THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

RECORD No.1164/2004/JR

BETWEEN

MARTIN HARRINGTON

APPLICANT

AND
AN BÓRD PLEANÁLA

FIRST NAMED RESPONDENT

AND
IRELAND AND THE ATTORNEY GENERAL

SECOND NAMED RESPONDENT

AND
SHELL E.AND P.IRELAND LIMITED, MAYO COUNTY COUNCIL AND OTHERS

NOTICE PARTIES

Judgment delivered by Macken J.on the 26th day of July, 2005

1. The applicant is seeking leave to commence proceedings by way of judicial review for two orders in respect of the decision of the first named respondent, An Bórd Pleanála, to grant planning permission to the first named Notice Party, Shell E&P Limited, for the development of a gas terminal and peat deposition site.The applicant is an electrician.He resides about fifteen miles from the proposed terminal, and seeks to commence proceedings because, he says, he has concerns arising from the grant of permission to develop the terminal at a site at Bellnaboy, Co.Mayo.

2. While the respondents and the first and second notice parties filed notices of opposition, as well as the required written submissions, and were present at the hearing of this application, none of the other notice parties did so.Prior to the commencement of the hearing evidence as to the appropriate service of the motion on the several remaining notice parties was presented to the Court.I was satisfied that all procedural steps in that regard had been properly taken.

Brief Background Facts:

3. The following is a synopsis of the factual matters giving rise to the dispute between the applicant and the respondents.The proposed gas terminal is to be used for the reception and separation of gas taken from what is called the "Corrib" Gas Field located some 65 kilometres off the Mayo Coast.The entire of this undertaking will consist of a number of sub-sea gas wells flowing into an underwater pipeline.A collection system will be placed on the seabed and a pipeline will come ashore and run underground to the proposed terminal.

4. The site upon which the terminal is proposed to be built has an area of 160 hectares.The actual terminal building itself, together with some ancillary buildings, that is to say, the "footprint" as it is often called in architectural and/or planning terms, and the immediate surrounding area, comprises around 13 hectares and is enclosed by a perimeter or security fence.The pipeline from the gas field will run underground from the Mayo coastline at a point where it comes ashore at Dooncarten to the commencement of the terminal footprint at the site at Bellnaboy.This pipeline runs over ground only for the last five metres where it comes above ground and within the terminal footprint itself

5. On or about the 30th April, 2001, Shell E&P Ireland Ltd originally applied to Mayo County Council for planning permission for the development of the above described gas terminal.After a number of applications, appeals and refusals, planning permission was granted by An Bórd Pleanála on 22nd October 2004, subject to several conditions.The planning permission was sought and granted in respect of a development within the area surrounded by the perimeter fence already mentioned.

6. It is in respect of the above decision of the 22nd October 2004 that proceedings are now sought to be instituted.

Relief Sought:

7. The reliefs which the applicant seeks in his proposed proceedings are:

> (i) an order of *certiorari* quashing the decision of An Bórd Pleanála of the 22nd October 2004; and
>
> (ii) a declaration that the failure of An Bórd Pleanála to ensure that it had all the necessary information it was required to have in accordance with Article 12 of Council Directive 96/82/EC, and any provisions of Irish law purporting to implement that Directive, vitiates its grant of planning permission;

8. The grounds upon which the reliefs are sought can also be synopsised fairly briefly.

9. The applicant claims that on a correct interpretation of Article 12 of Council Directive 96/82/EC on the Control of Major Accident Hazards Involving Dangerous Substances (hereinafter "the Directive"), An Bórd Pleanála is itself required to form an opinion as to whether a development in respect of which planning permission is sought concerns an "establishment" within the meaning of the Directive.Further it is not permitted to abrogate that role to a third party.An Bórd Pleanála did so and erroneously accepted and adopted the narrow and invalid interpretation of the term "establishment" which the National Authority for Occupational Safety and Health (hereinafter "the Health and Safety Authority") had itself erroneously adopted, and wrongly bound itself to that interpretation.

10. As a result, the applicant claims:

> a) that the decision of An Bord Pleanála was *ultra vires* its powers, because its decision making process avoided the legal obligations placed upon it pursuant to the Directive and by the European Communities (Control of Major Accident Hazards involving Dangerous Substances) Regulations, 2000 (S.I.476/2000) (hereinafter the "Major Accident Hazards Regulations of 2000") which transposed the Directive into Irish law.
>
> b) that the decision was also in breach of s.141 of the Planning and Development Regulations 2001 (S.I.600/2001), because An Bórd Pleanála failed to notify the Health and Safety Authority that it had received an appeal relating to the provision of an establishment the development of which would be relevant to the risks or consequences of a major accident within the meaning of the Directive.

c) that An Bord Pleanála failed in its obligation under section 141 of the said Regulations of 2001 to form an opinion as to whether the planning application or the appeal related to the provision of an establishment within the meaning of the Directive by adopting a limited and unlawful interpretation of "establishment" to include only the area within the above security or perimeter fence.In that regard 900 metres of pipeline, at least, extended from the security fence to the boundary of the developer's land take.This comprises part of the establishment according to the applicant, but was not included as part of the planning application.No technical advice was therefore sought or supplied in respect of this pipeline.

d) that An Bord Pleanála failed to obtain technical advice from the Health and Safety Authority in respect also of the pipeline extending beyond the boundary of the first notice party's land take to the gas field itself, which pipeline, according to the applicant, also forms part of an establishment within the meaning of the Directive.

The case against the Second Named Respondent

11. The second named respondent has been named in this application on the basis that it is contended by the applicant that, on a certain analysis, the provisions of the Directive have not been correctly or completely transposed.Its position is anomalous in that it is alleged in essence that the said respondent has not provided for the establishment of the required competent authority to ensure compliance with Article 12 of the Directive.In so far as this respondent is concerned, therefore, both the claim against it, and the response to that claim, are subsidiary to the primary case pleaded by the applicant against the first respondent and, where applicable, against the first and/or second notice party.

European and Domestic Legislation

12. As to the Directive, its stated objectives, according to its recitals are "the prevention of major accidents which involve dangerous substances and the limitation of their consequences for man and the environment, with a view to ensuring high levels of protection throughout the Community in a consistent and effective manner."

13. The Directive achieves these aims by imposing certain obligations, firstly on operators of establishments in which dangerous substances are present, and secondly, by requiring Member States, pursuant to Article 16, to designate a competent authority with responsibility for carrying out the duties laid down in the Directive.In Ireland, the body charged with this latter function is the Health and Safety Authority.The relevant articles of the Directive are the following.

14. The obligation on Member States which the Directive imposes in Article 17 is in the following terms:

> "1. Member States shall prohibit the use or bringing into use of any establishment, installation or storage facility, or any part thereof where the measures taken by the operator for the prevention and mitigation of major accidents are seriously deficient.
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> Member States may prohibit the use or bringing into use of any establishment, installation or storage facility, or any part thereof if the operator has not submitted the notification, reports or other information required by this Directive within the specified period."

15. Article 12 of the Directive concerns solely the issue of land use.It provides as follows:

> "1.Member States shall ensure that the objectives of preventing major accidents and limiting the consequences of such accidents are taken into account in their land-use policies and/or other relevant policies.They shall pursue those objectives through controls on:
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> (a) the siting of new establishments,
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> … .
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> Member States shall ensure that their land-use and/or other relevant policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between establishments covered by this Directive and residential areas, areas of public use and areas of particular natural sensitivity or interest, and, in the case of existing establishments, … ."Article 16 of the Directive provides as follows: "Without prejudice to the operator's responsibilities, Member States shall set up or appoint the competent authority or authorities responsible for carrying out the duties laid down in this Directive and, if necessary, bodies to assist the competent authority or authorities at technical level."

16. The definitions are contained in Article 3 of the Directive and so far as are relevant, read as follows:

> "1. 'establishment` shall mean the whole area under the control of an operator where dangerous substances are present in one or more installations, including common or related infrastructures or activities;
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> 2. 'installation` shall mean a technical unit within an establishment in which dangerous substances are produced, used, handled or stored.It shall include all the equipment, structures, pipework, machinery, tools, private railway sidings, docks, unloading quays serving the installation, jetties, warehouses or similar structures, floating or otherwise, necessary for the operation of the installation;"
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> …
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> (8) "storage" shall mean the presence of a quantity of dangerous substances for the purposes of warehousing, depositing in safe custody or keeping in stock."

17. Two other parts of the Directive were referred to in the course of the hearing.They concern exclusions.The first is recital 13 which reads as follows:

> "Whereas the transmission of dangerous substances through pipelines also has a potential to produce major accidents;

whereas the Commission should, after collecting and evaluating information about existing mechanisms within the Community for regulating such activities and the occurrence of relevant incidents, prepare a communication setting out the case, and most appropriate instrument, for action in this area if necessary;"

18. The second is Article 4 of the Directive, which, under the title "Exclusions" provides as follows:

> "This Directive shall not apply to the following:
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> …
>
> (d) the transport of dangerous substances in pipelines including pumping stations outside establishments covered by this Directive;
>
> … ."

19. The Directive was implemented in Irish law through a combination of the above mention Regulations of 2000 and 2001.Article 29 of the Major Accident Hazard Regulations 2000 transposes Article 12 of the Directive in the following manner:

> "29.(1) For the purpose of ensuring that technical advice on the risks arising from an establishment is available to a planning authority or An Bord Pleanála, either on a case by case basis or on a generic basis, when decisions are taken relating to—
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> (a) the siting of new establishments,
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> (b) the modification of an existing establishment to which Article 10 of the Directive applies, or
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> (c) proposed development in the vicinity of an existing establishment.the Authority may, and shall when requested to do so by a planning authority or An Bord Pleanála, give technical advice to a planning authority or An Bord Pleanála (as the case may be) on the basis of the information available to the Authority."

20. In the Planning and Development Regulations 2001, Articles 137(1) and 141(1) provide that where a planning authority or An Bord Pleanála on appeal receives a planning application in respect of an establishment that would contain dangerous substances or contain a risk or consequence of a major accident, then the planning authority or An Bord Pleanala shall notify the Health and Safety Authority, of the same.Under Article 141, the latter obligation so to notify applies only where the planning authority has not itself already notified that Authority under Article 137.

21. This legislative scheme envisages that the Health and Safety Authority gives advice to the planning authority or to An Bord Pleanála (hereinafter "The Bord") on appeal, concerning, so far as is pertinent to this application, inter alia, on the hazards or risks in respect of the siting of new establishments.The Health and Safety Authority may give advices whether or not it has been requested so to do, but planning authorities and the Bord are obliged to seek such advices.When requested to do so, the Health and Safety Authority is is turn obliged to provide advices.

22. According to the information before the court, that Authority had provided advice in response to a request from the second notice party (the planning authority).Also according to the undisputed information presented in Court, notwithstanding the same, The Bord sought advices or further comment from the said Authority during the course of the appeal.

The Legal Requirements for leave to issue proceedings

23. This application is made pursuant to s.50 of the Planning and Development Act, 2000.Under the terms of that section, the applicant must establish that there are "substantial grounds" for contending that the decision of the Bord is unlawful.All parties appear to be ad idem that the test as to whether or not substantial grounds exist was laid down by Carroll J.in *McNamara v.An Bórd Pleanála* (No.1) [1995] 2 I.L.R.M.125 as follows:

> "In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty.It must not be trivial or tenuous.However, I am not concerned in trying to ascertain what the eventual result would be.I believe I should go no further than satisfying myself that the grounds are "substantial".

24. This interpretation had been adopted with approval and further developed in several subsequent cases, such as *Drogheda Port Company v.Louth County Council* (unreported), High Court, Morris P., 11 April, 1997), *Kenny v.An Bórd Pleanála* [2001] 1 I.R.565, and by the Supreme Court in *re Art.26 and the Illegal Immigrants (Trafficking) Bill, 1999 [2000]* 2 I.R.360.

25. In addition to the statutory requirement that there be "substantial grounds" for judicial review, s.50(4)(b) of the Act of 2000 provides that the applicant for leave must also establish that he/she also has a "substantial interest in the matter which is the subject of the application".As to the latter it is not disputed that the applicant has formal locus standi to challenge the decision of the Bord, in that he had participated as an observer in the appeal.The first respondent and the first and second notice parties, however, challenge the applicant's entitlement to raise issues relating to the validity of the decision on the basis of the provisions of the Directive, and/or the implementing provisions of Irish law, as he did not himself raise any such issues before The Bord at the appeal stage.They submit therefore that the applicant does not have the required "substantial interest in the matter the subject of the application", within the meaning of the proviso to Section 50(4) of the Act of 2000.

26. As to the first of these requirements, that is to say, whether there are substantial grounds for contending that the decision is invalid, it seems to me that this cannot really be determined until I have exposed the arguments of the parties on the several matters raised, when I can then assess whether the applicant has met this statutory requirement.However, as to the second criterion, namely whether the applicant has established that he has a "substantial interest" in the matter which is the subject of the application, this can be determined as a discrete separate issue, since the real ground for this argument is that the applicant himself did not actually raise, in the course of the appeal before The Bord, the specific grounds he now wishes to raise in his intended proceedings.

27. In that regard, the parties who raised this as a ground for their contention that the applicant has not met the statutory requirement, not only point to the undisputed fact that the grounds now sought to be raised were not, in fact, raised by the applicant in the course of the appeal procedure, but they also invoke certain case law in that regard.The first respondent invoked the decision of Ó Caoimh, J.in the case of *Ryanair v An Bórd Pleanál*a (2004) I.E.H.C., in which he stated:

> "In the context of the obligation of a party who is other than a prescribed party or an applicant for permission to have participated in the planning process by making submissions or observations, I consider that a party such as the applicant, who participated in the appeal process, cannot avail of the procedure under S.50 to question the validity of a decision if it relates to a matter which could have been addressed in the appeal but was not.I accept as correct the submission made by Counsel for the Bord that the applicant does not have locus standi or has not shown a substantial interest to raise certain of the grounds advanced having regard to that requirement under S.50 of the Act of 2000, in circumstances where those matters were not raised in the course of the appeal and do not arise from the appeal."

28. The first notice party adopts a similar approach to that of the first respondent, and relies on the decision of the Supreme Court in the case of *Lancefort Ltd v An Bórd Pleanála (No.2)* (1990) 2 I.R.270 in which Keane, C.J.stated (as part of the majority decision):

> "But it would in my opinion be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the application was made for leave to bring the proceedings."

29. That notice party submits further that the statutory provision requires the Applicant to satisfy the Court as to his standing to bring the proceedings and argues that he has failed to give any reasons whatsoever as to why the case he now seeks to bring was not raised by him, but rather confines himself to referring, in his affidavit, to submissions made by a third party observer.The first named notice party moreover contends that the combined effect of the requirement to have a "substantial interest" and also to have participated in the appeal procedure supports the requirement that the applicant himself must have advanced the grounds which he now seeks to invoke.

30. The applicant, however, responds by submitting, not that he made observations on the appeal based on alleged non compliance with the obligations imposed pursuant to the Directive, which he now seeks to do at leave stage, but that the law does not require him to do so, since the same issues were raised by another party in the course of the appeal to The Bord and were therefore before the Bord, and in the circumstances, The Bord cannot be at any disadvantage, since it was on notice of the same issues, even if not presented by the applicant.He too invokes the decision in *Lancefort, supra*, and in particular submits that neither that case nor the *Ryanair* case, *supra*.actually dealt with the precise issue which is now before the Court.Counsel for the applicant also referred the Court to section 50 (4)(d) of the Act in support of his argument.This states that a substantial interest for the purposes of objecting to a decision of The Bord is not limited to an interest in land or other financial interest.

31. Finally, the applicant relies on the wording of Section 50 of the Act, and argues that the proviso to Section 50(4), on a correct reading, does not require that an issue specific substantial interest be established.Counsel for the applicant submitted that for the purposes of establishing a "substantial interest" it was sufficient for him to indicate a concern about the legal basis upon which the decision was granted, and to invoke in support of that, the concerns expressed by another party to the appeal, as the applicant had indicated in his grounding affidavit.

Conclusions on "Substantial Interest"

32. On this aspect of the dispute between the parties, I find as follows.I accept the applicant's contention that neither the *Ryanair*, *supra*, judgment nor the judgment in the case of *Lancefort, supra*., definitively resolve the issue arising in the present application.But that is so, however, only in so far as those cases did not specifically relate to a situation where the issue had been raised, not by the applicant, but by a third party.Nevertheless, it seems to me that the extract from the judgment of Ó Caoimh, J.in the case of *Ryanair, supra*., is not only a proper starting point, but also represents a correct interpretation of that section.

33. As has been stated in several cases, consideration of the legislative scheme makes it clear that the Oireachtas intended that Section 50 be stricter than the equivalent section of the earlier Local Government (Planning and Development) Act of 1992, which itself adopted a stricter set of criteria applicable to challenges to the grant of planning permissions than previously existed.This is because there is in place an extensive statutory scheme under which members of the public may object to the original grant before a planning authority, and may also appeal to and be heard by an independent appeal authority, namely the Bord.To that appeal scheme the statute also provides for the nomination of certain designated parties, who have an automatic right to be heard, with a view to ensuring wide ranging representation in planning matters from diverse interest groups.

34. The matter was put pithily by Keane, J.in the case of *Lancefort, supra*.At p.309, in which, having traced the change from "a person aggrieved" to a person with a "sufficient interest", he stated:

> "In requiring, as they do, an applicant to institute such proceedings within a strict time limit of two months, and to establish "substantial grounds" for contending that the decision in question is invalid before leave is granted and in severely restricting the right of appeal from the decision of the High Court to this Court, the Oireachtas has made plain its concern that, given the existence of an elaborate appeals procedure which can be invoked by any member of the public and the determination of the issues by an independent Bord of qualified persons, the judicial review procedure should not be availed of as a form of further appeal by persons who may well be dissatisfied with the ultimate decision, *but whose rights to be heard have been fully protected by the legislation*.The courts are bound in their decisions to have regard to that concern."

35. The underlying intention of the Oireachtas was also explained in the judgment in the same case, in which Lynch, J., added the following comment in an assenting majority judgment:

> "By the code of legislation embodied in the Local Government (Planning and Development) Acts, 1963 to 1992, the Oireachtas has established two tiers of independent and qualified bodies to administer the Acts and ensure proper standards of planning and development throughout the State.The first tier of such bodies comprises the local authorities and their planning departments staffed by qualified persons.They have the duty of ensuring proper standards of planning and development through their local areas.The second tier is of course the first respondent which is the national authority charged with ensuring proper planning and development throughout the State when there is an appeal to them from decisions of the local planning authorities.Again, the first respondent is staffed by appropriately qualified people.…
>
> In the vast majority of cases, the decision of the first respondent should be the end of the matter.Further proceedings by way of judicial review should be the rare exception rather than the rule …."

36. The Act of 2000 adopted an even more strict approach overall to the rights of third parties to object to the grant of planning permissions than that found in those cases heard under earlier legislation, once a full appeal has taken place, inter alia, by requiring

that an applicant should have, not just a status as an "aggrieved party" as was the position under earlier legislation, or even a "sufficient interest" as was the case under the Act of 1992, but rather a "substantial interest", a clearly more onerous test.

37. Section 50(4) of the Act of 2000, in its relevant part, provides as follows:

> …
>
> (2) A person shall not question the validity of:
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> …
>
> (b) a decision of the Bord …
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Court
>
> …
>
> (4) (a)(i) Subject to subparagraph (iii), application for leave to apply for judicial review under the Order in respect of a decision … shall be made within the period of 8 weeks, commencing on the date of the decision of …or of the Bord
>
> ….
>
> (iii) The High Court shall not extend the period referred to in subparagraph (i) or (ii) unless it considers that there is good and sufficient reason for doing so.
>
> (b) An application for leave to apply for judicial review shall be made by motion on notice …(i) … (ii) if the application related to a decision referred to in subparagraph (i) of 2(b), to the Bord and each party, or each other party, as the case may be, to the appeal …(iii)… (v) to any other person specified for that purpose by order of the High Court and leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed, and that the applicant has a substantial interest in the matter which is the subject of the application." (emphasis added).
>
> (c) "Without prejudice to the generality of paragraph (b), leave shall not be granted to an applicant unless the applicant shows to the satisfaction of the High Court that:-
>
> (i) the applicant –
>
> …
>
> (III) in the case of a decision of the Bord on any appeal …, was a party to the appeal … who made submissions or observations in relation to the appeal …" (emphasis added).

38. The foregoing extracts, relevant to the issues in these proceedings, demonstrate clearly that the Oireachtas has now adopted an ever more stringent set of obligations which must be met before the High Court should permit an applicant to commence judicial review proceedings to challenge the validity of planning permissions.

39. So, for example, no challenge can be brought, save by means of a judicial review application, and not otherwise, for example by plenary proceedings.Strict time limits are imposed.Those strict time limits can only be extended by application to the High Court, and not, as in the case of many other statutory schemes, by automatic application of a provision in that regard, in the legislative scheme itself.Even then, the Court cannot itself grant an extension of time, unless it is satisfied that good and sufficient reasons for doing so have been established.

40. Unlike ordinary judicial review proceedings, the application must be made on notice, rather than *ex parte*, thus ensuring that the planning authority or An Bórd Pleanála, as the case may be, as well as an applicant for planning permission and in the case of an appeal, persons who were also parties to the appeal, may first be heard, and it is only on the hearing of that application on notice that the Court may decide whether or not to grant leave to commence proceedings.Apart from such strict procedural matters, the Act of 2000 also imposes the conditions mentioned above, of both "substantial grounds" for contending a decision is invalid, and a "substantial interest" in the matter the subject of the application.

41. And finally, under the same Section 50 of the Act of 2000, there is no appeal from a decision of the High Court to refuse leave to commence judicial review proceedings save where that Court itself certifies that its decision involves a point of law of exceptional public importance, and also that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

42. All of these indicia suggest clearly that in adopting such a strict regime in relation to challenges to the validity of planning decisions, the Oireachtas intended that such applications would only arise in the case of those which were of such seriousness as genuinely to merit judicial scrutiny by way of judicial review.

43. Having regard to the legislative history, and in particular to the increasingly strict provisions for commencing judicial review proceedings in planning matters put in place by the Oireachtas, it seems to me that in deciding what is intended by the phrase "substantial interest in the matter which is the subject of the application", an equally rigorous approach must be adopted.The interpretation of that phrase in the proviso to Section 50(4) of the Act of 2000 must be informed by the general approach found in the legislation to the question of appeals of this nature provided, however, that the legislation is not applied in such a restrictive manner that no serious legal issue legitimately raised by an applicant could be ventilated, or which would have as its effect the inability of the courts to check a clear and serious abuse of process by the relevant authorities, such that either event might thereby remain outside the supervisory scrutiny of the Courts, a factor also considered by Keane, J.in the case of Lancefort supra.

44. While I accept the applicant's argument that the Act makes it clear such substantial interest may be wider than an interest in land, or a financial interest, and therefore, in theory it can cover a wide variety of circumstances, I consider that the substantial

interest which the applicant must have is one which he has already expressed as being peculiar or personal to him.

45. It is difficult in logic to see how a ground which the applicant for leave has never, up until now, and certainly not during the course of the appeal, expressed himself to have any interest in, can thereupon form the basis for the applicant's "substantial interest in the subject matter of the application" at the leave stage, provided it could have been raised by him during that appeal.Here it could certainly have been, but was not.In that regard, I note that the applicant has not given any indication to the court why the concerns which he now wishes to raise were nevertheless not raised by him in the course of the appeal procedure.

46. If it were the correct interpretation of Section 50 that any person who was a party to a planning appeal, who, while not raising a specific issue himself on that appeal, could nevertheless raise any number of issues raised by other parties, but abandoned by them on the decision being made by The Bord, there would be in effect, an "open season" on such appeals.The interpretation proposed by the Applicant would have, as its result, that where one party raised three grounds, and another party ten different grounds, and yet another party five different grounds again, and a final party one quite different ground to all the others - a situation which is not at all inconceivable - the party raising the latter single ground could adopt all other 18 grounds, or some or all of them, in support of an application for leave to issue judicial review, even if never raised by him, and even if all three other parties abandoned their position altogether by not challenging the grant of permissions, and even if he himself also abandoned his single original ground for objection.Equally, the persons objecting on five grounds could follow the same pattern.And so on.Having regard to the provisions of Section 50 of the Act, this cannot have been the intention of the Oireachtas.

47. But, the applicant argues, invoking *Lancefort, supra*., that the case law suggests only that the matter should be determined by reference to any disadvantage which The Bord or other interested parties might suffer, and since the grounds he seeks to raise were already, through the submissions of a third party part of the appeal process, that is sufficient .

48. I do not accept that argument is a good basis as to the correct interpretation of Section 50 of the Act of 2000.The cases cited do not, in fact, deal with the precise issue under review here.I do not find anything in that section, and in particular in the proviso to Section 50(4) which either expressly or by implication suggests that the basis upon which an application for leave to issue judicial review proceedings should be determined is to be by reference to whether or not a matter was simply before The Bord, or, in the case of a decision of a local authority, before that authority.On the contrary, all the language of the Section suggests that it is the applicant who, having exercised his right to object before the local authority and/or having exercised the further right to appeal to the Bord and having been heard, must establish positively the various conditions applicable, including that he has a "substantial interest in the matter the subject of the application" and the Court is restrained by the very wording of the section from permitting proceedings to issue unless those conditions are met by the applicant.

49. In my judgment Section 50 of the Act of 2000 separates, even more clearly than under previous Acts, the applicant's interest, which is to be considered from the point of view of his having established the required substantial interest, and the second requirement, being one under which the applicant must establish to the Court that there are, objectively speaking, substantial grounds for contending that the decision is invalid.

50. I have particular regard for the findings of the Supreme Court in *Lancefort, supra*., and the concerns found to underlie the statutory scheme, provided that an applicant's right to be heard under that statutory scheme has been fully protected.Here the interests as expressed by the applicant in the appeal procedure were fully met.The Applicant does not say otherwise.His right to be heard on those expressed interest was therefore wholly met by the proper application of the legislation in the course of the appeal procedure before the Bord.

51. I am therefore satisfied from the foregoing that an applicant is required, on a correct interpretation of Section 50, to have himself raised before the Bord the particular ground or grounds which he wishes to invoke in the course of the application for leave to issue judicial review proceedings, so that the substantial interest he invokes is concomitant with an expressed interest he himself has previously disclosed in the course of the appeal.It follows that an applicant for leave to issue judicial review proceedings is not entitled to invoke grounds not raised by him, merely because the same or substantially the same grounds were presented by a third party in the course of the appeal procedure.

52. Having regard to the foregoing, I find that the applicant has not established to the satisfaction of the Court that he has the "substantial interest" required by Section 50, not having raised, in the course of the appeal, the grounds which he now seeks to invoke.

53. However, that is not quite the end of the matter.I have already indicated that, while the Section, as well as the obligations imposed upon an applicant in the proviso, must be construed and applied strictly, the application of that strict test must not permit a clear abuse of process, or a serious failure to apply the law correctly, to escape judicial scrutiny.In that regard I refer to the comments of Keane, J.in the case of Lancefort, supra., where, having considered two judgments on the same issue, he stated:

> "It was accepted in both cases that it was unlikely that any other responsible challenger would emerge if standing was denied to the applicants and that the allegations, if made out, would establish a clear breach of an important duty or a default in a significant area by public bodies".

54. In the circumstances, while in accordance with the general rule as I have found it to be, I have held that an applicant for leave to issue judicial review proceedings may not raise grounds not previously raised by him, the major contention of the applicant here is that the law has been misapplied by The Bord, and that this alleged serious failure ought to be scrutinised by the High Court.

55. Having regard to the jurisprudence, it is my judgment that, notwithstanding that the applicant has failed to satisfy the Court he has a substantial interest, as required, the court should now consider the arguments on the question whether there are, in fact, substantial grounds for contending that the decision was invalid.If that is established, on the basis that the Bord failed in a real sense seriously to comply with the law, in the sense set forth in the above extract, the applicant would still be entitled to commence proceedings, under the proviso I have mentioned, namely that the Court should not be precluded from scrutinising a serious failure properly to apply the law

56. I now turn therefore to the separate, but in this case related question, of the existence of the required "substantial grounds" for contending that the decision of the Bord was invalid.

57. On a preliminary note, according to the information made available to the Court, the Health and Safety Authority considered potential major accidents involving flammable gas, flammable and toxic liquids and the potential impact of these on the surrounding people and environment.It concluded that the refusal of planning permission was not warranted, but recommended that a number of

conditions be attached to the grant of planning permission.Its findings and recommendations were forwarded to the Bord, and the recommended conditions were adopted by it as part of the grant of permission to the first named Notice Party.I have concluded from this information that the the Health and Safety Authority did not consider the measures proposed by the applicant for permission were "seriously deficient" within the meaning of Article 17 of the Directive, and no suggestion was made to the court to the contrary.

58. Among the conditions is one which requires the first named notice party to submit to the Council a safety audit prepared and certified by an independent person, in relation to the installation of the combined upstream pipeline and terminal elements of the development (condition No.15).Condition No.16 provides that any further amendments to the permitted scheme which relate to the control or impact of major accident hazards would be subject to notification and agreement of the Council, following consultation with the Health and Safety Authorty

59. The appeal file which was sent to the Bord contained this advice of the Authority.The Bord concluded that there was no basis upon which it was obliged to invoke Article 141 of the Planning Regulations 2001 to request further advice from the Health and Safety Authority, although it, in fact, requested further comment or advices from the Authority during the appeal.

Applicant's submissions
60. An essential and fundamental element of the applicant's case concerns the correct interpretation of "establishment" as used in the Directive.According to him, the Bord failed to take its own independent view of what consititutes an establishment for the purposes of the Directive, and in addition it bound itself to an incorrect and restrictive interpretation of "establishment" adopted by The Health and Safety Authority.He raises other issues but these are the two key and essential elements upon which he basis his claim.

61. According to the Applicant, having itself failed to interpret and apply "establishment" correctly, the Health and Safety Authority as a result did not give adequate advice to the Bord as required under Article 12 of the Directive, as transposed.The Health and Safety Authority considered that "establishment" in this case meant what I have called the terminal footprint.It did not, however, include the entire further area of land owned by the first notice party nor, ipso facto, the area beyond its land take.The rationale behind the definition of establishment as adopted by the Health and Safety Authority, according to the applicant, was that the area within the terminal footprint is the area where the hazardous substances are processed and stored.

62. It was noted that the Directive does not apply to the transport of dangerous substances and that the transport of dangerous substances in pipelines is specifically excluded from the scope of the Directive by Article 4 (d) which excludes "the transport of dangerous substances in pipelines, including pumping stations, outside establishments covered by this Directive"

63. The applicant submits that, on the contrary, the entire site under the control of the operator, however large that may be, is the "establishment" for the purposes of the Directive.Dangerous substances are present throughout the site in one or more installations, in common or in related infrastructure, as they are defined.The applicant argues therefore that any suggestion that the 900 metre pipeline described above (which runs from inside the terminal footprint to the outer boundary of the lands of the first notice party) does not constitute part of the common infrastructure of the gas terminal and is therefore part of the establishment, defies the clear meaning of Article 3 of the Directive.

64. The applicant also submits that where a gas terminal is considered an installation, it follows that all pipe work serving it is also a installation.The 900 metre pipeline further comes within the Directive because dangerous substances are used or stored within it and therefore it falls within the definition of "storage" in the Directive.

65. As regards Article 4 of the Directive which excludes from the Directive "the transport of dangerous substances in pipelines, including pumping stations, outside establishments covered by this Directive", the applicant asserts that the pipeline in question is not outside the establishment.With this interpretation of "establishment" contended for by the applicant, it is claimed that the Second Named Notice Party as well as the Bord avoided their legal responsibilities under the Directive by not requesting the Health and Safety Authority to give advice in relation to the full extent of the establishment in question.

66. Counsel for the applicant further argued that the Health and Safety Authority is vested only with the power to give "technical advice" but not with what he categorises as a legal question, namely the question of deciding the scope of an "establishment" within the meaning of the Directive, an obligation which he says is vested in the Bord.

Respondents' and Notice Parties' Submissions:
67. The Respondents and the first and second notice parties all reject the applicant's submissions.

68. They contend that as the pipeline had already been granted a consent by the Minister for the Marine under section 40 of the Gas Act 1976, it constituted exempted development for the purposes of the Planning and Development Act 2000.Therefore, regardless of whether the pipeline constituted part of the establishment, for the purposes of the Directive and the national law implementing the same, it did not in any event form part of the "development" upon which the Bord had to make a decision.

69. The first respondent submits that:

> As regards the correct interpretation of "establishment" it is not the function of the Bord to review the legality of the Health and Safety Authority's approach.It was aware that the Authority had obtained the advice of the European Commission on the matter, and it appears that it was following Commission advice in its approach.The findings of the Health and Safety Authority were findings of fact presented to the Bord which it, in turn, was entitled to and did take account of.If the applicant is challenging the legality of the Health and Safety Authority's advice because it adopted a wrong interpretation of the word "establishment", then the appropriate respondent is the Authority, who is not a party to the proceedings, and not the Bord.

70. In so far as land use obligations are concerned, the Directive does no more than to impose on a planning authority (and on appeal the Bord) the obligation to consult and to have available to it technical advice when planning decisions are being taken in respect of establishments.The advice sought and received from the Health and Safety Authority was an appropriate consultation within the meaning of Article 12 of the Directive.The Bord had formed the view that the advice given by the Authority was sufficient to enable it to exercise its functions, which were to form a view of the risks posed by the proposed development.

71. The pipeline underwent examination as to the possible environmental repercussions and the impact that the pipeline would have, for the purposes of the Environmental Impact Assessment.Both the Inspector and the Health and Safety Authority did not consider there was any reason why planning permission ought not to be granted.The Bord adopted this conclusion, along with the

recommended conditions.

72. As to the contention that the Bord failed to obtain advice on the 900 metre pipeline between the terminal footprint and the edge or boundary of the first named notice party's lands, this is factually incorrect.The Bord gave detailed consideration to the health and safety issues relevant to the siting of the establishment, and thereby met their obligations.In particular, the Inspector in his report to The Bord, noted the various consents that had already been obtained by the first notice party, and in particular the pipeline consent granted by the Minister for the Marine pursuant to s.40 of the Gas Act 1976.Therefore, the pipeline, while not a part either of the development or of an establishment, was nevertheless clearly part of the overall project, in respect of which the appropriate consents had been obtained.

73. The applicant did not identify a single actual or potential danger or hazard arising from the alleged failure of the Health and Safety Authority to consider the pipeline to be part of the establishment for the purposes of advices given to The Bord.

74. The first named Notice Party argues as follows.

> The arguments put forward by the applicant in these proceedings are based on a misunderstanding of the separate roles and responsibilities of the Health and Safety Authority and of the planning authorities, including The Bord.

75. Article 12 of the Directive has been properly and fully implemented into domestic law by a combination of the provisions of Part II of the Planning and Development Regulations of 2001, Regulation 29, Regulations 137(1)(a) and 138 of the Major Accident Hazards Regulations of 2000 and the provisions of the Local Government (Planning and Development) Act 2000.

76. The correct interpretation to ascribe to the combination of the foregoing provisions of the relevant legislation is the following:

> (a) When a Planning Authority has received a planning application relating to the provision or modification to an establishment, it is obliged to notify the Health and Safety Authority and to request technical advice from it and following receipt of that advice to take it into consideration in deciding whether to grant permission.It is not required to form any view in relation to the question whether, or the extent to which, a particular development constitutes an "establishment" except for the limited threshold purposes of deciding whether to notify the Health and Safety Authority.
>
> (b) The Bord is required to notify the Health and Safety Authority only when the planning authority itself has not already notified the Health and Safety Authority.
>
> (c) When it is requested to, the Health and Safety Authority is required to give such technical advice.Regulation 29(1) of the Regulations of 2000 is not prescriptive as to the advice to be given by the Health and Safety Authority.

77. The Planning Authority notified the Health and Safety Authority of the application on the 8th April 2004, technical advice was furnished by the Health and Safety Authority to that Planning Authority in the form of a report entitled "Land Use Planning Advice for Mayo County Council in relation to PO3/3343, which was exhibited to the affidavit of the applicant.

78. The Bord was required only to consider the advice of the Health and Safety Authority when deciding to grant permission and this it clearly did.Further, even if there was an obligation on the Bord to notify the Health and Safety Authority of the appeal and to seek further technical advice from it, and there is no such obligation, the Bord did in fact refer the appeal to the Health and Safety Authority and sought and did obtain advice in relation thereto.

79. Neither a planning authority nor the Bord has any power to direct the Health and Safety Authority in relation to the nature or extent of the advices to be provided by it.It is for that Authority to give all appropriate technical advices on the basis of the information available to it so as to "ensure that technical advice on the risks arising from an establishment" is available to the planning authority or the Bord, upon which the Bord should act, pursuant to *The State (Abenglen Properties) v Dublin Corporation* (1984) I.R.381.

80. Under the Regulations of 2001 it is the Health and Safety Authority, and not the planning authorities or An Bord Pleanála who have the requisite expertise in relation to the nature and extent of risks which will arise from the construction or modification of an establishment.It is precisely for this reason that planning authorities and the Bord are required to seek its advice and having done, so it is not open to them to ignore or question the basis of that advice.In that regard the notice party relies on the decision in *Hickey v An Bord Pleanála*, unreported, High Court 10th June 2004 in Smith J.stated:

> "In my judgment given that the agency is the expert body entrusted with the responsibility under the Environmental Protection Agency Act for IPC licensing, ……(Louth County Council) were entitled to accept its determination as expressed in the letter of 30th July 2001, that an IPC licence was not required and to proceed with the planning application on that basis.The concerns of the applicant (and perhaps others) that she 'believed that the development required to be the subject of an IPC licence from the agency and that to the extent that it failed to deal with this issue, the entirety of the application was fundamentally invalid and void' are respectfully recorded at page 17 of the Inspector's report.This is not a case where a decision was made without the knowledge of the applicant's concerns…"

81. This notice party also submits that even if there was a free standing or independent obligation to form its own view as to the extent of an establishment, no different result would or could have occurred in the present case.The Bord could not require the Health and Safety Authority to alter its view as to the extent of an establishment or to give different advices.In discharge of its obligations under Regulation 29 of the Regulations of 2001 the Health and Safety Authority is required to give its advice in relation to the establishment as understood by it.

82. On the hypothesis advanced by the applicant that The Bord had in fact an independent obligation, in compliance with obligations pursuant to Article 12 of the Directive, to come to a view as to the extent of an establishment, it follows that the Health and Safety Authority also had an independent obligation.

83. On the specific interpretation of the Directive this notice party contends that an establishment according to the Directive is an area where two conditions are met namely:

> (1) it is under the control of the operator; and
>
> (2) dangerous substances are present in one or more installations.

84. In the present case it is argued that the second condition is not satisfied because the pipeline is not a technical unit within an establishment in which dangerous substances are or are intended to be produced, used, handled or stored.The pipeline is used exclusively for the transportation of gas.

85. Finally the notice party contends that its interpretation of establishment is supported by the application of the teleological or schematic approach required to be applied in relation to the interpretation of measures implementing Community legislation, and in particular says that as is apparent from Recital 13 that the Directive is not intended to apply to pipelines because these will be the subject of separate more tailored regulations.

86. In relation to the stance actually taken by the Bord in relation to the contested pipeline, this notice party submits that all the appropriate health and safety issues arising not just in relation to an establishment as defined by both the local authority and the Health and Safety Authority, but also in relation to the import pipeline, were in fact fully considered by the Bord.Counsel for the first-named notice party referred to sections of the Inspector's report which specifically deal with health and safety issues and in particular health and safety issues concerning the existence of the proposed development.The Inspector stated:

> "I submit that it is critical that the health and safety aspects of the combined incoming pipeline within the application site and the proposed terminal prior to commissioning are considered.The two elements are interdependent without the incoming pipeline transporting the raw gas there would be no terminal and without the proposed terminal at this location there would appear to be no need to route the incoming pipeline as proposed".

87. He then recommended and continued as follows:

> "There are two options for the Bord to consider on this issue.Firstly, it could conclude that the health and safety aspects of the incoming pipeline (including the section within the current application site) have already been considered by the Minister for the Marine, Communications and Natural Resources and that repetition of the exercise under the planning code is not necessary.Secondly, the Bord may conclude that, having regard to the circumstances outlined, it would be reasonable to consider the health and safety aspects of the combined elements within the application site prior to commissioning as part of this appeal, even though planning permission is not being sought for the incoming pipeline outside the terminal footprint.I favour the second option because:· I consider that there is a lack of absolute certainty under the first option.
>
> · The two elements are interdependent.
>
> · There is an onus on the Bord to consider all impacts (including direct, indirect, cumulative, etc.) and
>
> · The adoption of the first option could be interpreted as project splitting.
>
> Based on the information before me, including the Bord directions referred to above and the HSA submissions to the planning authority and the Bord, I consider that it would be unreasonable to refuse permission for reasons relating to health and safety.I am recommending that any permission granted should include a condition requiring that health and safety aspects of the combined elements within the application site be addressed and agreed with the planning authority prior to the commissioning of the terminal.I accept that such a condition may duplicate in part conditions under the pipeline consent code but I consider that it is necessary and in the interests of the proper planning and sustainable development of the area.I further consider that it would be reasonable to include the additional HSA requirements (as outlined in the submission to the Bord) by way of conditions".

88. The second named notice party supported the arguments of the first respondent and first notice party.

Conclusions on Substantial Grounds:
89. I have set out in considerable detail the arguments of the main parties in the application.I do so for the purposes of assessing whether or not in the circumstances of the present case the applicant has established that there are, objectively speaking, substantial grounds for contending that the decision of the first respondent is invalid, within the meaning of Section 50 of the Act of 2000.I have already referred to the extract from *MacNamara v.An Bord Pleanála* which has been accepted as being the standard which must be met, and this interpretation of the phrase "substantial grounds" has since been considered and developed in several subsequent cases.It is not sufficient, despite counsel for the applicant arguing to the contrary, simply to assert a substantial ground.Of course grounds asserted may be serious, but it is necessary always to place them context for the purposes of establishing whether those grounds are weighty, that is to say have some real substance, at the very least, but without having to decide the case itself or its eventual outcome.

90. I think it is useful to set out some aspects of the jurisprudence in which the interpretation of the phrase "substantial grounds" has been the subject matter of findings.In relation to the same phrase found in the Road's Act, 1998, it has been stated by Geoghegan J.in the judgment in *Jackson Way Properties Limited v.Minister for the Environment* (unreported, 2nd July 1999):

> "I am satisfied that it was clearly intended by the Oireachtas that stricter criteria be applied to the granting of leave than would be applied on an *ex parte* application in an ordinary judicial review.Once a court has established that the points at issue in the proposed judicial review are not trivial or tenuous, the court must assess whether there is real substance in the argument and not merely that it is just about open to argument".

91. More recently the same question has been considered by McKechnie J.in the case of *Kenny v.An Bord Pleanála* (No.1) (2001) 1 I.R.565 in which the learned High Court judge analysed the distinction between the statutory threshold and the threshold generally applicable in ex parte applications for leave to apply for judicial review

> "Indeed in a consideration of these words, one can think of grounds which could be both reasonable and arguable and yet still fall significantly short of meeting the threshold of being substantial.The words 'trivial or tenuous' are undoubtedly helpful but more so as words of elimination rather than words of qualification.The description of being 'weighty' and of 'real substance' are in my view of considerable importance in the interpretation of this threshold phrase.However, it must also be remembered that, from a base of say opposite substantial, namely, insubstantial, an applicant must navigate the considerable distance in between, and in addition must arrive at and meet the threshold while still afloat and on course.In truth I feel, while many attempts have been made to explain or convey "the equivalent of its meaning" I am not certain that one can better the original phrase itself."

92. I would agree entirely both with the exposition of the difficulties expressed by McKechnie J.and in particular with the characterisation of the words "trivial or tenuous", in the context in which they are found in the citation, as being words which eliminate but do not determine positively what is required.It is reasonably easy to establish when a claim is either trivial or tenuous, and therefore relatively easy to eliminate such a claim from an entitlement to seek judicial review pursuant to Section 50.It is rather more difficult to navigate the necessarily lengthy line between trivial or tenuous and "weighty" save to say that at the commencement point beyond trivial or tenuous, it may be very difficult to persuade a court that an applicant has substantial grounds, whereas further along the line between tenuous or trivial on the one hand and weighty on the other hand there comes a point where an applicant undoubtedly proceeds into the waters of "weighty".It can only be on the basis of the particular and peculiar facts of each individual case that a court can determine whether or not one has reached the area of "weighty" which is constituted by an accumulation of argument on the law and/or the establishment of facts which taken together make it abundantly clear that the matter is sufficiently strong to be considered weighty.

93. In that regard I do not consider that the standard which is to be reached is different depending on the facts of any particular case.Rather that the standard of weightiness remains the same, but the achievement of that standard may be more difficult in some cases than in others.

94. In the present case the applicant essentially contends for three things:

> (1) The existence of an independent stand alone obligation which is imposed both on a planning authority and in the present case on the Bord arising from the correct transposition of Article 12 of the Directive.
>
> (2) The correct interpretation of "establishment" is one which encompasses a significantly larger area than that contended for by the first-named notice party, or by the first-named respondent, and therefore includes at least the 900 metre pipeline beyond the footprint of the terminal itself;
>
> (3) The respondent abrogated its obligations pursuant to Article 12 of the Directive and of national law transposing that obligation, in favour of the Health and Safety Authority and thereby tied itself wrongly and illegally to the incorrect and unlawful interpretation of "establishment" adopted by that Authority.

95. I propose to deal first with the question of the definition of establishment adopted by the Health and Safety Authority and accepted by the Bord as being correct.I reject the contention put forward by the applicant that "establishment" must necessarily always encompass what has been called the "upstream pipeline".There is a very clear distinction in the Directive and in consequence in the Regulations of 2001, between on the one hand a pipeline, and on the other hand pipe work, and although counsel for the applicant tended to use one in case of the other, it is a long established principle of community law that when different words are used in legislation, this is deliberate and they are intended to have distinct and precise different meanings, unless of course the context otherwise requires.It follows therefore that when the community legislator adopted in the course of the Directive two distinct separate terms, one pipeline and one pipe work, it is not correct for the applicant to conclude that one is interchangeable with the other.

96. It is also quite clear from the context both of the recitals and of the definition section of the Directive that a pipeline is intended to refer to one for the transportation of gas (or other hazardous or dangerous substances), and in the present case it applies to a pipeline both to the terminal and from the terminal.It is noteworthy that in so far as the present terminal is concerned it has been stated on affidavit, and without objection or contradiction on the part of the applicant, that there is in fact not only what has been called the upstream pipeline which is to serve the transportation of gas from the Corrib gas field itself to the terminal but also a downstream pipeline which will proceed from the terminal elsewhere, and in respect of which no objection has been raised by the applicant.

97. There is nothing inconsistent in approaching the exclusion of gas pipelines specifically referred to in the recitals and in Article 4 of the Directive on the one hand and considering as part of an establishment that portion of the pipeline which forms part of the terminal footprint itself on the other hand.That latter was clearly "within the establishment", and therefore subject to the Directive.

98. Nor do I accept the applicant's contention that because, for the purposes of planning, the area of land owned by the first-named notice party is larger than the terminal footprint itself, it follows that the entire of that area, whatever that may be, is automatically to be considered an "establishment" for the purposes of the Directive, and no expert opinion to that end was furnished on behalf of the applicant.

99. Moreover when the Health and Safety Authority adopted as "establishment" the terminal footprint site of the first-named notice party, it did so, according to the materials before the court, after consultation with the officials of the European Community and after consultation with competent authorities of Member States of the European Community.While this is not to say that such consultation automatically determines the approach which this court should adopt, the actual approaches made were not challenged by the applicant.Nor did the applicant present any contrary expert evidence in support of a different interpretation of "establishment" to that emanating from the Health and Safety Authority in consequence of those consultations.I do not of course lose sight of the fact that the applicant states his claim is not against the Health and Safety Authority, which is not party to the proceedings.However, that contention would not in any way preclude the applicant from countering, by expert evidence, the interpretation actually adopted by the Health and Safety Authority and accepted as being correct by the Bord, so as to support his contention that an "establishment" under the Directive is something different, and that the Bord was acting unlawfully in accepting the interpretation adopted by that Authority.

100. The applicant also suggests that the pipeline should be considered to be an installation because gas is stored in it, or as related infrastructure.However, a consideration of the definitions in Article 3 of the Directive suggests otherwise.I refer in particular to the definition of "storage", which means the presence of a quantity of dangerous substances for the purposes of warehousing, depositing in safe custody or keeping in stock, which clearly does not encompass a pipeline transporting gas from the gas field to the terminal.As to whether the additional 900 of pipeline is part of the infrastructure, that is defined as being included in the term "installation", but that in turn must consist of a "technical" unit in which dangerous substances are produced, used, handled or stored.The gas pipeline does not come within any of these categories of technical unit, nor therefore of infrastructure.

101. I do not find therefore that the applicant has put forward a substantial ground for his contention that his interpretation of "establishment" is correct, or more accurately, that the Bord's interpretation was incorrect, and therefore invalid.

102. As to a free standing obligation to determine for itself what is or is not an establishment, I do not accept the applicant's submission in that regard either.The competent authority has a peculiar and very specific role to ensure that all obligations imposed

on the State or on operators, which arise pursuant to the Directive, are complied with.No challenge has been raised to its expertise.It is only necessary to consider what could occur if in fact local authorities, or on appeal from a local authority, the Bord, had a fully independent obligation to determine the extent of an establishment.There could be a clear dispute between one local authority and another as to what an establishment is, or between one or more local authorities and the Bord, or between any or all of these and the Health and Safety Authority.The applicant suggests that if no such independent obligation exists, how could a planning authority or the Bord know with certainty that a proposed development is one which involves an establishment within the Directive.This is a misguided concern, since it is clear from the obligations on an applicant pursuant to the legislative scheme in question, that an applicant for permission must specify with particularly and in detail the precise nature of the development which is proposed by him, and equally, the statutory obligations to seek or to grant advice on that very planning application are clear.

103. I agree with the argument of the first notice party that it is clear from the Directive and the Regulations of 2000 that the identification of the nature and extent of "an establishment" requires an assessment of various technical matters involving the application of expert judgment, and that article 16 of the Directive requires the appointment of a competent authority in each Member State with specific responsibility for carrying out the duties laid down in the Directive.The Health and Safety Authority has been identified as the body with the requisite expertise to ensure that the Regulations are applied and enforced and that the duties placed on the State by the Directive are fulfilled.

104. For the purposes of ensuring uniformity and certainty in the application of the Directive and the Regulations, it is my judgment that in the assessment of the extent of what constitutes "an establishment", which itself falls readily to be considered and assessed by reference to highly technical matters - and not simply by reference to an unspecified and uncertain legal definition, as contended for on behalf of the applicant - it is both appropriate and valid to ascribe to that competent authority, which is also best placed to consult both with the Commission and with competent authorities of other Member States, the role of advising as to the scope of an "establishment" under the Directive.

105. Article 12 of the Directive certainly requires that Member States ensure that the objectives of preventing major accidents and limiting the consequences of such actions are taken into account in land use policies and or other relevant policies, including undoubtedly planning and development policies, and that this is done through controls inter alia on the siting of new establishments.And it is equally true that in doing so, Member States are obliged to ensure that land use or other relevant policies take account of the need to maintain appropriate distances between establishments and residential or other areas.There is no express obligation on a planning authority or on The Bord to determine the extent of establishment under Article 12.the applicant arguing that this is implicit..On a correct reading of the Article, however, nothing in it prohibits these matters, including the scope of an establishment, being assessed by reference to technical advice delivered by the competent authority, in this case after appropriate consultation with Commission officials and competent authorities in other Member States.Since the legislative scheme governing such developments obliges an applicant to disclose with particularity the precise nature of its proposed development, and therefore to indicate clearly to a local authority that the development includes or is in respect of an establishment, and the local authority and/or the Bord is also obliged to seek advices in relation to the risks arising from the same, and further the competent authority is in turn obliged to furnish such advices when requested, I do not accept that such obligations as arise pursuant to Article 12 are not met by the scheme actually in place.

106. I do not find therefore that The Bord had an independent stand alone obligation to determine the scope of an establishment, nor do I find that in seeking the advice as to the development in question, or in accepting the advice already given to Mayo County Council, and forming part of the planning appeal dossier, it thereby abrogated its alleged obligation to determine independently the extent of an establishment, to the Health and Safety Authority, or invalidly or unlawfully bound itself to the advice received from the said Authority, on the materials and arguments presented by the Applicant.

107. It has been specifically drawn to the attention of the court, and without it being countered, that not only was the terminal footprint and the actual or potential hazards attaching to it considered by the Health and Safety Authority, but that the Health and Safety Authority also took into account also the existence of a licence by the Minister for the Marine in respect of the upstream gas pipeline, and that there had been an Environmental Impact Statement prepared in respect of the same.But it is also of importance to note that notwithstanding the existence of that licence and notwithstanding that the establishment was considered to be the area within the terminal footprint as described in this judgment, the Inspector's report considered by the Bord prior to reaching its own decision, actually took into account the combination of the terminal footprint together with the upstream pipeline and made recommendations on that combined position.Indeed a reading of that portion of the Inspector's report clearly indicates this.It is not necessary for me to describe in detail the enquiry of the Inspector, which was set out in its relevant portion, in the submissions of the first notice party and repeated, in part, above.

108. It is clearly advised by the Inspector that a full safety audit of the combined terminal and upstream pipeline was to be prepared and made available, and this resulted in the imposition, by the Bord, of very specific conditions attaching to the planning permission in that regard.Those conditions must be complied with prior to the commencement of operation.Pursuant to Article 17 of the Directive Member States must prohibit either the use or bringing into use of any establishment where the measures taken by the operator for the prevention and mitigation of major accidents are seriously deficient.I have already concluded that the Health and Safety Authority did not appear to consider that the provisions proposed by the applicant for permission were seriously deficient.Nor did the applicant present to the Court any evidence expert or otherwise, that had the Bord independently considered the 900 metre pipeline to be part of "an establishment", the advice in relation to the same would have been any different.

109. In the circumstances I find that even if the court were to accept his contention that there is an independent obligation on the Bord itself, to determine the extent of an establishment, which I do not find to be the case, and even if the upstream pipeline were correctly to be the subject of independent or joint investigation with the terminal footprint, as being within the meaning of term "establishment", the applicant has not established in any way that the results would have been any different to those which actually occurred.

110. Having regard to the foregoing, I find that the applicant has not made out a case that there are substantial grounds for contesting the validity of the grant of planning permission in the present case on the basis of an alleged independent obligation arising pursuant to Article 12 of the Directive, as transposed, or on the basis that The Bord abrogated its so called independent obligation to the Health and Safety Authority.I have already found that there were no substantial grounds, based on his interpretation of the word "establishment", for contending that the decision was invalid.

111. In circumstances where the applicant has not established to the satisfaction of the court that there are substantial grounds, within the meaning of Section 50 of the Act of 2000, for permitting the applicant to commence judicial review proceedings, it follows that, not having a substantial interest, as I have found, I also do not find that the applicant is entitled to leave on the basis of the exception to "substantial interest" which I hold the Court should retain within its control at all times.

Delay
112. Both the respondents and the notice parties argued that in any event, the applicant should be precluded from having leave to commence judicial review proceedings on the grounds that he had not moved promptly, on a correct application of the case law in that regard.I do not find it necessary, having regard to the foregoing findings to deal separately with this matter.It is sufficient for me to say that had it been necessary for me to do so, I would have found that the applicant had not complied with the requirement to move promptly, having filed his papers in the matter on the last day of the statutory period permitted.I did not consider, however, in an important case such as this, that the matter should be decided entirely on the basis of the procedural question of delay.

A Reference to The European Court of Justice
113. There remains outstanding the question of a reference to the European Court of Justice.Again this is not a matter I propose to deal with in any great detail.Apart from the question whether, in an application for leave to issue judicial review proceedings, where there are no proceedings extant, and an applicant is refused such leave, there are any proceedings in being which require an answer to a question involving European Community Law in the present case, the issue has been resolved by quite recent jurisprudence of the Court of Justice, in which that Court determined that where there is a national rule which permits an appeal only with leave of the Court, that Court is not a final court of appeal for the purposes of Article 234 of the Directive.Since the most recent jurisprudence was not opened to this Court, it would be inappropriate for me to make any more detailed findings, which are not necessary in the context of the present case.

The Applicant's claim against the Second Notice Party
114. I have not made any specific findings on the Applicant's claim against the second notice party.The case against it was subsidiary to the main claim.Nevertheless I am satisfied that no material or argument was presented to me upon which I could safely consider that the applicant had established substantial grounds for contending that the Directive had not been correctly transposed into Irish law..

115. Having regard to the foregoing, I dismiss the applicant's application for leave.