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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

National Trusts' Application [2013] NIQB 60

AN APPLICATION FOR JUDICIAL REVIEW BY THE NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY

WEATHERUP J

[1] The Giant's Causeway is a World Heritage Site partly owned by the National Trust. On the 27th of February 2007 a developer made an application for planning permission for a hotel and golf resort on 148 hectares of land some 550 metres south of the world heritage site. The Minister for the Environment in Northern Ireland granted planning permission for the development on the 29th of March 2012. The National Trust applied for Judicial Review of the decision to grant planning permission. Mr Beattie QC and Mr Lyness appeared for the applicant, Mr Elvin QC and Mr McLaughlin for the Department and Mr Shaw QC and Mr Dunlop for the developer, a notice party to the application.

[2] The development was described on the planning application as a golf resort including 18 hole championship golf course, club house, golf academy incorporating a driving range, a three hole practice facility, a 120 bedroom hotel incorporating conference facilities and spa, 75 guest suites and lodges and associated car parking, maintenance buildings and landscaping.

[3] By the Minister's decision it was recognised that there was an adverse impact arising from the development proposal but that the adverse impact would be outweighed by economic and tourism considerations.

[4] The submission to the Minister of February 2012 recommending approval of the proposal summarised the considerations in play. The proposed development

would have a significant landscape and visual impact on the setting of the Giant's Causeway World Heritage Site and the Causeway Coast Area of Outstanding Natural Beauty but when balanced against the regional economic and tourism benefits of the development it was considered that the impact was acceptable; while it was accepted that the proposed development would have some detrimental impact on nature conservation interests, mitigation measures were proposed, and when balanced against the economic and tourism benefits of the development it was considered that the impact did not warrant refusal; approval of the proposal was considered premature in that it would prejudice the outcome of the draft Northern Area Plan by pre-determining the decision on the merits of the policy proposals for the Distinctive Landscape Setting of the World Heritage Site in the draft plan, however given the delay in the adoption of the plan and the economic and other benefits of the proposal it was considered that the issue of prematurity was outweighed by the other material considerations in favour of the proposal; it was considered that there were significant benefits for the tourism industry and a very significant boost to the local economy and that the proposal was in line with the economic objectives of government strategies.

[5] There are multiple grounds for Judicial Review and I reduce them to seven headings. First of all, consultation about the World Heritage Site, second, environmental impact and habitats, third, economic considerations, fourth, tourist accommodation, fifth, the precedent effect, six, public inquiry and seven, the reasons for the decision.

(1) Consultation about the World Heritage Site

[6] The applicant relied on six grounds –

First, the respondent unreasonably failed to consult with the World Heritage Committee in respect of the application for planning permission.

Second, the respondent failed to take into account a material consideration or make sufficient enquiry regarding the impact of the proposals on the world heritage site.

Third, the respondent acted irrationally in concluding that he had properly considered the effects of the proposal on the world heritage site.

Fourth, the Minister was misled by advice received from officers of the Department regarding consultation with UNESCO.

Fifth, the respondent acted irrationally in allowing timing concerns to influence the decision to grant permission in the absence of any consultation with UNESCO.

Sixth, the respondent acted unfairly and in breach of a legitimate expectation or under a misunderstanding of its powers in deciding to grant permission.

[7] The 1972 United Nations Educational Scientific and Cultural Organisation (UNESCO) World Heritage Convention concerning the protection of the world cultural and natural heritage was ratified by the United Kingdom in 1984. The provisions of the Convention have not been incorporated directly into UK national law. The Giants Causeway was added to the world heritage list. A World Heritage Committee is responsible for the implementation of the World Heritage Convention and within the UK the Department of Culture, Media and Sport, at Westminster, is responsible for the UK's general compliance with the World Heritage Convention and for co-ordinating and conducting all communications between UNESCO and other government bodies within the UK with responsibility for world heritage sites. In Northern Ireland the Northern Ireland Environment Agency is responsible for world heritage matters on behalf of the Department of the Environment which in turn contacts the Department of Culture, Media and Sport which in turn contacts UNESCO.

[8] Guidelines have been issued in relation to the operation of the Convention. They are described as Operational Guidelines for the Implementation of the World Heritage Convention, issued by the United Nations Educational Scientific and Cultural Organisation by its Inter-governmental Committee for the Protection of the World Cultural and Natural Heritage. The stated aim is to facilitate the implementation of the Convention concerning the protection of the world cultural and natural heritage. The definition of world heritage includes cultural and natural heritage. Natural heritage is defined as including natural features, geological and physiographical formations and natural sites, in each case being items of outstanding universal value. Outstanding universal value is defined as cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations for all humanity.

[9] Under the heading 'Process for Monitoring the State of Conservation of World Heritage Properties' paragraph 172 of the Guidelines states –

> "Information received from the State Parties and/or other sources.
>
> The World Heritage Committee invites the State Parties to the *Convention* to inform the Committee, through the Secretariat, of their intention to undertake or to authorise in an area protected under the *Convention* major restorations or new constructions which may affect the Outstanding Universal Value of the property. Notice should be given as soon as possible (for instance, before drafting basic documents for specific projects) and before making any decisions that would be difficult to reverse, so that the Committee may assist in seeking

appropriate solutions to ensure that Outstanding Universal Value of the property is fully preserved."

[10] The Convention is an International Treaty between the United Nations and the States who subscribe to the Convention. The Convention does not create individual rights for the citizens of the subscribing States. However a State may adopt national measures that apply the standards of the Convention and create individual rights. In the present case the applicant claims that this creation of individual rights has occurred by the Department adopting a planning policy that imposes paragraph 172 of the Guidelines on an application for planning permission affecting the World Heritage Site.

[11] The domestic provisions relied on by the applicant are contained in Planning Policy Statement No 6 under the heading World Heritage Sites as follows -

"The Importance of World Heritage Sites.

4.1 The criteria for selection of cultural and natural sites of outstanding universal value to be included in the World Heritage List are contained in the "Operational Guidelines for the Implementation of the World Heritage Convention" published by UNESCO. No additional statutory controls follow on from inclusion of a site in this List. Inclusion does, however, highlight the outstanding international importance of the site as a key material consideration in the determination of planning and/or listed building consent applications and appeals.

Policy BH 5
The Protection of World Heritage Sites.

The Department will operate a presumption in favour of the preservation of World Heritage Sites. Development which would adversely affect such sites or the integrity of their setting will not be permitted unless there are exceptional circumstances.

Justification and Amplification

4.2 World Heritage Sites are places or buildings of outstanding universal value and accordingly the Department attaches great weight to the need to protect them for the benefit of future generations as well as our own. Development proposals affecting such sites or their settings may be compatible with this objective but will always be carefully scrutinised for their likely effect on the site or its setting in the longer term. The

Department will pay particular attention to the impact of the proposals on –

the critical views of and from the site;
the access and public approaches to the site; and
the understanding and enjoyment of the site by visitors.

[12] None of this imposes any requirement on the Department to consult with the World Heritage Committee (WHC) on a planning application affecting a World Heritage Site. It refers to the criteria for the selection of a site. It states that inclusion on the List highlights the outstanding international importance of the site as a key material consideration in planning decisions. The policy is stated to be a presumption in favour of the preservation of the World Heritage Site. Only in exceptional circumstances will development be permitted that adversely affects the site or its setting. Nor does this domestic policy purport to apply the Guidelines to applications for planning permission affecting the World Heritage Site. It merely states that the Guidelines set the criteria for inclusion in the List. It does not state that the Guidelines are a material consideration for planning purposes. Thus in considering whether or not there was an obligation on the Department to consult with the WHC before determining this planning application it is not to be found in the domestic planning policy.

[13] There have been planning policy changes since PPS6 was introduced. The Causeway Coast Area of Outstanding Natural Beauty was designated under the Nature Conservation and Amenity Lands (Northern Ireland) 1985 and this area includes the setting of the World Heritage Site. The Department has published its Management Plan for the Area of Outstanding Natural Beauty. The Management Plan for the World Heritage site has also been published. In May 2005 the draft Northern Area Plan was published and the draft Plan includes draft boundaries and associated draft policies for what is known as a Distinctive Landscape Setting and the Supporting Landscape Setting of the World Heritage Site. The proposed development falls within the proposed Distinctive Landscape Setting and the relevant policy is draft Policy COU12 and provides –

"No development within the Distinctive Landscape Setting outside of settlement development limits will be approved except:

1. exceptionally modest scale facilities, without landscape detriment, which are necessary to meet the direct needs of visitors to the World Heritage Site;
2. extensions to dwellings that are appropriate in scale and design and represent not more than 20% of the cubic content of existing dwellings;
3. replacements of existing occupied dwellings with not more than 20% increase in the cubic content.

These allowances will be permitted once only."

[14] None of the additional domestic matters referred to could be said to impose an obligation on the Department to consult with the World Heritage Committee before making a decision on a planning application affecting a World Heritage Site.

[15] There was engagement with the WHC in relation to the World Heritage Site. In February 2003 a joint UNESCO/ IUCN mission visited the site and prepared a report. There were at that time three planning applications for development within the vicinity of the World Heritage Site, one was an extension to the Causeway Hotel by the National Trust, another was for a Visitors' Centre at the Causeway by Seaport Investments Ltd and the third was an application for a golf resort and hotel at Runkerry. A report went to the 2003 meeting of the WHC. The Department was advised of the outcome of the meeting and provided with a copy of the decision. The WHC did not request any further information regarding the proposal for development of the golf course but rather requested that the UK should keep the WHC and IUCN informed on any further development.

[16] In September 2007 the Northern Ireland Environment Agency wrote to the WHC updating it about the planning application by Seaport Developments Ltd for a Visitors' Centre. An alternative proposal for a Visitors Centre was notified to the WHC in January 2008 and considered at the 2008 meeting. An up-to-date report was requested from the Department by February 2010, which report was submitted. In the meantime the Department had written to the WHC and advised that it was refusing planning permission for the Seaport Developments Visitors' Centre and had issued a Notice of Intention to grant planning permission for a National Trust Visitors' Centre. The report to the WHC in 2010 advised of the second planning application for a golf resort development at Runkerry with which this application for Judicial Review is concerned. The matter was not put before the 2010 meeting of the WHC as there were considered to be no serious issues arising.

[17] In 2011 the applicant wrote to the WHC to express their concern about the proposed golf development. After some time had elapsed the WHC notified the applicant that it had made a formal request to the UK Ambassador to arrange a response. This led to a report being furnished by the Department in February 2012 when a decision had been made to grant planning permission. In March 2012 the Department submitted a further report to the WHC on the decision to approve the Runkerry development.

[18] According to the Department, adopting the advice of the Department in London as representing the position of the UK, the WHC only needs to be advised of the grant of planning permission affecting a World Heritage Site once the decision has been taken and before it is announced. It is the Department's view that such an approach complies with the Guidelines.

[19] The Department's approach to the WHC has not always been apparent in the actions of officials. There was, rather, some confusion in the ranks of the Department.

Suzanna Allen, Acting Director of the Natural Heritage Directorate of the Northern Ireland Environment Agency, chaired a meeting of the Giant's Causeway World Heritage Site Management Group in March 2011. In the course of that meeting the view was expressed by a majority of those attending that the WHC should be advised immediately about the current position with regard to the planning application for the golf resort. On 16 March 2011 Ms Allen spoke to Peter Marsden the head of the World Heritage section in the Department in London. She states that in accordance with previous advice from DCMS he said that there was no need to advise the WHC as it had previously been informed that the golf resort application was under consideration and no decision had been made on the planning application. He advised that it was normal practice in the UK to inform the WHC quickly once a development decision which may have an adverse impact on outstanding universal value had been taken.

[20] Ms Allen advised the Management Group of the Department's position on communications with the WHC. Letters were written by Ms Allen to the effect that there was no need to report to the WHC at that stage and that they would be notified once the application had been "fully assessed". The Management Group was similarly informed. The wording suggests that there would be consultation with the WHC after an initial assessment of the proposal and before a decision was made. Ms Allen's affidavit stated that she had advised that the WHC would be informed "once a decision had been taken". After attention was drawn to this difference in wording in the course of the hearing Ms Allen filed a further affidavit in which she sought to explain what she meant. In essence she stated that she meant there to be no difference between the two forms of wording. "In my mind a decision equated with being fully assessed. These two expressions were not intended to convey different meanings, nor to refer to different stages in the process of determining a planning application. In my mind, they both refer to the point in time when the Department has determined the application".

[21] A second instance of the confusion on this issue involved Rosemary Bradley, a member of the Strategic Projects Team within the Department. She requested assistance from Ms Allen in relation to the UNESCO position and was informed that UNESCO should be advised about the proposal for development. Ms Bradley, it is said, had not fully understood the advice which she received and she informed the Strategic Projects Team that UNESCO should be consulted prior to the decision to approve the development. Ms Allen therefore seeks to draw back from the manner in which Ms Bradley expressed the position and to reiterate the advice she obtained from London as representing the position of the Department.

[22] Further, at a meeting on the 26th of April 2010 between representatives of the Planning Service and the developer it was stated by a Mr Cummins of the Planning Service that the views of the NIEA, including comments from UNESCO, would form part of the Department's consideration of the planning application. The Department contend that Mr Cummins appears to have held his view following the erroneous advice contained in the email of Ms Bradley and that he was not fully aware of the

protocols for communicating with the WHC. Thus Ms Bradley misunderstood the position and Mr Cummins took that misunderstanding to one of the meetings.

[23] At a further meeting on 4 August 2010 a comment was attributed to a Mr Cummins that NIEA was no longer concerned about the impact of the development on the World Heritage Site. Mr Cummins responded to this by relying on his own version of the minutes of that meeting in which he did not agree with the comments that were attributed to him. This is an instance of a disputed record of a meeting rather than of conflicting advice.

[24] Another instance referred to by the applicant concerned the statements made by the Minister. The statements are carefully worded. For example the Minister reiterated that he had regard to the views of the World Heritage people and of the approach that might be taken by the WHC. This is not to state that he will consult with the WHC before making a decision on the proposed development. The Minister stated that he was taking into account world heritage issues and by referring to the approach "that might be taken" was anticipating the views of the WHC on the particular proposal. Whether one agrees or does not agree with such a position it does not have the effect of creating an obligation to consult with the WHC before reaching a decision.

[25] I am satisfied that the advice that operates within the UK, be it right or wrong, is that notice of the planning decision will be given to the WHC once the decision has been made and before it is announced. Ms Allen suggested otherwise and she did so by mistake. Ms Bradley suggested otherwise and she too did so by mistake. Mr Cummins suggested otherwise and he made the same mistake.

[26] A further concern was whether the Minister had been misled by the advice given by his officials in relation to consultation with the WHC. The Minister was not briefed on the various statements made by staff as referred to above suggesting consultation with the WHC prior to a decision. Rather the Minister was briefed on the basis that there would be notification of the decision before announcement, this being in accordance with the national stance on the obligations to the WHC. A briefing of this character was not to mislead the Minister but to apply the Departmental position.

[27] In addition the applicant complained that the decision on the grant of planning permission was subject to unnecessary time constraints that influenced the approach to consultation with the WHC. The Minister did initially set a ten week time limit for a decision although that was later extended. Engagement with the WHC would have resulted in the decision being deferred. However it is clear that the imposition of a time limit did not affect the approach to consultation with the WHC. The Department, in line with the stated national approach, was going to notify the WHC of the decision made before it was announced and not consult with the WHC before the decision was made.

[28] The applicant contends that a material consideration was not taken into account by the Department, namely the views of the WHC in advance of the decision. Further the applicant contends that the Department failed to scrutinise the impact of the proposal on the World Heritage Site. As to the views of the WHC, this is a variant of the applicant's contention that the Department was obliged to consult the WHC, a matter that does not find domestic expression. The material consideration is stated to be the outstanding international importance of the site. As to the Department taking account of the outstanding international importance of the site or the impact of the proposal on the site, it is apparent that the Department engaged in a process that involved consideration of those matters but elected to give greater weight to the economic and tourism advantages that were considered to apply to the proposal.

[29] The statements made by representatives of the Department lead on to a consideration of whether there was a legitimate expectation of engagement with the WHC prior to the decision being taken. Legitimate expectation requires the relevant authority to give a clear and unequivocal statement of intent or to adopt a practice of a particular course of action. I have found that the statements made by officials that are relied on by the applicant were based on a misunderstanding of the Department's position and do not have the effect of binding the Department. I do not find that the basis for legitimate expectation arises in this case.

[30] International Treaties are not justiciable in the domestic courts. In examining the obligations that may or may not arise under the Convention or under the Guidelines issued under the Convention the Court must step away from seeking to implement directly or indirectly the requirements of the Convention or the Guidelines so as to afford individuals rights under the Convention. If the State does not adopt the terms of the Treaty into the domestic law the terms are not capable of affording rights to citizens.

[31] Where the Director of the Serious Fraud Office relied on an interpretation of article 5 of the OECD Convention in deciding not to continue with an investigation into arms sales to Saudi Arabia the issue arose as to whether the Court should determine the correct interpretation of article 5. In the House of Lords Lord Brown considered that intervention by the domestic courts was not to be contemplated "save for compelling reasons" and that it simply could not be the law that, provided a public officer asserted that his decision accorded with the State's international obligations, the Court would entertain a challenge to the decision based on his arguable misunderstanding of the obligation and then decide the point of international law at issue (R (Corner House Research) v Serious Fraud Office [2009] 1 AC 756).

[32] This issue was considered by our Court of Appeal in McCallion's Application [2009] NICA 55 which concerned the United Nations Convention on the Rights of the Child. Article 2.2 requires that the State shall take all appropriate measures to ensure the child is protected from all forms of discrimination or punishment on the basis of

the status or activities of a parent. The Criminal Injuries Compensation Scheme in Northern Ireland provides that compensation will be denied to the families of deceased persons if the deceased had terrorist convictions. Mr McCallion was unfortunately a victim of assassination and he had a terrorist conviction. As the Scheme provided that his family could not recover compensation the issue arose as to whether that provision was compatible with United Nations Convention which prevented discrimination on the basis of the activities of a parent. Girvan LJ set out the general position that international treaties which have not been incorporated into domestic law do not form part of the national law and the courts do not generally have jurisdiction to interpret or apply the terms of the Treaty. There was no necessity for the Court to intervene.

[33] The applicant refers to Republic of Ecuador v Occidental Exploration [2006] QB 432 a decision of the Court of Appeal in England and Wales. This was a dispute which concerned the United Nations Commission on International Trade Law. The dispute proceeded to arbitration under a bi-lateral investment Treaty between Ecuador and the United States of America by which nationals and companies of one State enjoyed direct dispute resolution rights against the other. It was held that the Court had jurisdiction to interpret an international instrument which had not been incorporated into domestic law where it was necessary to do so in order to determine a person's rights and duties under the domestic law. In determining whether such interpretation was necessary, account had to be taken of the special character of the Treaty and the agreement to arbitrate in the domestic courts. The Court was satisfied that it was necessary to interpret the Treaty in order to give effect to the arrangements between the States which provided for domestic arbitration. Thus there may be good reason not to apply the principle of non-justiciability, as when the international instrument provides for domestic legal arrangements.

[34] There is no such imperative in the present case. The applicant seeks an interpretation of the Guidelines as opposed to the Treaty. The applicant contends that the interpretation adopted by the Department and throughout the UK is incorrect in relation to consultation between the agencies of the State and the agencies of UNESCO. The applicant seeks to impose a contrary interpretation on the Department which would have the effect of obliging the Department to consult with the WHC before making a decision on a planning application affecting a World Heritage Site. I have found that there is no such domestic obligation. The Court is not entitled to grant to the citizens of the State a right that only arises in international law between States.

[35] The obligation that arises under the Guidelines is a different obligation to that which arises under the Convention itself. Whatever interpretation one places on paragraph 172 of the Guidelines I refuse to interpret it or apply it in a way which would impose upon the Department an interpretation which has the effect of requiring them to comply with paragraph 172 of the Guidelines or any particular interpretation of paragraph 172. The result is that the National Trust cannot rely on

any supposed breach of the obligations under the Guidelines unless the obligations find domestic expression, which I have found is not the case.

[36] The domestic requirement is to treat the status of the World Heritage Site as a material consideration for planning purposes. That requirement was acknowledged by the Department but it does not entail a legal obligation to consult with the WHC either under the Convention or the Guidelines or Policy BH5 or by reliance on the statements of the Department officials or the ministerial statements referred to by the applicant.

[37] I find the outcome on the role of UNESCO to be surprising in a number of respects. First, that the Department does not have to engage with the WHC before making a decision. While there is a Treaty in place and the matter is to be dealt with initially on the international plane, protection might better be afforded by some requirement for engagement with the WHC before a decision is made that may affect the site. However no such domestic obligation has been adopted. Secondly, it is surprising that the Department did not canvass the views of the WHC on the impact of the particular proposal before making its final decision and I am satisfied that they did not do so. The Department reported on the fact of the application having been made but prior to making the final decision the Department did not seek to obtain the views of the WHC. Thirdly, it is surprising that the UK considers that notification of a decision after it is made accords with paragraph 172 of the Guidelines. A reading of the Guidelines suggests that the object of the exercise is to engage with the WHC so that they will present a view on the impact of development on the World Heritage Site before the decision is made. I do not know the basis on which this advice has been furnished, nor what the view of the WHC is on this approach but that is a matter between the United Nations and the State. It is not a matter for the Court. There was no challenge to the fact that this was the national advice and the national approach, although there were internal misunderstandings to which I have referred. None of this operates at a level at which the Court has power to intervene and therefore I am unable to do so.

(2) Environmental Impact and Habitats

[38] The applicant relied on six grounds –

> First, the respondent acted unlawfully, failed properly to make available to the public or to advertise environmental information pursuant to the EIA Regulations.
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> Second, the respondent erred by imposing conditions on the permission so as to allow the provision after the grant of planning permission of material required to be provided before a grant of permission.

Third, the respondent imposed a condition on the permission which was invalid.

Fourth, the respondent was unable to carry out an appropriate assessment of whether the proposals would have any significant effect on a European site pursuant to the Habitats Regulations.

Fifth, the respondent was unable to carry out an appropriate assessment of whether the proposals would have any significant adverse effect on a possible European site.

Sixth, the respondent failed properly to assess the impact of the proposals on European Protected Species pursuant to the Conservation Regulations.

[39] These grounds are concerned with two European Directives and their domestic equivalents, one on environmental impact assessments (Council Directive 85/337/EEC as amended by 97/11/EC) and the other on the conservation of natural habitats and of wild fauna and flora (Council Directive 92/43/EEC).

[40] In relation to environmental impact assessments the Directive finds its domestic form in the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999. The scheme provides first of all that projects that are likely to have significant effect must be subject to an environmental impact assessment; secondly, that the developer should produce an 'Environmental Statement' with the content being defined by the Regulations; thirdly, the adequacy of the contents of an Environmental Statement is a matter for the Department, subject to the Wednesbury rule that the decision must be rational, take into account relevant considerations and leave out of account irrelevant considerations; fourthly, it is for the Department to assess whether the proposal is likely to have a significant impact on the environment, again subject to the Wednesbury rule and fifthly the Department must take into account 'environmental information' before granting planning permission.

[41] In relation to habitats the Directive finds its domestic form in the Conservation (Natural Habitats) Regulations (Northern Ireland) 1995. The scheme provides for protected sites by designating Special Areas of Conservation, in the present case the North Antrim Special Area of Conservation and the draft Skerries and the Causeway Coast Special Area of Conservation. A determination has to be made as to whether or not the proposed development is likely to have significant effect on the Special Area of Conservation. For this purpose an 'appropriate assessment' of the implications of the proposal has to be undertaken and the developer provides such information as the Department reasonably requires. No planning permission can be granted unless the development will not adversely affect the Special Area of Conservation. The habitats scheme therefore differs in structure from the environmental impact assessment scheme.

[42] Further the habitats Regulations provide for protected species. There are European Protected Species of animals, such as bats and otters, and strict protection of the protected animals. Similarly, there are European Protected Species of plants, again subject to strict protection. The Department must have regard to the Directive in relation to the grant of planning permission.

[43] In addition there is domestic protection under the Wildlife (Northern Ireland) Order 1995 and the Wildlife and Natural Environment Act (NI) 2011, which applies for example to badgers, lizards and newts.

[44] The Environmental Impact Assessment Regulations contain publicity requirements. 'Environmental information' is defined in the Regulations as (i) the Environmental Statement, (ii) 'further information' supplied by the developer at the request of the Department to supplement the Environmental Statement, (iii) representations made by any body required to be consulted, (iv) representations made by anyone else.

[45] The publicity requirements at Regulation 12 state that where an Environmental Statement is submitted the developer should make it available to the public and the Department is required to publish notice in a newspaper and state that there is an Environmental Statement and give the address at which copies of the Environmental Statement can be obtained. In relation to 'further information', Regulation 15 states that when the Department requires further information that too is subject to the publicity rules for the Environmental Statement. A distinction must therefore be drawn between 'environmental information' and the Environmental Statement. 'Environmental information' includes two types of information that are not provided by the developer and are not subject to the same publicity rules, namely, representations by required consultees and representations by others.

[46] An 'Environmental Statement' is one that includes the matters set out in the schedule to the Regulations. The second part of the schedule specifies those matters that must be included in the Environmental Statement, being in summary a description of the development, a description of the mitigation measures to address significant adverse effects, the data required to identify the main environmental effects, an outline of alternatives and a non-technical summary. The first part of the schedule refers to information reasonably required to assess environmental effects and includes a description of the aspects of the environment likely to be significantly affected (including population, fauna and flora among other particular aspects) and a description of the likely significant effects.

[47] The applicant's first ground concerns the alleged absence of publicity for information supplied by the developer on population. Population impact is a requirement of the Environmental Statement. The developer provided the Department with information on population which the applicant contends should have been publicised and was not. However the Department's response is that the

additional information about population was advertised in a subsequent advert and therefore this point has been met.

[48] The applicant's second ground concerns the alleged postponement of aspects of the environmental impact assessment. The applicant contends that by imposing certain conditions in relation to the development the Department had effectively postponed the consideration which it ought properly to have given to the proposals prior to the grant of planning permission. 42 conditions were imposed in the grant of planning permission and 50 informatives were included. By way of example condition 23 requires that prior to the commencement of work there should be a botanical survey. Condition 24 provides that prior to the commencement of work there should be a faunal survey. Condition 21 provides that there should be an Environmental and Habitat Management Plan by which there would be a report to the Department at stated intervals in relation to operations. Condition 11 deals with the Sustainable Urban Drainage System which has to be installed as agreed with the water authorities. Condition 13 deals with sediment prevention and requires a Method Statement. Condition 16 relates to bat detector surveys and is concerned with lighting arrangements during the work.

[49] The first two conditions referred to are related to the transfer of plants and fauna, referred to as translocation. The other four conditions are of a different character and relate to the conduct of the works. The conditions will be referred to below in the context of the particular aspects of the environment to which they relate. However it is my conclusion that conditions 23 and 24 in relation to the surveys do not represent a postponement of the assessment. Rather they are a method of dealing with the impact of the development which involves the translocation of the plants and the fauna that have been identified as likely to be affected by the proposal. Further it is my conclusion in relation to the other conditions relating to working methods for the development and the monitoring of compliance with agreed work methods that they are not a deferral of the necessary assessment but amount to ongoing scrutiny of the outworking of the construction work and the overall development.

[50] The applicant's third ground concerns the alleged absence of a mechanism for enforcement of a condition on lighting. Condition 16 is concerned with the lighting arrangements in relation to bats and provides that, prior to commencement of any permanent light or lamination works on site, monthly bat detector surveys between May to September should be carried out to include the access road, woodland and watercourses and then repeated at the same locations over stated times. It is contended by the applicant that there is no remedy for any deficiencies identified by the surveys.

[51] I consider that it is inherent in the condition that there would be enforcement of identified deficiencies. Hulme v Secretary of State for the Environmant and Local Government [2011] EWCA Civ 638 concerned noise produced by turbines proposed to be installed and a planning condition required evaluation of the noise levels when

complaints were made. There was a challenge to the grant of planning permission on the basis that there was not an appropriate enforcement mechanism. The Court of Appeal decided that it was clearly intended that there should be an enforcement mechanism and that the obligation was not to contravene the standards that had been set. It was necessary to construe the condition on the basis that there would be enforcement by the planning authority of non-compliance with the standard.

[52] In the present case there is a lighting standard to be maintained and there will be the capacity for enforcement of the standard if there is non-compliance. This matter re-emerges in the discussion of bats below.

[53] The additional environmental grounds concern the adequacy of the assessment of the impact of the proposed development, which became the subject of much debate between, on the one hand Dr O'Neill, managing director of an environmental consultancy engaged by the applicant and on the other hand those from the Northern Ireland Environment Agency who were consulted by the Department, being Dr Hempsey and Dr McCullough and Mr Finnegan. Dr Hempsey's account of the consultation responses indicates that first of all there was a combined response dated the 31st of October 2007 from the NIEA Directorates of Natural and Built Heritage. That response recommended refusal of the proposal and provided details of inadequacies in the Environmental Statement. On the 3rd of September 2008 there was a response to additional environmental information on the issues identified. Thirdly, on the 26th of January 2010 NIEA issued a further consultation response indicating that its advice and recommendations had not changed. Fourthly, on the 13th of June 2011 a request was made for additional environmental information and fifthly on the 25th of August 2011 an NIEA natural heritage response referred to the additional information. Sixthly on the 31st of October 2011 NIEA responded to further environmental information and an addendum which had been added to the Environmental Statement.

[54] Dr Hempsey states that by 31st October 2011 it was considered that all of the information necessary in order to conduct an assessment of the likely significant environmental effects of the development had been submitted. Having considered all of that information it was recommended that planning permission should be refused. The reasons were that the development would adversely impact on the views and setting of the Giant's Causeway landscape quality, that it would damage wildlife and physiographical features, that it would be premature because of the draft Northern Area Plan and it would be contrary to policies in the Regional Development Strategy in relation to the protection of coastal scenic areas. However planning permission was eventually granted by the Department.

[55] The general approach to Environmental Statements is set out in R (Blewett) v Derbyshire County Council [2004] Env LR where Sullivan J at paragraph 68 stated that there is a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in Environmental Statements as revealed by the consultation process prescribed by the Regulations and to contend that because

the document did not contain all the information required it was therefore not an Environmental Statement and thus that the local planning authority had no power to grant planning permission. However Sullivan J continued that unless it could be said that the deficiencies were so serious that a document could not be described as in substance an Environmental Statement for the purposes of the Regulations such an approach was misconceived. It was stated to be important that the decisions on EIA applications were made on the basis of full information but the Regulations were not based on the premise that the Environmental Statement will necessarily contain the full information. The Environmental Statement is but a part of the environmental information that the decision maker must take into account.

[56] The applicant relied on R (Hardy) v Cornwall County Council [2001] Env LR 34. The planning authority will fail to comply with the requirements if they attempt to leave over questions which relate to the significance of the impact on the environment and the effectiveness of the mitigation. There was evidence in an ecological report that bats or their nesting places may have been found on the site and the planning authority concluded that surveys should have been carried out. It was held that the planning authority were not in a position to conclude that there were no significant nature conservation issues until they actually had the results of the survey.

[57] In relation to 'environmental information' a number of matters may be noted. First of all, the 'environmental information' gathered by the Department from the developer the consultees and others will be wider than the 'Environmental Statement' provided by the developer. The Environmental Statement must contain the information required by the schedule to the Regulations and will fail if it cannot be regarded as in substance an Environmental Statement. As well as the Environmental Statement and further information from the developer the Department will also be able to rely on the environmental information obtained from consultees and others. For this purpose the representatives of the Northern Ireland Environment Agency are consultees. Secondly, it is for the Department to decide if there are likely significant effects, that is, if there is an effect, if it is significant and if it is likely. Thirdly, the Department can take into account mitigation measures, thus concluding that what would otherwise be a likely significant effect will, by reason of mitigation, not be so. In order to so conclude the mitigation measures should be clearly established and easily achievable. Fourthly, the Department cannot postpone the decision on likely significant effects or on whether mitigation measures will mean that there is no likely significant effect. If a conclusion on likely significant effects requires a survey then the survey must be done. Nor can the Department impose conditions instead of making the assessment. Fifthly, there must be sufficient information for the Department to decide on the likely significant effects and mitigation. It is for the Department to decide if there is sufficient information and the Department may require further information from a planning applicant, with the required publicity for such further information, and may obtain additional information from consultees or from members of the general public.

[58] Similarly in relation to habitats, it is for the developer to provide the information reasonably required by the Department. The Department will decide if sufficient information has been provided by the developer. The Department may have other relevant information. The Department will make an appropriate assessment of likely significant effect of the development. In each instance the Department's conclusion is subject to the Wednesbury rule.

[59] Is the present case one where the Department had sufficient information to decide on the likely significant effects of the proposal, as the Department would say is the position, or is it a case of the Department granting planning permission without sufficient information and deferring a decision on likely significant effects, as the applicant would say was the position?

[60] I turn to a number of particular subjects as illustrative of the issues. The discussion includes certain recurring issues namely, the applicant complains of inadequate surveys being undertaken by the developer; of inadequate information on impact and mitigation being provided by the developer; of the Department relying on other available information; of the absence of public awareness of the other available information; of the use of conditions attached to the planning permission by which the Department postponed the assessment of the development on the environment and habitats. These are issues on which witnesses for the applicant and for the Department disagreed. It is necessary to restate the nature of Judicial Review. The primary decision maker in this process was the Department as provided by Parliament. The Court is limited in its review of the decision and considers whether the decision is within the legal framework, whether the decision is rational and takes account of the relevant considerations and leaves out of account irrelevant considerations and whether the decision has been arrived at in a procedurally fair manner.

[61] First of all there was debate about the treatment of lizards on the site. Lizards are protected under the Wildlife Order. The Department's approach is that where a development site includes potential lizard habitats such as boglands, heathlands and sand dunes the Department will assume that lizards are present. An initial survey did not show any sign of lizards. The Department's view was that there was adequate habitat within the sand dunes area which would remain intact after development and thus the development was considered to be unlikely to give rise to significant effects upon the reptiles.

[62] The applicant's advisers took a different view. Dr O'Neill's expressed concerns about the approach taken by NIEA which concerns were said to be confirmed by consideration of guidance prepared by Natural England in a publication known as the Reptile Habitat Management Handbook. There is no such guidance in Northern Ireland. Dr O'Neill considered that it was clear that the environmental impact of the proposal could not have been assessed until all basic survey data had been provided by the developer and specific measures envisaged to

reduce or eliminate impacts upon lizards were described within the Environmental Statement.

[63] Dr Hempsey's view was that the most important factors were the extent to which the proposed development works might harm lizard habitats and the extent to which suitable habitats would remain undisturbed. The NIEA had this information through the golf course construction study which demonstrated the areas of golf course use and the very large amounts of dune land that would remain undisturbed. The key issue when assessing impact was said to be knowledge of the suitable habitat available to which the lizards could relocate, an approach which was said to be supported in the Reptile Habitat Management Handbook to which Dr O'Neill referred. The NIEA judgment was that impacts were unlikely to be significant and it was said to be possible to make that assessment without requiring a detailed survey to determine the precise location of lizard populations within the dune land.

[64] Dr O'Neill objected to a potentially significant impact being excluded from consideration within the Environmental Statement and the further information supplied by the developer and on reliance being placed on other information. He reiterated that where the mere potential for an impact to arise was recognised the significance or otherwise of that impact must be assessed within the Environmental Statement and the effectiveness of proposed measures subjected to appropriate scrutiny, whereas the Environmental Statement was silent in respect of the issues.

[65] The NIEA information is part of the environmental information obtained by the Department to be taken into account in the assessment of likely significant effects. The Environmental Statement may not include mitigation measures but they may be taken into account in considering likely significant effects if they are proposed by consultees such as NIEA. The publicity rules do not prevent this additional information being considered.

[66] In giving effect to the planning permission the Department introduced condition 24 to provide for a relocation scheme prior to the commencement of the works. The introduction of condition 24 did not amount to a postponement of an assessment of the likely significant effects of the proposal. The Department had already found that it has sufficient information to decide on the likely significant effects without a survey. It had found that the development would impact on lizards. It had found that lizards could be moved to another part of the site. It had found that there were unlikely to be significant effects on the lizards as a result of the translocation. The proposed survey is not for the purpose of determining likely significant effects but to give effect to the scheme for relocation. I am satisfied that the approach of the Department accords with the purposes of the Directive and the Regulations.

[67] Next is the issue of the treatment of plant species. The applicant raised concerns about the presence of priority plant species, of which four species had been identified, and considered that without appropriate specialist surveys it was

impossible to determine the environmental impact on the species. The developer's Environmental Statement had only identified two of the species. Dr Hempsey consulted an earlier plant survey conducted in 2002. Dr Hempsey concluded that the site was one of high local ecological value and that the proposed development would amount to a significant loss to local biodiversity. A member of the public, David McNeill, an amateur expert in the identification of Irish vascular plants, made representations critical of the botanical information provided by the developer. Dr Hempsey revisited the issue and consulted a botanical expert. However it was not considered that additional environmental information or surveys were required in order to complete the impact assessment.

[68] Condition 23 required that prior to the commencement of any works on site a detailed botanical survey should be undertaken to locate the priority plant species and a plan agreed for translocation of the plants where required. Dr Hempsey stated that this condition was a means of requiring the developer to carry out the necessary mitigation measures to minimise the effects on protected plants that had been identified.

[69] Dr O'Neill's view was that surveys in advance to understand the presence of the species and the mitigation proposed in respect of each species and determine whether that mitigation would be effective.

[70] Again it can be stated that not all environmental information relied on by the Department is required to be in the Environmental Statement. The decision-maker is entitled to have regard to other information garnered in the consultation process. Surveys are a vehicle that may be required to determine the likelihood of significant effect and the nature of mitigating measures. However, surveys are not essential if the decision can be made without surveys. Primarily it is for the decision-maker to determine if the surveys are required in order to reach the decision on likely effects. Likely effects and mitigation measures may be identified. In the present instance Dr Hempsey felt able to reach a conclusion without the surveys. The Department received the views of the consultees in relation to plant species and reached a conclusion. The applicant has not identified any basis on which that conclusion can be set aside.

[71] There was dispute as to the assessment of the effects on birds. In relation to the bird population the applicant again contends that the necessary surveys were not conducted to permit a decision to be made on environmental impact. The Department referred the issue to Dr Michael McCullough, a Higher Scientific Officer in NIEA and a member of the Conservation Science Ornithology Team. On receipt of the developer's Environmental Statement Dr McCullough considered that the bird surveys did not meet normal standards. The developer's data identified only 25 species as being present on the site which was considered to be an underestimate. These included 15 species at various levels of conservation concern and 6 species likely to breed within the site. Dr McCullough consulted other information held by NIEA. His conclusion was that the development was likely to have an adverse effect

on some of the resident breeding species, particularly ground nesters. The removal of grazing on the dune grassland could reduce the long term attractiveness of the site as a breeding ground for some ground nesting species. Other species that nest in scrub and hedgerow were likely to suffer from short to medium term displacement. However, re-establishment was likely in the post-construction period and an appropriate habitat management plan had the potential to largely off-set any additional impact. The developer had indicated that an environmental and conservation management plan would be produced. The proposed management plan was influential in Dr McCullough forming the opinion that the development could be carried out without significant long term adverse effect on bird populations in the area.

[72] Condition 20 prohibits work within a defined sand dune habitat from 1 March to 31 August and condition 21 provides that prior to the commencement of any works an Environmental Habitat Management Plan will be agreed.

[73] Dr O'Neill pointed out that the information relied on by Dr McCullough had not been contained in the Environmental Statement and it was not available to the public. In any event he was of the opinion that the available information was not sufficient to enable impacts to be accurately assessed.

[74] Dr McCullough disagreed, being of the opinion that the information supplied by the developer was sufficient to comprise in substance an Environmental Statement and that all the environmental information was sufficient for an assessment to be made. There are no judicial review grounds on which the Department's approach can be overturned.

[75] Similarly, in relation to bats. Under the habitats regime bats are protected species and entitled to strict protection. It is necessary for the Department to carry out an appropriate assessment to determine whether they are likely to be significantly affected. The Department did not consider that the information contained in the Environmental Statement was sufficient and requested a bat survey. A bat survey was provided establishing three roosts outside the site, bat activity along the river and within the woodland on the site and four different species of bat were identified. A further addendum to the Environmental Statement included an assessment of light impacts and proposed mitigation measures. It was then considered by the Department that sufficient information for an assessment had been obtained.

[76] The presence was established of a species of bat particularly sensitive to light. Low level lighting at 1 lux was proposed, which met recommended levels. Monitoring of the impact of lighting was required by the Department. Condition 15 provides that all lighting along the access road and at the site entrance should be low level lighting at no greater than 1 lux. Condition 16 provides for monthly bat detector surveys between May and September to monitor the impact of lighting. Condition 17 prohibits outdoor floodlighting at the golf academy driving range from

May to October. Condition 18 provides for no lighting directed towards the identified bat maternity roost.

[77] Dr O'Neill was not satisfied that the surveys should be carried out after the grant of planning permission rather than informing the assessment of impact. Dr Hempsey described the purpose of the additional surveys before and after commencement of the works as being to ensure ongoing monitoring of the habitats and of any impacts on the bats.

[78] I am satisfied that the Department has undertaken an appropriate assessment, that the conditions are monitoring mitigation measures and are not deferring assessment of impact and that the conditions are enforceable.

[79] Newts are protected under the 1985 Order. Dr O'Neill's view was that no adequate inquiry had been made in respect of a potential presence of the species on the site. Dr Hempsey stated that a survey was not requested as the development did not involve the disturbance of ponds or other still watercourses. By an addendum to the Environmental Statement it was confirmed that there were no ponds or standing water on the site. On that basis Dr Hempsey concluded that an assessment of likely environmental effects was possible and that the development would not give rise to any likely significant effects.

[80] Dr O'Neill's response was that the majority of a newt's life cycle is spent on land and that the current NIEA practice of assessing the presence of ponds or still water was incapable of determining significant impact. Dr Hempsey's view was that significant impact would only be likely to occur if the breeding water area or all suitable terrestrial habitat were removed. Accordingly, in her view, the most important factors were the availability of alternative habitats and the potential impact on breeding sites and it remained her view that there was not any significant impact.

[81] It has been pointed out by Dr O'Neill that newts are a protected species and that offences would be committed if they are damaged. The Department points to Informative 13 which is to remind the developer of obligations in relation to wildlife protection. I am satisfied that the Department has reached a decision on which there are no judicial review grounds to set it aside.

[82] The Department had to make a determination of the impact of the proposal on conservation areas. Keith Finnegan of the NIEA is responsible for conservation designation protection. The North Antrim Coast Special Area of Conservation covers approximately ten miles of the north Antrim coastline. The draft Skerries and Causeway Coast Special Area of Conservation would cover approximately another 30 kms of coastline. Mr Finnegan carried out an impact assessment. The most likely impact arose from the potential discharge of pollutants during construction and the operation of the development together with disturbances to coastal process due to the discharge of sediment during construction. Mr Finnegan was satisfied that he

had the necessary information to conduct a full assessment. He concluded that the development would not give rise to any likely significant effects on the North Antrim Coast SAC.

[83] In respect of the draft Skerries and Causeway Coast SAC he concluded that significant effects upon several of the conservation interests could not be discounted and these arose primarily from the risk of sedimentation and discharge into nearby watercourses. Accordingly he proceeded from a screening exercise to a full appropriate assessment. This included consideration of three mitigation measures involving a 10m vegetated buffer zone around watercourses and streams, a 50m gap between water courses and displaced earth and the use of sustainable urban drainage systems. The result of the full appropriate assessment was the conclusion that the proposed development would not impact the integrity of the draft Skerries and Causeway Coast SAC provided that the identified mitigation measures were included in legally enforceable conditions within planning permission. These mitigation measures are contained within conditions 9, 10 and 11. Condition 12 requires an agreed construction Method Statement and condition 13 requires an agreed Sediment Prevention Strategy.

[84] Dr O'Neill complains that the information on the likely significant impacts is not contained in the Environmental Statement and not available to the public and the mitigation measures were not contained in the developer's application. As stated above the scheme for habitats differs from the scheme for environmental impact assessments. There is no schedule of required information. The Department decides what information the developer will provide. The Department decided that additional information was not required from the developer.

[85] The mitigation measures were directed by the Department. The mitigation measures were not contained in the developer's application or the information supplied by the developer. That does not affect the propriety of the mitigation measures, provided an appropriate assessment has been completed. The Department made such an assessment.

[86] One of the conditions involved Sustainable Urban Drainage Systems. Dr O' Neill considers SUDS to be likely to fail in areas of unstable substrata such as sand dunes. Mr Finnegan considers their effectiveness to be well known. Dr O'Neill considers that these scientific differences illustrate the doubt that must exist about the effectiveness of the measures.

[87] Condition 11 requires that Sustainable Urban Drainage System features shall be agreed with NIEA. There are scientific differences which illustrate that there is a doubt that must exist about the effectiveness of some of the measures that are being proposed. This is a matter within the competence of experts and they have disagreed on the effect of the proposal. I am not satisfied that the Department's view should be rejected. I am not satisfied that there are grounds to intervene.

[88] Condition 21 requires that an Environmental and Habitat Management Plan be agreed with the Department. Thereafter the site is to be managed in accordance with the Plan and periodic reports produced. Condition 22 requires the Plan to deal with winter cattle grazing and bracken control and condition 25 requires the Plan to deal with herbicides, pesticides and fertilisers. Again there was debate as to the effect of the Plan and whether it was a means of implementing, monitoring and managing the development, as the Department contends, or whether it amounted to the postponement of the assessment of the likely significant effects of development, which was the applicant's view. The Guidelines for Ecological Impact Assessment in the UK provide for an Action Plan as a means of drawing together "mitigation, compensation, enhancement, management and monitoring proposals".

[89] I am satisfied that an assessment was completed of the relevant aspects of the environment and the Plan was not a means of avoiding the necessary assessment. Again, there are no judicial review grounds on which to set aside the Departments conclusion.

(3) <u>Economic considerations.</u>

[90] The applicant relied on two grounds –

First, the respondent unlawfully failed to make sufficient enquiry into the economic impact of the proposals.

Second, the Minister was misled by advice received from officers regarding the economic assessment of the proposals.

[81] The developer provided an economic commentary prepared by an economist. The Department consulted the Northern Ireland Tourist Board and the Economics Branch of the Department of Rural Development. The Tourist Board approved the development on tourist and economic grounds. The Economics Branch response included the indication that further analysis was required to establish the financial viability of the proposal. An economic impact assessment prepared by the economist was submitted by the developer and referred to Economics Branch who provided additional comments. The Department took into account various government policies concerned with promoting economic growth, increased tourism, specifically golf tourism and new high quality golf resorts.

[92] The applicant contends that the initial reservations of Economics Branch were not addressed by the subsequent economic impact assessment and it was inexplicable how the Department could have reached its decision in the absence of proper analysis. Dr Mark Robertson provided research consultancy services for the applicant and criticised the Department for proceeding on the basis of the developer's submissions without requiring a proper economic impact assessment and also for failing to recognise the different character of a cost benefit analysis that

would include less tangible measures. There was much debate about financial factors, economic impact and cost benefit analysis. In effect the applicant points up the absence of information on which to assess the economic impact of the proposal and the lack of a response from the developer to the reservations of the Economics Branch who advised the Department.

[93] On the other hand the Department pointed up what was described as a strategic approach to the assessment. The Department did not intend to carry out a forensic scrutiny of the economics of the project. Rather the Department's approach was to consider whether the project would bring benefits to the wider economy as part of a more strategic policy driven assessment. Dr Robertson's view was that the financial viability of the project was relevant to whether the project and the claimed economic benefits could actually happen.

[94] Thus the applicant contends that it is a relevant consideration that there be completed a proper economic assessment of the project. The respondent contends that what is relevant is a wider consideration as to whether the project advances the strategic government aim for the development of tourism and golf, the perceived benefits of which have been established in general policy analysis. The Department's approach is likely to give effect to proposals considered to further the strategic aim. This proposal was judged to be within the strategic aim. Broadly, if benefits of a proposal can be identified, as is said to arise in the present case from the construction works, which would be the position in every development, and further the benefits said to arise from tourism and golf, which the Tourist Board considered to be the case, and if the proposal were considered to be sustainable, which the Department concluded would be the position, although based on certain assumptions, then the Department considered the case for the development to have been made out.

[95] In taking the approach that it did, has the Department left out of account a relevant consideration by failing to complete a proper economic assessment? What are the relevant considerations for the purposes of the Departments decision on planning permission? There are generally said to be three categories of considerations for a decision maker. There are the mandatory considerations that are expressly or impliedly identified by the statute as considerations to which regard must be had. Then there are the prohibited considerations identified by the statute as considerations to which regard must not be had. Finally there are the discretionary considerations being those considerations that are within the discretion of the decision maker whether or not to take into account, subject to the Wednesbury rule. Further it is for the decision maker and not the Court to decide the manner and intensity of inquiry into the relevant considerations (Creednz Inc v Governor General [1981] NZLR 172 and Re Findlay [1985] AC 318).

[96] A full economic appraisal cannot be shown to be a mandatory consideration. The Department completed what was considered to be a sufficient economic impact

assessment. I am not satisfied that any ground has been shown on which to set aside the approach that has been taken by the Department.

[97] The applicant contends that the Minister was not informed of the concerns of Economics Branch. An appendix to the submission to the Minister contains the arguments, although the applicant says it is inaccurate and incomplete. I am satisfied that the text sufficiently sets out the position. Further the applicant questions whether or not the appendix would have been read by the Minister. I cannot begin to consider in a particular case whether the decision maker can be said to have read or not read any part of any paper presented, short of direct evidence to that effect.

(4) Tourist accommodation

[98] The applicant relied on four grounds –

> First, the respondent acted irrationally by failing to secure by condition the tourist accommodation on which the decision to grant the permission depended.
>
> Second, when granting the permission the Minister was misled by the advice received from officers of the respondent regarding provision of tourist accommodation.
>
> Third, the respondent failed to take into account advice within policy TOU3 of the Planning Strategy for Northern Ireland and policy TSM6 of draft Planning Policy 16 relating to control of tourist accommodation.
>
> Fourth, the respondent imposed a condition on the permission relating to the provision of the "guest suites/lodges" which was invalid.

[99] A Planning Strategy for Rural Northern Ireland at Policy TOU3 'Tourist Accommodation' states that – "Often proposals for self-catering accommodation are in areas in which the provision of permanent housing would be contrary to policy on development in the countryside – see policy GB/CPA 1. Where such a proposal is acceptable on the basis of meeting tourist need, it is essential the accommodation intended for tourism is retained as such. To this end, the Department will attach a condition requiring that the accommodation be used for holiday occupation only and not for permanent residential accommodation."

[100] Policy TSM6 of draft Planning Policy Statement 16 on 'Tourism' stated that all permissions for self-catering accommodation would include a condition requiring the units to be used for short term (maximum 3 calendar months in any one calendar year) holiday letting accommodation only and not for permanent residential accommodation.

[101] The Department did not attach a tourism accommodation condition to the 75 guest suites/lodges. The Department's reasons for not imposing such a condition were stated to be because such a condition would impact on the operation of the scheme for the use of the lodges and on the economics of the proposed development. The scheme will operate on the basis of a sale of the guest houses/lodges for use by the purchasers for a specified period during the year and then a letting to the hotel for use as accommodation for guests of the hotel for the remainder of the year. It is a version of the timeshare model. The Department concluded that it would be inappropriate to impose a tourist accommodation condition because the purchasers would not be tourists as that term is generally understood and to impose a tourist condition may therefore have invalidated the proposed scheme. In addition the proposed scheme for the use of the guest suites/lodges was said to be important to the economics of the overall development because the use of the 75 guest suites/lodges will contribute to the overall viability of the development. Thus the Department decided not to apply the tourist accommodation condition. In any event the Department contends that to change the properties into fully residential use would require a change of use application for planning purposes. I am satisfied that the Department has justified the decision not to apply a tourism accommodation condition.

[102] The applicant complains that the Minister was not briefed on the issue of, or the absence of, a tourism accommodation condition. The body of the submission to the Minister does not refer to the issue. The appendix includes a reference to Moyle District Counsel seeking a tourism accommodation condition and their concern that the lodges should not become residential units. The issue is referred to in the submission, if not flagged. However it could not be said that the Minister was misled.

[103] The invalid condition ground relates to condition 2 which states that the 75 proposed guest suites/lodges shall not be occupied until the golf course, hotel and clubhouse have been constructed "to an advanced stage" in accordance with the approved plans to the satisfaction of the Department "or as otherwise may be agreed in writing by the Department".

[104] There are two reasons for invalidity of the condition, one being uncertainty and the other being that it may be varied by agreement of the parties rather than by application by the developer.

[105] The complaint of uncertainty relates to the words "to an advanced stage". A planning decision is only void for uncertainty "if it can be given no meaning or no sensible or ascertainable meaning and not merely because it is ambiguous or leads to absurd results" (per Lord Denning in Fawcett Properties v Buckingham CC [1961] AC 636). The issue in the present case concerns the stage at which the lodges may be occupied. "An advanced stage" suggests substantial completion as a sensible meaning. The time of compliance cannot be determined in advance but that is not conclusive. The precise stage in the development when it is sufficiently "advanced"

is a matter of judgment but that does not invalidate the condition. The words used are not such as to import uncertainty into the condition.

[106] The other words in issue are "or as otherwise may be agreed in writing by the Department". The words relate to any variation on the stage that occupation is permitted and do not relate to variation of the approved plans. The provision that this condition may be altered by agreement at a later date rather than by an application, with the requirements of such a process, is impermissible. Where a condition provided that a foodstore should not exceed a specified floorspace unless otherwise agreed in writing with the planning authority, the Court removed the clause permitting variation of the condition by agreement (R (Mid Counties Co-op Ltd) v Wyre Forest DC [2009] EWHC 964 (Admin)).

[107] I propose to delete the tailpiece to condition 2, namely the words "or as otherwise may be agreed in writing by the Department". The deletion does not alter the substance of the condition but will require any variation to be effected by way of application by the developer.

(5) Precedent.

[108] The applicant's ground is that the respondent acted irrationally in concluding that the permission would not act as a precedent for further proposals to come forward.

[109] The North Area Plan Team had considered a grant of planning permission for the proposed development to represent a precedent that would be "very high and widespread". However the Department concluded that the precedent value of the grant of permission would not be significant. This conclusion was reached on the basis that the proposal was unique and would provide distinctive benefits to the local economy and tourism industry at a time when golf tourism had been given a high priority. The applicant contends that it is irrational to recognise the precedent effect but to classify it as not significant. This is the kind of judgment that must be made in every case. The Departments position could not be said to be irrational.

(6) Public Inquiry.

[110] The applicant's ground is that the respondent failed to make proper enquiry into the exercise of the power to hold a public inquiry.

[111] The applicant says that there was no evidence of briefing the Minister on the decision not to hold a public inquiry. Article 31 of the Planning (NI) Order 1991 provides a special procedure for major planning applications and the Department applied article 31 to the present application. The Department may then hold a public inquiry and take into account the report of the Planning Appeals Commission in

deciding the application or issue a Notice of Opinion outlining the decision it is minded to make before deciding the application. The Department's Guidance on the holding of a public inquiry indicates that the primary consideration is whether the normal procedures will not be sufficient to enable the Department to have all the required information to determine the application.

[112] The applicant requested the Department to hold a public inquiry and the Minister was briefed on that request. The Department concluded that the normal procedures would be sufficient to enable the Department to have all the required information to determine the application. Ultimately the recommendation to the Minister was to proceed by Notice of Opinion, a recommendation that clearly was accepted. The Minister was aware of the issue about the holding of a public inquiry. There are no judicial review grounds for setting aside the decision not to hold a public inquiry.

(7) Reasons.

[113] The applicant's ground is that the respondent erred in law by failing to give any or adequate reasons for the decision to grant permission. The applicant contends that the Department's position on specified issues was not explained, namely the absence of consultation with UNESCO, the economic and tourism benefits overriding environmental impact, the absence of a tourism accommodation condition, the precedent effect and the absence of a Public Inquiry.

[114] Lord Brown stated the position in South Bucks DC v Porter [2004] 1 WLR 1953 as follows –

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand

> how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision"

[115] The reasons for the decision were outlined in the submission to the Minister, the authorisation for the grant of planning permission, the press release of 21 February 2012, the radio interview of that date and the statement to the Northern Ireland Assembly on 28 February 2012. The applicant was closely involved throughout the process and familiar with the issues. It is correct that the various statements about the decision do not articulate the reasoning on the issues specified by the applicant. I do not accept that the reasons given were inadequate. They were sufficient to enable the applicant to assess the decision and decide whether to mount a challenge. The applicant was not substantially prejudiced by the manner in which the decision was articulated.

Conclusion.

[116] Accordingly, subject to deleting the tailpiece from condition 2 of the grant of planning permission, namely the words "or as otherwise may be agreed in writing by the Department", I am not satisfied on any of the applicant's grounds for judicial review.