monitoring are proposed to ensure a low risk”.*

112. In the introduction to the report it is stated by Aquafact at para. 2.2.1 that screening for appropriate assessment: -

“Should be undertaken without the inclusion of mitigation, unless potential impacts clearly can be avoided through the modification or redesign of the plan or project, in which case the screening process is repeated on the altered plan”.

113. While the Applicant disagrees with the rider as to repeating the process on an altered plan, it is noteworthy that Aquafact, who wrote this report in November 2015, long before the decision of the CJEU in *People Over Wind*, adopted the approach that it was inappropriate to include mitigation measures in the Stage 1 AA screening for Article 6(3). It is also clear that they recognised and applied a different approach to the Article 12 analysis by including there a description and consideration of mitigation measures relevant to the impact of the project on marine mammals. As discussed later in this judgment, the Committee did not follow this distinction of approach in its AA Screening Report.

Report of the Committee: 6 July 2017

114. The Respondent's Notice of Determination refers to this report as one of the matters to which the Respondent had regard and with which he agreed with in making the determination to grant a Foreshore Lease.
115. The report runs to 71 pages, including three appendices. The appendices comprise: -
- (a) The EIS screening document.
 - (b) *The Appropriate Assessment Screening Report. This is confusingly headed "Appropriate Assessment Report" which is relevant when one examines the text in the final page of it, considered at paragraph 127 below.*
 - (c) Site specific conditions.
116. The report describes the background to the application and the proposed development. It recites the consultation undertaken and the legislative requirements concerning environmental impact statements and appropriate assessment. It summarises its assessment under a series of headings which include, environmental impact assessment requirements, and appropriate assessment requirements, followed by separate sections concerning health concerns, visual impact, impact on tourism, impact on fisheries, impacts on navigational safety, on marine mammals, on sea birds, on Natura sites, lease issues and other subjects. It also contains a summary of relevant considerations in terms of government initiatives on renewable energy, industrialisation of the bay, grid connection issues and marine archaeology. The EIS Screening Report and the Appropriate Assessment report at Appendix A and B form an integral part of the report itself.
117. Section. 6(j) contains the Committee's conclusions regarding the potential impacts on marine mammals. It refers to the reports submitted by the Marine Institute including its *"Environmental Report"* and its AA screening report. It then refers to Appendix B which is the Committee's own AA Screening Report. Section 6(j) concludes that the potential impact or effects on marine mammals will be negligible or minimal and that *"the implementation of the best practice measures would minimise any potential impact to marine mammals"*.
118. Section 3 (l) is headed *"Potential impacts on Natura 2000 sites"*. It refers to the Appropriate Assessment Screening Report of the Committee which is dated 15 March 2017, and which is Appendix B and forms part of the Report to the Minister. It identifies ten Natura sites which have the potential to be impacted upon by the Test Site operations, up to a distance of 27km from the Test Site. It continues as follows: -
- "Based on the assessment of significance on the habitats and species of the Natura 2000 sites, this Appropriate Assessment Screening Report concluded that there are not likely to be any significant effects as a result of the proposed development of a 37.52-hectare wave, tidal and wind energy Test Site (on same footprint area to that which was previously licenced under FS 004904 and FS 006611) on the conservation objectives of the ten pertinent Natura 2000 sites.*

In its submission, NPWS of the Department of Arts, Heritage, Regional Rural and Gaeltacht affairs was also of the view that the operation of the renewable energy Test Site is “unlikely to have a negative interaction with Natura 2000 nature conservation sites due to the nature and location of the works”, and, with the application of mitigating/best practice measures described in the environmental report, it is likely to reduce the potential impact to negligible levels. (emphasis added)

This MLVC report has also assessed the potential impacts to fish species, marine mammals and birds and in all cases the MLVC was satisfied that subject to the implementation of the recommended conditions, there would be minimal effect to fish, marine mammal and bird species arising from the proposed Test Site operations. (emphasis added)

The MLVC is satisfied that this proposed development would have a negligible effect on designated Natura sites, does not require a Natura Impact Statement (NIS) which is Stage 2 in the appropriate assessment process, and agrees with the conclusion as presented in the Applicant’s Appropriate Assessment report that there is not likely to be any significant effects on the Conservation Objectives of the ten pertinent Natura 2000 sites.”

119. It is clear from these references that the Committee’s conclusion is derived from the assessment contained in its own Screening Report at Appendix B to which I now turn.

The Committee’s AA Screening Report: 15 March 2017

120. This report runs to 15 pages including five pages of tables. Unhelpfully, it is headed “Appropriate Assessment Report” and not Appropriate Assessment Screening Report, although it is clear from the main body of the Committee report itself at pages 30 and 31 that the Committee regarded it as a screening report and not an appropriate assessment. It contains a brief description of the nature of the project, and identifies the Natura 2000 sites potentially affected.

121. At p. 50 there is a brief discussion under each of the headings Installation/construction phase and Operational phase as follows: -

“a. Installation activities may generate noise in context of increased shipping traffic to and from the Test Site and general human activity during installation. Installation of devices onto the seabed or their anchoring onto the bed – attached to previously placed anchorage – may impact to displace sediment and lead to smothering or mortalities of benthic invertebrates.

This impact is considered to be very localised in view of reported current velocities and not likely to have any impact of significance into any of the SAC’s or SPA’s listed.

b. Operational phase will involve the various devices, listed in the application, in an active or operating mode. There is potential for noise, for electromagnetic field

(EMF) generation, for turbulence generated by mechanical parts rotating/operating at the seabed or in the water column, and for strike impact of moving parts, including propellers (whether in the water column or air mounted or on the water's surface or seabed). The turbulence could impact on sediment and on benthic organism with dispersal, displacement and possible mortalities.

This impact is considered to be very localised and not likely to impact into any of the SAC habitats listed. There is potential for impact on the mobile animals using the SAC and its environments for feeding migration. The four aquatic species covered are highlighted in Table 2 – the otter, harbour seal, salmon and sea lamprey."

122. There then follows a discussion as to the potential impact on each of these species, namely otter, harbour seal, salmon and sea lamprey.
123. There follows a more detailed description of the project and two critical headings commencing at p. 54 and p. 55. The first, commencing at p. 54, is "*Describe how the project or plan (alone or in combination) is likely to affect the Natura 2000 site*". The next section beginning on p. 55, is "*Assessment of significance of the above listed effects on habitats and species of the Natura 2000 sites*".
124. Under the heading "*How the project is likely to affect the sites*", the potential impacts are discussed under firstly the installation phase and secondly the operational phase, as follows: -

"(a) During the installation phase:

- Impact on microinvertebrate communities in bay/estuarine environments as a result of the installation.*
- Disturbed natural sediments on seafloor by installation of devices leading to smothering and increased suspended sediment and turbidity levels.*
- Disturb and displace birds, marine mammals, fish/shellfish from construction noise (device installation/removal and installation/service vessel movements).*
- Lead to increased risk of collision with installation vessel with birds and marine mammals.*
- Introduce pollutants into the water column during the installation phase, including from accidental pollution from service and support vessels."*

In respect of the operational phase the potential effects are described as follows:

- Disturb and displace marine mammals and fish/shellfish from noise generated from the operation of the devices and maintenance vessels.*

- *Impact on hydrodynamics and sediment processes from the generation of EMR fields (electromagnetic radiation).*
- *Impact on the movement and migration patterns of marine mammals and fish species (including Annex 1 species sea lamprey and Atlantic salmon migrating to and from adjoining SAC's) from the generation of EMR fields from the cables and devices in operation.*
- *Impact on sediment transport pathways and coastal process from the physical presence of devices and associated infrastructure by accretion or erosion (scour).*
- *Cause a direct loss of benthic habitat and sessile species in the footprint of the devices and infrastructure.*
- *Create a barrier to movement of marine mammals., fish and birds from presence of devices and infrastructure leading to avoidance behaviour and potential habitat exclusion.*
- *Lead to increased risk of collision for birds, marine mammals and fish (including Annex 2 species sea lamprey and Atlantic salmon migrating to and from adjoining SAC's) with the devices themselves in operation (e.g. rotating parts including wind turbine) and with service/maintenance vessels.*

125. Under the heading "Assessment of the significance of the above listed effects on habitats and species of the Natura 2000 sites" the report states as follows: -

"The actual footprint of the infrastructure within the Test Site estimates that app. 460m² of the sea floor would be occupied by the site infrastructure and test devices. This means that a very small percentage (0.12%) of the overall Test Site seabed area (37.5 hectares) will actually be occupied by structures, thus the proposed works will result in a very small area of interaction with the seabed within the bay/estuarine habitat.

Any increase in the water column turbidity would be temporary, localised and within the natural range of variability caused by current induced sediment resuspension. The reported current velocities are low at both ebb and full spring tides and disturbed sediment is unlikely to be transported to Annex 1 habitats nor are habitats in Annex 1 habitats likely to be disturbed by sediment transport".

126. There follows separate descriptions of the effect of noise, collision risk, cables, increase in sediment levels and turbidity. For the most part, these sections of the report discuss the potential effect of these items on marine mammals, fish or bird species. The report considers that these impacts are variously "low", "negligible" and in some cases "temporary".

127. The contents of pages 58 and 59 of the Report are of such importance that it is necessary to quote them in full. The report says at page 58: -

- “1. The actual area lost is so small that the impact on the benthic community will be negligible. In addition, the loss of such a small area of seabed is extremely unlikely to cause any reduction in fish stocks or of spawning and nursery areas. Marine mammals in the area are extremely unlikely to be impacted upon given the very small area of seabed impacted and the extremely unlikely impact on fish stocks in the area.*
- 2. In addition, a number of construction, operational and best practice measures are recommended to ensure minimal impact from the Test Site with marine mammals. These are presented in s. 4.3 of the Applicant’s own AA stage 1 Screening Report, dated November 2015 [which is the Aquafact report] and they include:*

 - The presence of MMO’s when work is taking place.*
 - Target work during spring/early summer (time of lowest porpoise presence).*
 - Work during daylight hours (minimise collision risk of birds/mammals with vessels).*
 - Design devices for minimal collision risk*
 - Minimise service vessel trips.*
 - Avoid sensitive time for local receptors.*
 - Use low toxicity biodegradable materials.*
 - Design infrastructure for minimum maintenance.*
 - Design devices to minimise risk of leakage of pollutants.*
 - Implementation of Shipboard Oil Pollution Emergency Plan (SOPEP).*
- 3. These construction, operational and best practice measures are proposed to ensure that there will be a low to nil risk of any impact on marine mammals from the operation of the proposed Test Site. Their implementation will also further minimise any potential impacts on fish and bird species from the operation of the Test Site.*
- 4. The low power levels in the proposed cables mean that the magnetic field and induced electrical field from the proposed interconnecting cables will not have any significant effect on salmon or sea lamprey in the area, and migrating salmon and sea lamprey will not be impacted by the presence of one to three scaled test devices and associated infrastructure in the Test Site.*

5. *The presence of one short term temporary wind turbine in the Test Site (25 metre hub height, 20 metre blade diameter) has the potential to be a specific collision risk for bird species, however a collision would be extremely unlikely as the birds will be able to see and detect the turbine and adjust flight paths accordingly, and also the turbine will be lit at night.*
 6. *There will be no direct or indirect impact and there will not be significant disturbance to key habitats or species. Additionally, there will be no habitat or species fragmentation and the overall integrity of the Natura 2000 sites will not be affected. (emphasis added).*
 7. *On the basis of the above it is concluded that there are not likely to be any significant effects as a result of the upgrading of an existing 37.52 hectare wave energy Test Site, to allow for the testing of a wider range of marine renewable energy devices, floating turbine, innovative marine technologies and sensors in Galway Bay on the conservation objectives of the ten numbered pertinent Natura 2000 sites as listed on the first page of this report." (emphasis added)*
128. The Applicant submits that the paragraph commencing "*On the basis of the above*" can only mean that the conclusion that there are not likely to be any significant effects as a result of the upgrading of the site was reached by the Committee, after taking into consideration everything which has gone before in the report which includes the measures listed.
 129. The relevant measures are described as mitigation measures in the Marine Institute's own Screening Report. It is said that the use of the label "*mitigation measures*" is not definitive on this point and the real question is whether measures are in substance intended to reduce harmful effects. I shall return to that question later.
 130. The Applicant says that the finding that there are not likely to be any significant effects is made no earlier in the report, and that the only conclusion from the use of the words "*on the basis of the above*" on p. 59 can be that the mitigation measures described earlier in the Report (at page 58) informed the Committee in its conclusion.
 131. The Respondent and notice parties submit the following: -
 - i. That a close reading of the paragraphs quoted above (2) and (3) reveals that they relate only to the impact on marine animals and not on the Natura sites listed.
 - ii. That these measures are recited having been drawn from the Aquafact report at s. 4.3 which includes and takes account of the mitigation measures only in the context of an assessment for the purpose of Article 12 and not Article 6(3). It is not in dispute between the parties that the Aquafact report respects that distinction and takes mitigation into account only in the context of its Article 12 assessment.
 - iii. That the report reaches conclusions about the effect on the sites much earlier in the Report than the description of mitigation measures at page 58. The Respondent

refers to all of the findings contained earlier in the report regarding "*no significant risk*", "*lower than posed by commercial shipping traffic*", "*likelihood of collision unlikely*", "*likelihood of impact negligible*". The Respondent and notice parties submit that all of these conclusions have been made before the report makes any reference to mitigation measures.

iv. That the use of the words "*in addition*" before the reference to mitigation measures means that these measures are proposed as an additional recommendation after reaching the conclusion that there would be no significant effect on the sites and that it would be a flawed policy to fault the Committee for thereafter adding references to mitigation measures, by way of best practice.

131. The Applicant refers also to the paragraph numbered 6 which states: "*Additionally there will be no habitat or species fragmentation and the overall integrity of the Natura 2000 sites will not be affected*". This paragraph is an unfortunate quote from the test applied in a Stage 2 Appropriate Assessment because a finding concerning adverse effects on "*the overall integrity of the Natura sites*" is one which can only be made after the performance of a full appropriate assessment. The use of this phrase calls into question whether the author of the Report properly understood and applied the distinction.

132. The Respondent also submits that this Court should look to all the evidence which was before the Committee. In particular, he refers to the Aquafact report which makes it clear that it treats mitigation measures (being the same as those recited on p. 58 of the Committee report) as relevant only to the Article 12 analysis. It is submitted that in circumstances where the Marine Institute and its consultants Aquafact did not cite mitigation measures or propose them as a basis for any part of its submission that there are not likely to be any significant effects on the sites, it cannot be said that the Committee then relied on such measures.

133. It is clear that the Aquafact report submitted on behalf of the Marine Institute limited its consideration of mitigation measures to the Article 12 analysis. I conclude for the reasons stated below, that the Committee did not observe the same limitation.

134. The submissions of the Respondent and the Notice Parties require this court to read the report such that the words "*On the basis of the above*" mean "*on the basis of the above except the paragraphs discussing mitigation on p. 59*", which I have numbered 2 and 3. It is suggested that this is reasonable because the words in those paragraphs show very clearly that they apply only to the minimisation of the impact on marine mammals.

135. I cannot agree with this submission. It would require a reader to undertake a tortuous reading of the Screening Report and, identify which parts of "*the above*" on the basis of which the Committee made its conclusion should be extracted as not having informed the Committee, and then requires a reader to ascertain, having followed the same process, that the Respondent in agreeing with the recommendation, did so having followed the same process of extraction and therefore did not take into account the mitigation measures. This would by any standard be excessive for even the most informed reader.

136. The consequence of this finding is that the only credible conclusion is that the Committee and the Respondent fell into the error of taking mitigation measures into account. I should add that the very fact that the Respondent's submission requires such a difficult and unsustainable reading of the Report, means that even if the Respondent could stand over his proffered construction of the Report in terms of his own understanding – albeit that there is no evidence to that effect from the Committee or the Respondent and the Respondent's proposition is advanced only by legal submissions in these proceedings – the Report would fail the test of being a clear and unambiguous conclusion by reference to objective scientific information.
137. I accept the submission of the Respondent that the Committee's report should be read together with the supporting reports and submissions made by the Marine Institute, particularly where they had been expressly adopted by reference in the Committee's report. But the Committee has not simply cited those reports and approved or adopted them by reference. It has recited in full its own conclusions by reference to the potential effects described. Undoubtedly it has made, without reference to mitigation, a series of findings of "*low risk*", "*likelihood of impact negligible*", "*unlikely to have large scale effect*". However, the fundamental conclusion, which is critical to the Article 6(3) Stage 1 screening test that: "*There are not likely to be any significant effects on the conservation objectives of the sites as listed*" was made only after the words "*on the basis of the above*"; and "*the above*" clearly includes the mitigation measures.
138. At p. 50 – 51 of the Report, it is said that the input of the installation and of the operation phases respectively are considered, "*very localised and not likely to impact into any of the SAC's or SPA's listed*". This is clearly and concisely stated but, again, it is stated before the analysis of the impact of the individual effects which follows and does not form any part of "*Assessment of significance of the above listed effects on habitats and species of the Natura 2000 sites*" which commences at page 55.

Consideration of Marine Mammals

139. It is clear from an overall reading of the report that disturbance and displacement of marine mammals is treated as an integral part of the effects on the Natura sites. At pages 54 and 55, these disturbances and displacement are listed among the potential effects, the significance of which are then assessed commencing on page 54. It does not say that that this is only an Article 12 issue and the AA Screening Report does not mention Article 12 anywhere. Clearly this assessment all forms part of the Article 6(3) assessment.
140. If p. 58 had been the only discussion within the report of the effect on marine mammals, there may be some force in the Respondent's arguments. However, it is clear throughout the assessment section of the report, from p. 54 onwards, that marine mammals are regarded as part of the assessment of the effect on the sites in the same way as the effect on fish species and birds.
141. Within the Article 6(3) analysis in the Aquafact report, there is contained a short reference to marine mammals. It says at 3.1.2.2 that: -

"This section of the report only discusses marine mammals of relevance to the Natura 2000 sites in the locality, i.e. seals".

The detailed review and assessment of all other marine mammals is contained in s. 4 which clearly relates only to the assessment for the purpose of Article 12.

142. Aquafact had taken the trouble to recognise these distinctions and had limited its consideration insofar as it is relevant to Article 6(3) to seals. However, the Committee in its Article 6(3) Screening Report, considers marine mammals extensively from p. 54 onwards and not only at p. 58. Therefore, the Committee has not followed the distinction which was so properly made for this purpose by Aquafact. This failing is not cured by the submission that the Committee has said that it agrees with Aquafact that there is not likely to be any significant effect on the sites, because the express terms of the Committee's report recite the mitigation measures squarely within the Article 6(3) analysis.

Are there harmful effects?

143. It is clear from the judgment of Simons J. in *Heather Hill Management Company clg v. An Bord Pleanála* [2019] IEHC 450, that the principle in *People over Wind* is only violated if in the first place there are as a matter of fact harmful effects on a site from the plan or project. The principle is that it is inappropriate to take account of mitigation measures where they are "*intended to avoid or reduce the harmful effects of the plan*". The first element of that test is whether there are in fact harmful effects.
144. Pages 54 and 55 of the Committee's AA Screening Report identify harmful effects both during the installation phase and the operational phase. They include such matters as increased "*sediment and turbidity*", "*disturb and displace birds and mammals, fish/shellfish from construction noise*", "*increased risk of collision*", "*introduce pollutants*", "*cause a direct loss of benthic habitat and sessile species*", "*create a barrier to movement of marine mammals, fish and birds . . . leading to avoidance behaviour and habitat exclusion*". The assessment of the significance of the effects for the habitats follows at p. 55 onwards and the conclusion that they are not likely to have significant effects on the Natura 2000 sites is to be found at p. 59. However, it is clear from the above that effects which were identified in the Report are in themselves harmful.

Are the measures intended to avoid or reduce the harmful effects?

145. In *Eoin Kelly v. An Bord Pleanála* [2019] IEHC 84, the question of the purpose or intent of the relevant measures was considered by Barniville J. In that case, the relevant measures were known as Sustainable Urban Drainage Systems, ("SUDS"). These had been incorporated into the development design.
146. The court found that SUDS measures were a requirement under the GSDSDS, being the Greater Dublin Strategic Drainage Study Regional Policy, which in turn emanated from the adoption by the State of the Water Framework Directive. The driving policy behind requiring SUDS was the GSDSDS and the Water Framework Directive and therefore the incorporation of these measures was not directed to the protection of any European

Natura 2000 site. Nor could it be said that they were incorporated with the intention of avoiding or reducing the harmful effects of the subject site.

147. The Respondent submits that a close examination of the description of the measures and of the language of page 58 of the Committee's Report reveals that they can only have been intended to "*ensure minimal impact from the Test Site with marine mammals*" and that they "*are proposed to ensure that there will be a low to nil risk of any impact on marine mammals*". There are two infirmities in this submission. Firstly, a number of the measures recited are clearly not confined to the minimisation of impact on marine mammals. These include such items as:

- a. "*Work during daylight hours*" – which is expressly stated to minimise collision risks of both birds and mammals.
- b. Use low toxicity and biodegradable materials.
- c. Design devices to minimise risk of leakage of pollutants.

Secondly, the Report itself states that the "*implementation [of the measures] will also further minimise any potential impacts on fish and bird species*". (emphasis added)

148. Throughout the Committee's Screening Report, and not only on page 58, the assessment of impact on marine mammals is interwoven with the assessment of impact on other species. They are therefore wholly integrated within the Article 6(3) assessment, without any reference to Article 12. Accordingly, the conclusion at page 59 applies to all these effects and was made on the basis of, *inter alia*, the referenced mitigation measures.

149. The effect of these findings is that the committee fell into error in terms of the clear parameters now recognised by the CJEU in *People Over Wind v. Coillte* and followed by this Court in *Eoin Kelly v. An Bord Pleanála* and in *Heather Hill Management Co. v. An Bord Pleanála*. The Respondent had regard to the Report of the Committee and agreed with its recommendation and accordingly, I must make the order of certiorari of the Determination.

150. This result is regrettable because it appears from the material exhibited that many, if not most, of the effects of the Test Site on the environment generally will be, minimal or negligible and in some cases temporary. However, this Court must consider whether the Respondent has complied with the Habitats Directive. In this context, the critical and defining conclusion required for Article 6(3) of the Habitats Directive that there are not likely to be any significant effects on the conservation objectives of the identified Natura sites, is in the Report of the Committee expressly stated to have been made on the basis of what has come before that conclusion, which includes the mitigation measures.

151. The rule in *People Over Wind* is not simply a rule without good reason. The CJEU identified a very good reason for this approach when it said that taking account of such measures at the screening stage would be liable to compromise the practical effects of

the Habitats Directive in general by creating a risk of circumventing that stage which, it said, constitutes an essential safeguard provided for by the Directive.

THIRD GROUND: FAILURE TO TAKE ACCOUNT OF BEST SCIENTIFIC KNOWLEDGE

152. The Applicant seeks a declaration that the Respondent did not adequately or at all consider and/or assess the submissions and/or observations of the National Parks and Wildlife Service (NPWS) and/or Birdwatch Ireland and/or Inland Fisheries Ireland. In the written submissions and at the hearing, this complaint was pursued only in respect of observations and submissions made by NPWS.
153. The context of this ground is that for an appropriate assessment to comply with the requirements of Article 6(3) of the Habitats Directive, it must examine all aspects of the proposed plan in the light of the best scientific knowledge available in the field. This principle was established in the *Waddenzee* case (Case C 127/02) and has been followed in numerous decisions since then. See *People Over Wind & Anor v. An Bord Pleanála* [2015] IECA.
154. The applicant submits that these standards apply also to the Stage 1 Screening for Appropriate Assessment.
155. This ground is rooted in an exchange of emails within the Department of Arts, Heritage and the Gaeltacht in March and April 2017, copies of which were obtained by the Applicant following a request made pursuant to the Freedom of Information Act.
156. It appears that on 27 February 2017, and again on 1 March 2017, the Applicant contacted a Dr. Julie Fossitt of the NPWS, in the Department of the Arts, Heritage and the Gaeltacht expressing concern in relation to the project. This prompted Dr. Fossitt to email her colleagues within the Department in the following terms on 1 March 2017: -

“Colleagues,

I was contacted by Dave (Tierney) and John about this case on Monday. In addition to the emails below addressed to me [being a reference to emails from the Applicant] I believe there was a PQ. I am not sure what action, if any, has been taken by NPWS at this stage.

Having looked at the available “screening for appropriate assessment” [by Aquafact] and the departmental/NPWS submissions at application and pre application stage, I think there are some concerns which should, essentially be the concerns of DHPCLG (the Department of Housing Planning Community and Local Government) as the public authority and decision making authority.

These are: -

- (1) *It appeared to NPWS, at pre – application stage, that an NIS was in preparation for the proposal. There is no NIS with the foreshore application.*

- (2) *The “screening for appropriate assessment” document is lengthy and in Table 3.7, identifies the potential for impact on common seal, sea lamprey and salmon, which are QI’s (qualifying interests) of Galway Bay Complex SAC (00268) and on seven bird species which are SCI’s of inner Galway Bay, the two nearest European sites.*
- (3) *There are uncertainties about the nature and scope of the development and about the potential impacts of new or novel technologies.*
- (4) *There may be combination issues such as the Galway Port Extension which need to be considered by DHPCLG.*
- (5) *As there is no NIS or EIS, there is no statutory environmental assessment of the development. There is no (non-statutory) ecological impact assessment.*

The above matters haven’t all been conveyed to that Department in the observation made on the foreshore application”.

157. On 14 April 2017, Mr. John Fitzgerald of the Department of Arts Heritage and the Gaeltacht forwarded the above email to Mr. Ciaran O’Keeffe of the same department and made the following comments: -

“You will recall that we discussed this email from Julie around the time we received it. You were satisfied that the development given its nature was unlikely to cause damage to Natura sites and the matter had been looked at by scientific staff and that there was nothing further to add to comments we had already given to DHPCLG.

On reflection, for completeness I wonder if we should send on Julie’s comments to Roger Harrington [who is a Principal at the Respondent’s department] just for his consideration in the context of his Department’s deliberations on the application.

Any views – if you agree I will be happy to pass on”. (emphasis added)

158. It appears that these emails were not taken any further at the time.
159. By email of 13 May 2016, the Department of Arts Heritage and the Gaeltacht, of which the NPWS is a unit, made its first observation to the Respondent’s department. In that email it was noted that the construction and operation of the site is *“unlikely to have a negative interaction with Natura 2000 nature conservation sites due to the nature and location of the works”*. The email continued that it is recognised that evaluation of the potential interaction with marine mammals is presented in the documentation which had been circulated in support of the application and it is stated that *“included in the appropriate assessment Stage 1 Screening Report are a series of mitigating measures. The following should be attached as a condition of consent”*. The email then identifies what have been described as the mitigation measures which featured in the Aquafact Screening Report and ultimately are recited in the Committee’s report.

160. The email continued as follows: -

"In addition, although a clear effort has been made by the proponents of the project to evaluate the potential interaction with the marine environment and natural features therein the proposed test and evaluation nature of the site will suggest that it is not possible to fully understand the potential interaction for every conceivable device that may be deployed. In order to ensure that an evaluation of potential interaction can be made prior to deployment, the developers or project managers must forward to the competent authority a detailed description of the ocean energy collecting device".

Reference is then made to such matters as the likely sound pressure, frequency of noise, and a consideration of the potential collision risk posed to marine mammals.

161. On 1 June 2016, the Marine Institute addressed the observations submitted by the NPWS on an item by item basis. There was a further exchange of emails between the Respondent's department and the NPWS culminating in an acknowledgment dated the 11 July 2016 from the Marine Institute.

162. The Committee's report describes in s. 3 the consultation process and in s. 3 (b) the "prescribed body" consultation process, of which the exchanges with NPWS form part. It recites the steps which were undertaken to engage with NPWS and other prescribed bodies and notes that submissions had been received from all of those bodies with the exception of the Heritage Council. It further notes: -

"There were no objections in principle to the proposed development but a number of key issues were raised and these are addressed within this report".

163. The report prepared by the Marine Institute in November 2016 summarising its response to the public submissions, identifies some 557 submissions received, and within those, 102 issues were associated with 18 topics, all of which are discussed in that report. It is noted in that report that the submissions include those received from the prescribed bodies including NPWS.

164. The Committee's report records its satisfaction that the application documents were of an appropriate standard to enable the decision to be made and that the Marine Institute had provided "adequate responses to address queries" from members of the public and the prescribed bodies.

165. It is submitted on behalf of the Respondent and notice parties that the email of 1 March 2018 from Dr. Fossitt is no more than an internal communication within the Department of Arts Heritage and the Gaeltacht. It appears to be accepted that that email itself was not forwarded to the Respondent's department prior to the decision being made on the application. That being the case, the committee cannot be faulted for not having considered its contents. The submission of the NPWS was contained in its email of 13 May 2016. I am satisfied that it would not have been for the Respondent or the Committee,

much less this Court now, to go behind that submission by reference to evidence of internal communications within NPWS.

166. It is also submitted on behalf of the Respondent that the contents of the email in itself do not represent particular scientific information or knowledge but merely an expression of concern by Dr. Fossitt as to whether certain matters have been duly brought to the attention of the Respondent and her expression within her Department of concern as to what she described as uncertainties about the nature and extent of the development and its potential impacts.
167. Dr. Fossitt's email also expresses concern as to procedural matters, namely what she characterises as the absence of a stage 2 appropriate assessment and of an environmental impact assessment report. Such observations as to procedural matters which would not add to the scientific information available to the Committee or to the Respondent.
168. In *O'Sullivan v. An Bord Pleanála* [2017] IEHC 761, and *People over Wind v. An Bord Pleanála* [2015] IEHC 271, the court emphasised that it was entirely within the scope of the remit of the Bord in those cases to determine that it had before it sufficient information to carry out in those cases an AA.
169. At its height, this ground is based on the proposition that the observations made internally in the NPWS by Dr. Fossitt long after the NPWS had made its submissions to the Respondent, were not before the Committee and the Respondent when making the Report and the Determination. In circumstances where the NPWS had made its submissions, and where the Committee had noted those submissions (at page 31), I cannot find that even if Dr. Fossitt's internal email was itself not placed before the Committee, this had the effect that best scientific evidence was not before and considered by the Committee.

FOURTH GROUND: ERROR ON THE FACE OF THE RECORD

170. The Applicant claims that the Respondent erred on the face of the record by reciting in the Notice of Determination of 15 December 2017, that he was satisfied that the proposed development "*would not adversely affect the integrity of any European site*". The Applicant says that this determination can only be made as a result of a Stage 2 Appropriate Assessment, which was not performed in this case.
171. The operative part of the Notice of Determination the subject of this complaint reads as follows: -

"Having had regard to the foregoing, and in particular having regard to the lease conditions attached to the Foreshore Lease, and having agreed with the recommendation of the MLVC, the Minister is satisfied: -

- i. That the proposed development on the foreshore would not have significant adverse impacts on human health and safety, nor on the marine environment.*

- ii. *That the proposed development on the foreshore would not adversely affect the integrity of any European site: (emphasis added) and*
- iii. *That it is in the public interest to grant the Foreshore Lease having regard to the purpose of the foreshore works”.*

172. Pursuant to Article 6(3) of the Habitats Directive a finding that the project “*will not affect the integrity of any European site*” can only be made after an appropriate assessment has been performed. The function of a Stage 1 Screening Assessment, which was undertaken in this case by the Committee, is to determine whether the project is “*likely to have a significant effect*” on a site or sites within the meaning of the first sentence of Article 6(3). If such effects cannot be excluded on the basis of the objective scientific information, the relevant authority must proceed to Stage 2, a full Appropriate Assessment (S.I. 477/2011).
173. There is no doubt that the Respondent made an error in declaring himself satisfied that the development would not adversely affect the integrity of any European site when no Appropriate Assessment had been performed. The next question is whether this error is of such a nature that it would justify the quashing of the Determination itself.
174. The Notice of Determination lists the matters to which the Respondent had regard, which includes the Committee’s Report, and refers to a list of information which is available on the website of the Respondent’s Department. That list includes not only the Notice of Determination, but also the Report of the Committee, and the Appropriate Assessment Screening Report, and the Marine Institute’s application for the Foreshore Lease together with supporting reports and documents supplied by it.
175. The Applicant submits that a decision which contains an error on the face of the record is amenable to an order of certiorari (*Clonree CLG v. An Bord Pleanála* [2018] IEHC 473). She submits also that the record of the decision must be sufficiently clear and precise as to evidence that the decision maker applied the correct test and having done so determined that no scientific doubt remains as to the absence of the identified potential effects.
176. The approach to these questions was considered by the Supreme Court in *Connelly v. An Bord Pleanála* and *Clare County Council* [2018] IESC 31 where Clarke C.J. said the following: -
- “The range of persons who are able to challenge a particular decision will vary from case to case, as will the extent of their involvement in the process. Thus, as a consequence of the above analysis, the requirement that reasons given for a decision must be adequate necessitates that, where the reasons are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision.”*
177. The Chief Justice continued: -

“Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned. In that regard, it seems to me that the trial judge has, put the matter much too far. The trial judge was clearly correct to state that a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear.”

- a. *“...in the context of a process such as that which occurred in this case, the reasonable observer would undoubtedly look to the Inspector's report but also have regard to the reservations expressed in that report, to the further information, including the NIS, which the developer was required to submit because of those reservations and to the rationale found in the decision itself for the Board expressing itself as being satisfied that those reservations had been met”.*

178. In the case of *Harten v. An Bord Pleanála* [2018] IEHC 40, a decision of An Bord Pleanála concluded that the proposed development: -

“... would not be likely to have a significant effect on the integrity of any European site”.

179. In that case the decision of the Board had incorrectly recited that an appropriate assessment had been undertaken when it had not been undertaken.

180. McDermott J. said the following: -

“The court is satisfied that an error was made in the drafting of the Board's decision which did not reflect the actual decision made by the Board not to carry out the Stage 2 AA. It is clear that the error is one of form and not one of substance in that the record of the actual decision was incorrectly drawn up. The court is also satisfied on the evidence that the Board made its decision on the basis of all relevant information and submissions. It was a lawful decision made in accordance and within a prescribed statutory process. It was not unreasonable or irrational. The reason for the decision is clearly stated in the quoted extract and is in compliance with the requirements set down by s.177U(7)(a) PDA 2000 and the above cited authorities. There was evidence available upon which it was open to conclude that the development would not be likely have a significant effect on a European site under s.177U PDA and Article 6 of the Directive. The court is not satisfied that the error in misstating the Board's decision in this case should result in a quashing of the decision. The tenor and terms of the remainder of the relevant paragraph within the decision indicate the conclusion that was clearly concerned

with a Stage 1 determination. This is in accordance with the evidence adduced as to the actual decision made. I do not consider that any prejudice was caused to the applicants as a result and indeed the ambiguity thereby created was easily addressed and was resolved on the evidence. Even if the technical form of the order were considered to give rise to a ground for relief it does not appear to me that it is in the interests of justice in the circumstances of this case that the court should exercise its discretion in favour of the applicants and quash the decision which the court is satisfied was in substance made in accordance with law”.

181. The result in that case was later altered on different grounds following the judgment of the CJEU in *People Over Wind*, but the judgment on the question of error on the face of the record was not overturned.

182. In *Eoin Kelly v An Bord Pleanála* [2019] IEHC 84, Barniville J. held that the approach of the court should be to examine the substance of the reports in order to determine whether the correct test had been applied rather than strictly construing the language used in the screening report or the inspector’s report.

“...the court does not read or construe the contents of the reports as if they were statutory provisions. It is not appropriate to read those reports as if they were statutes or even contractual provisions. In my view, the correct approach for the court to take is to consider the substance of the reports and not to approach what is said in the reports with an excessive degree of formalism.”

183. In that case, the applicant challenged the test applied by the Board and its inspector in screening for Appropriate Assessment on the basis that it did not expressly state that a “significant effect” on the European site could be “excluded” as required under s.177U(5) of the Act 2000. Barniville J. rejected this submissions and recited *Dublin County Council v. Eight Five Developments Limited (No. 2)* [1993] 2 I.R. 392 and *Buckley v An Bord Pleanála* [2015] IEHC 572 as support for the substance over form approach. He concluded:

“In my view, these cases amply demonstrate that the approach which the court should take in considering the screening report and the inspector’s report, insofar as it deals with the question of screening for appropriate assessment, is to examine the substance of what is said in those reports rather to focus on the use or non-use of particular statutory words or phrases.”

184. The report of the Committee is referred to three times in the Notice of Determination. Having regard to the approach taken by Clarke C.J. in *Connolly v. An Bord Pleanála and Clare County Council* and by Barniville J. in *Eoin Kelly v An Bord Pleanála*, it is appropriate to consider the terms of that Report, as regards the tests applied and conclusions made.

185. At three places in the Report of the Committee it is made clear that the test for screening at Stage 1 has been applied as follows.

186. At p. 15 the Committee reaches the following conclusion: -

“Based on the assessment of the effects of the proposed development on the habitats and species of the Natura 2000 sites listed above, this appropriate assessment Screening Report concluded that there are not likely to be any significant effects as a result of the proposed development and the conservation objections of the ten numbered Natura 2000 sites”.

187. At p. 31 the report concludes: -

“Based on the assessment of significance of the habitats and species of the Natura 2000 sites, this appropriate assessment Screening Report concluded that there are not likely to be any significant effects as a result of the proposed development of a 37.52-hectare wave, tidal and wind energy Test Site (on same footprint area to that which was previously licenced under FS 004904 and FS 006611) on the conservation objectives of the ten pertinent Natura 2000 sites”.

188. Page 59 contains the conclusions of the Screening Report itself. These are contained within two paragraphs. As follows: -

“There will be no direct or indirect impact and there will not be significant disturbance to key habitats or species. Additionally, there will be no habitat or species fragmentation and the overall integrity of the Natura 2000 sites will not be affected.

On the basis of the above it is concluded that there are not likely to be any significant effects as a result of the upgrading of an existing 37.52 – hectare wave energy Test Site. . . . on the conservation objectives of the ten numbered pertinent Natura 2000 sites as listed on the first page of this report”.

The first of these is unfortunately phrased in that it contains a reference to the “overall integrity of the Natura 2000 sites” which is only appropriate after a Stage 2 appropriate assessment. Whilst I have mentioned earlier that the use of this phrase casts some measure of doubt about the author’s understanding of the correct test to apply, the immediately following paragraph refers to the correct test, namely the question of whether there are *“likely to be any significant effects”*.

189. It is not helpful that Appendix 2 to the Committee’s Report is headed *“Appropriate Assessment Report”*, and not *“Screening Report”*. This would tend to suggest that the Respondent could have understood mistakenly that an AA had been performed. However, apart from that title, nowhere in the record of the entire process, has it been expressly stated that a Stage 2 Appropriate Assessment was in fact undertaken.

190. The Respondent refers also to the approval of the Minister signed on 1 August 2017, pursuant to the departmental Recommendation made on 18 July, 2017.

191. It is clear from the section of the Recommendation which relates to the Habitats Directive that it is a recommendation based on screening for appropriate assessment and not a Stage 2 Appropriate Assessment. It states as follows: -

"Based on the assessment of the effects of the proposed development on the habitats and species of the Natura 2000 sites listed above, the appropriate assessment Screening Report concluded that there are not likely to be any significant effects as a result of the proposed development ... on the conservation objectives of the ten pertinent Natura 2000 sites.

The MLVC is satisfied that this proposed development would have a negligible effect on designated Natura 2000 sites, does not require a Natura Impact Statement (NIS) which is stage 2 in the appropriate assessment process and agrees with the conclusion as presented in the Applicant's appropriate assessment report that there is not likely to be any significant effects on the conservation objectives of the ten pertinent Natura 2000 sites".

192. It is very clear from this document that the recommendation has noted that the proposed development "would not have a significant impact on the marine environment" and accordingly it places no reliance the finding statement in the AA Screening Report of "no adverse effect on the integrity of any European site".

193. When the error on the face of the Notice of Determination in referring to the result of a stage 2 screening test is taken together with the reference in the penultimate paragraph of the Committee report at page 59 to a finding of "no adverse effect on the integrity of European sites", there is potential for a reader to be misled as to the basis upon which the Minister made his determination. However, I am satisfied that the references in the Notice of Determination to the recommendations of the Committee and to the appropriate assessment screening undertaken are sufficient to enable a reader to recognise that no Stage 2 appropriate assessment was in fact undertaken and that the decision was made on the basis of Stage 1 screening for appropriate assessment. I have found for other reasons that the Stage 1 Screening Report was flawed and that the determination should be quashed for those reasons. However, taking into account all of the material referenced in the Notice of Determination and readily accessible to any reader, I conclude that the Applicant should not succeed on the ground of error on the face of the record.

Conclusion

194. In making the determination to grant the lease, the Respondent had regard to the AA Screening performed by the Marine Licence Vetting Committee and agreed with the report and recommendations of the Committee. The measures described at page 58 of that Screening Report were intended to avoid or reduce identified harmful effects of the Test Site and such measures were taken into account by the Committee when it concluded that there are not likely to be any significant effects as a result of the proposed Test Site on the conservation objectives of the Natura sites identified in the Report. In *People over Wind*, the CJEU held that it is inappropriate to take such measures into account in making such a conclusion. This decision has been recognised and applied in the State since it was

delivered, notably in *Eoin Kelly v. An Bord Pleanála* and *Heather Hill Management v. An Bord Pleanála*, (op. cit). Having relied on the Committee's report and recommendation, the determination of the Respondent is contrary to Article 6(3) of Council Directive 92/43/EEC and accordingly, I shall make an order of *certiorari* of the Determination of the Minister.

195. I shall refuse the reliefs as regards the following declarations sought, namely: -

- a) A declaration that the decision of the Respondent of 15 December 2017 was contrary to the Environmental Impact Assessment Directive 2011/92/EU.
- b) A declaration that the Respondent did not adequately consider and/or assess the submissions and/or observations of the National Parks and Wildlife Service or at all.

195. As regards the ground that the Respondent erred on the face of the record by reciting the test for Stage 2 Appropriate Assessment when no Natura Impact Statement was submitted by the Notice Party and no Stage 2 Appropriate Assessment was performed, I find that the Respondent so erred. However, the Notice of Determination refers clearly to the Report of the Committee and other submissions and reports from which it is clear that a Stage 1 Screening Assessment was made, albeit one which I have determined to be flawed for other reasons. Accordingly, no interested party reading the Notice of Determination was misled by this error or prevented from availing of the remedy of judicial review and in the circumstances of this case the error is not such as would, of itself, justify an order of *certiorari*.

196. I shall hear counsel as to the form of order to be made.