Neutral Citation Number: [2009] IEHC 600

THE HIGH COURT

2009 45 JR

HANDS ACROSS THE CORRIB LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

GALWAY COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Birmingham delivered the 9th day of October, 2009

Introduction

1. This case, which involves a challenge to the decision of An Bord Pleanála ("the Board") to authorise the Galway City Outer-By-Pass ("GCOB") was, by direction of Mr. Justice Kelly, the judge having charge of the list in the Commercial Court, heard in tandem with the case of *Sweetman v. An Bord Pleanála* (99 JR/2009). The *Sweetman* proceedings were heard first and these present proceedings commenced immediately afterwards.

2. In the course of my judgment in *Sweetman* which I have just delivered, I set out the factual background to the challenge and also referred to the principal, relevant, domestic and European legislative provisions at issue. I do not propose to repeat that exercise here and accordingly, this judgment ought not to be read in isolation but rather read in conjunction with the judgment in *Sweetman*.

3. While the *Sweetman* proceedings were very tightly focused and centred on two principal grounds of challenge, the same cannot be said in relation to the present proceedings where a far greater number of grounds of challenge have been advanced. However while that is so, so far as those areas which were so fully and ably argued in *Sweetman,* are concerned, namely the contention that the decision was invalid by reason of a failure to provide adequate reasons and a contention that the Board fundamentally misinterpreted Council Directive 92/43/E.E.C. of 21 May, 1992 on the conservation of natural habitats and wild fauna and flora, O.J. L206/7 22.7.1992 ("the Habitats Directive") as well as the European Communities (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997) ("the Habitats Regulations" or "1997 Regulations"). Ms. Barbara Ohlig acting for the applicant in these proceedings was, for the most part, very properly and sensibly disposed to adopt the arguments that were advanced there.

4. However, one additional argument of substance which is unique to the present proceedings was put forward by Ms. Ohlig in relation to the misinterpretation point; it was argued that it was not open to the Board to take the view that the integrity of the site was not affected when the National Parks and Wildlife Service (NPWS) through Dr. Fossit had expressed the view that the proposal would indeed affect the integrity of the site. Ms. Ohlig said that the Board was simply not entitled to depart from the view of the NPWS that a project would result in an impact on the integrity of the site. To reject the views of an organisation of that stature was, it was said, to ignore the obligation to apply the precautionary principle as well as the obligation to permit projects to proceed only where no significant scientific doubt remained in relation to them. Ms Ohlig was quick to add that the situation would be otherwise if the NPWS, in a particular case, took the position that there would be no effect on the integrity of a particular site, where she says the Board would be quite free to reject its views.

5. The Board protests that this submission amounts to designating the NPWS as the competent authority for decision making in this area, without any statutory basis for doing so whatsoever. For my part, I do not think that it could be seriously suggested that the views of the NPWS were not entitled to be treated with the greatest of respect, indeed so much was acknowledged explicitly by the inspector in this case.

6. However, it is important not to lose sight of the context in which the arguments in relation to the role of the NPWS are being advanced. This is not a case where there was any significant disagreement about what the physical effects of the proposed development would be. On the contrary, the experts who expressed views on this, Dr. Julie Fossit and Mr. James McCrory, who was called to give evidence on behalf of Galway County Council were in broad agreement as to what the impact would be. However, where they disagreed was as to how the accepted impact was to be categorised or labelled and in particular, where they disagreed was as to whether the effect that it was agreed would occur should be regarded as having an adverse impact on the integrity of the site. As we have seen in the *Sweetman* case, Dr. Fossit contended that if the situation was that a severe adverse effect would be caused to a portion of the site that led automatically and without the need for any further consideration to a conclusion that there would be an adverse effect on the integrity of the site.

7. If this was a case where there was conflict between the experts as to whether a particular situation would result or whether flora or fauna would or would not be affected in a particular way, the arguments advanced by Ms. Ohlig would have much greater force. If that was the situation, then having regard to the high threshold identified by the European Court of Justice that the project could be authorised only if no reasonable doubt remained, one can readily imagine that the scope for departing from the views of NPWS experts might be quite limited. However, that is very definitely not the case here.

8. In summary then, in so far as the grounds that are common to this and the *Sweetman* proceedings are concerned, the position is that none of the arguments advanced by the applicant in this case persuade me to depart from the view I expressed in *Sweetman*. Accordingly, I propose to refuse leave in relation to the complaint that adequate reasons were not provided for the decision. In relation to the argument that the conclusion of the Board that there would not be an adverse impact on the integrity of the site was one that was not open to it, I propose to grant leave in respect of this ground, being of the view that there were substantial grounds for contending that the Board had erred in its interpretation of the Regulations of 1997 and the Habitats Directive. However, as in *Sweetman*, while I am of the view that there were substantial grounds for challenging the decision, on the substantive hearing, I am not satisfied that this ground of challenge was made out and I decline to quash the decision on that ground.

The Nature and Extent of Judicial Review Proceedings

9. So far as the arguments particular to this case are concerned, the applicant has raised questions about the nature of judicial review proceedings and in particular about whether the existence of the judicial review remedy was adequate to comply with the

requirements of Council Directive 85/337/E.E.C. of 27th June, 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L517, 5/7/1985 ("the Environmental Impact Assessment Directive"). It therefore gives rise to the slightly curious situation that these arguments are being advanced in the present case, where the State as such is not a party, but were not pressed in the Sweetman proceedings where State respondents had been joined.

10. Article 10a of Council Directive 85/337/E.E.C., as inserted by Article 3(7) of Directive 2003/35/E.C. of the 26th May, 2003 on the provision for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public access to justice Council Directives 85/337/E.E.C. and 96/61/E.C., O.J. L156/17 25.6.2003 ("the Public Participation Directive"). so far as material provides as follows:-

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."

11. By reference to the terms of the Directive, the applicant claims that it is entitled to a merits based review of the Board's decision and says that the decision of the Board was wrong in substance. This demand for a merits based review arises in a situation where it was claimed on behalf of the applicant that it was clear from the facts presented, prior to and at the oral hearing, that the traffic problems of Galway city are much better solved by other means than the proposed road, given that most of the traffic is commuting traffic. It was submitted that accordingly mass transport solutions, such as train, light train, PRT ("Personal Rapid Transport) and bus, as well a combination of these alternatives are the only sustainable solution to the traffic problems and that there was, therefore, no need for the motorway. Obviously the applicant is entitled to those views, but the suggestion that this was the clear outcome of the oral hearing, seems more than a little tendentious.

12. The demand for a merits approach is a far reaching one and if accepted might well have unintended consequences for the applicant and like minded groups and individuals. If there is to be a review on the merits, that would have to be available, not only to those who objected unsuccessfully to a grant of permission or a development project, but would inevitably have to be available to every disappointed developer or promoter. Why it should be thought that a judge who was unlikely to have any background in any of the disciplines relevant to the assessment of proposed infrastructural developments should be better positioned to assess the merits or demerits of a proposal than a specialist tribunal with accumulated expertise and experience is not clear to me.

13. In addition to this radical demand that this Court should review the decision of the Board on its merits, the applicant further submits that the approach to judicial review mandated by the case of *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 is no longer appropriate. Arguments to the like effect have been considered in a number of recent cases. In *Sweetman v. An Bord Pleanála* [2008] 1 I.R. 277, Clarke J. held that the procedures for reviewing administrative decisions in Irish Law were capable of meeting the standards required by the Directive. The argument that the requirement to demonstrate substantial grounds in order for leave to seek judicial review to be granted would deprive an applicant of access to a review procedure that has been advanced here, was also considered and dealt with firmly by Clarke J. who said, at para. 6.9, on p. 297:-

> "It does not seem to me that there could be any basis for suggesting that a party who is given access to a court to agitate whatever arguments they wish in support of a leave application has not been given a judicial review in the sense in which that term is used in the directive". The fact that the leave stage in judicial review may act as a filtering mechanism through which only claims of sufficient merit and substance may pass does not mean that it is a bar to the review to which an applicant is entitled under the directive."

And later, at para. 6.10, on p.297, he had this to say:-

> "The fact that, if the court thinks that the grounds put forward are insubstantial, it follows that the case does not go any further, does not mean that the applicant concerned has not had a judicial review. It simply means that the case was of insufficient merit to warrant further consideration… The mere fact that leave has to be obtained and that, as part of that process in order to obtain leave, substantial grounds need to be established, does not in any way diminish the entitlement of that party to access to a court and a review that is (within the parameters of Irish judicial review) conducted by a judge of the issues raised. I am not, therefore satisfied that there is any basis for the contention that the requirement for leave based on substantial grounds infringes the obligation to provide a judicial review as required by the directive."

It is appropriate to bear in mind that the requirement to obtain leave is ever present when judicial review is sought and the requirement that leave should be granted only when substantial grounds are established is now common place. The approach taken by Clarke J. was also endorsed by MacMenamin J. in the case of *Usk and District Residents Association v. An Bord Pleanála* [2009] I.E.H.C. 346, (Unreported, High Court, MacMenamin J., 8th July, 2009), where judgment was given some days after argument in this case had concluded. The matter was also considered by Cooke J. in *Cairde Chill an Disirt Teoranta v. An Bord Pleanála* [2009] I.E.H.C. 76, (Unreported, High Court, Cooke J., 6th February, 2009), who in the context of a challenge to a planning permission for an explosives factory and an application for declarations as to whether the proceedings before the Board constituted a review of the substantive and procedural legality of that decision as provided for in Art. 10a commented as follows, at paras. 35 and 36:-

> "The judicial review by the High Court is precisely the procedure envisaged by *Article 10(a)* in that the High Court has jurisdiction to quash the decision of the Board if it is shown to be vitiated by any material irregularity in the Board's procedures leading to its adoption or by any material error or failure on the Board's part in applying correctly the substantive criteria and conditions of proper planning and sustainable development governing the assessment of the proposed development.
>
> *Article 10a does not require the Member States to ensure access to a procedure for review of the merits of a development project for which a development consent has been granted but of the legality of the decision made on the application for that consent; both as regards the legality of the procedures of the deciding authority in reaching its decision and as regards its correct application and compliance with the substantive provisions of the laws and regulations governing the appraisal of the application for development consent." (Emphasis added)*

With that view I respectfully agree as indeed I agree with the views expressed by MacMenamin J. in *Usk* and the views of Clarke J. as expressed in *Sweetman*.

14. Since evidence was heard in this case, the European Court of Justice has given a judgment which addresses this issue, *Commission v. Ireland* Case (C-427/07), where the Commission argued that Ireland had failed to transpose the Directive in that an applicant for judicial review in environmental litigation was not in a position to challenge the merits of a decision. That ground of challenge failed and the ECJ held that the argument was unfounded in circumstances where the Commission had challenged the Irish government's failure to transpose the Directive, and not the quality of the transposing measures. Of interest is that the court referred without demurring to arguments advanced by the State, noting, at para. 75 as follows:-

> "Ireland also asserts that the requirements laid down in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35 are fully implemented into Irish law by reason of the existence of the judicial review procedure available before Irish Courts. The purpose of judicial review is to provide a form of review of decisions made and actions taken by courts and administrative bodies, to ensure that the functions conferred on such authorities have been carried out correctly and legally."

Earlier, at para. 74, the court observed:-

> "Ireland contends, in that regard that those articles [Article 10a of Directive 85/337 and Article 15a of Directive 96/61] do not require provision to be made for an exhaustive review of the merits of a decision, but merely require that it be possible to contest the substantive legality of a decision. Such a form of review is provided for under Irish law."

What is really at issue is the adequacy of review. In that regard one is bound to say that any suggestion that the applicant and others in like situations are denied a full and detailed review is belied by the history of the present proceedings. All parties had the opportunity to and did in fact present detailed legal argument orally as well as making detailed written submissions. For this and the related *Sweetman* case, no less than ten days were assigned in the Commercial Court list for oral argument and the two cases were ultimately argued over nine court days.

Public Participation

15. A number of arguments have been advanced in support of the view that the arrangements to permit the public to participate are inadequate and ineffective and fail to meet the standards established by Council Directive 2003/35/E.C.. The principal focus of attention has been in relation to the arrangements put in place in respect of Irish language speakers. The issues in relation to the position of Irish speakers arise in circumstances where the proposed road development would pass through areas of the country designated as Gaeltacht, as well as English speaking areas.

16. The Planning and Development Act 2000, touched on the question of language in that s. 135(8) provides as follows:-

> "(a) An oral hearing may be conducted through the medium of the Irish or the English language.
>
> (b) Where an oral hearing relates to development within the Gaeltacht, the hearing shall be conducted through the medium of the Irish language, unless the parties to the appeal or referral to which the hearing relates agree that the hearing should be conducted in English.
>
> (c) Where an oral hearing relates to the development outside the Gaeltacht, the hearing shall be conducted through the medium of the English language, unless the parties to the appeal or referral to which the hearing relates agree that the hearing should be conducted in the Irish language."

However, while the section dealt with the issue of proposed development located in a Gaeltacht area or in an English speaking area, it had not specifically addressed the possibility of a proposal cutting through both areas.

17. While there has never been any issue about the entitlement of the applicant to launch the present challenge, the Board has protested that the applicant lacks standing to advance arguments in relation to the Irish language, given that it is a limited company, the articles and memoranda of which are in English and it seems likely that it conducts its business in English. The Board protests that the applicant is seeking to assert a third party right that could more properly be asserted by any of the Irish speakers that participated in the oral hearing, none of whom chose to do so.

18. It must be said that the promoting local authorities and the Board were very conscious of the issues concerning the route of the road through different language areas from the earliest stage. It may also be said, in fairness to the local authorities, that their recognition of the need to address language issues predated both the Public Participation Directive and the Official Language Act 2003.

19. From the outset, information brochures were prepared in the Irish language, and Irish speakers were available to answer questions at meetings arranged to provide briefings on the project. The oral hearing was conducted by an inspector who was fluent in both English and Irish. The proceedings were bilingual, with many contributions in Irish, some from persons whose first language appeared to be Irish and others from persons for whom Irish seemed to be a second language. Two-way translation facilities were in place, and were apparently utilised.

20. The applicant's complaint really centres on the production of the Environmental Impact Statement (EIS). This was initially prepared in English, but that was unacceptable to the Board which directed that it be translated in part into Irish. However, the measures put in place, at the insistence of the Board, are criticised as inadequate and inappropriate. These criticisms relate to the fact that the original document was contained in four volumes, volume I and II comprising the non-technical summary and the main text, both of which were duly translated. However, volumes IIII and IV were not translated. Volume III comprises maps and plans so the question of translation does not really arise as a major issue. The real area of concern centres on volume IV. This volume contains the appendices, the source documents or technical documents to which reference was made in the main text. It seems to me that it was well within the discretion of the Board to take the view that requiring volumes I and II to be translated, adequately fulfilled the requirements of the Irish speaking section of the public and that to require the translation of the technical documents appended at volume IV, which would be likely to have an extremely limited readership in any language, would be disproportionate.

21. The other criticism that is made is that it is said that the Irish language section of the community were given only three weeks to respond to the publication of the EIS, whereas a greater period had been available to English speakers. If this was so, that would be a matter of concern. However, the argument misses the point that there was nothing whatever to stop people commenting on or

responding in Irish to the EIS as originally published. Indeed, my understanding is that a number of people did just that. What the Board did then, when the Irish translation of the EIS volumes which they had insisted upon became available, was to re-open the period for submissions and to provide an additional period over and above that which had already been made available. It is my understanding that nobody who had not already made submissions on the first occasion made any submission following the publication of the Irish language version. The suggestion implicit in the criticism now advanced that the section of the public which is Irish speaking may have been prevented from participation until the Irish language version became available, thereby giving them an inadequate period to respond, is somewhat fanciful. It ignores the reality that according to the 2002 census, the entire population living in the Gaeltacht area is also fluent in English and on the basis of that census, it appears that there is not a single person living in the Gaeltacht area in question who does not speak English. In those circumstances, it is perhaps not surprising, that no affidavit and no evidence whatever has been presented in the course of the present proceedings that any individual Irish speaker was denied the opportunity to participate effectively.

22. In my opinion, there is considerable substance in the argument advanced by the respondent, that the applicant was not the appropriate entity to assert the rights of Irish speakers interested or affected by the road proposal. However, I prefer to base my decision, in this regard, on the basis that the arrangements put in place in relation to the Irish language and Irish speakers were not so inadequate as to obstruct or inhibit public participation in a real and meaningful way.

23. Insofar as it is suggested that the arrangements were so inadequate as to amount to a violation of Council Directive 2003/35/E.C., it is striking that the Directive makes no reference to language issues at all. Given that linguistic, nationality and ethnicity issues are of such significance in a number of Member States, I regard this as highly significant. I am satisfied that the arguments in relation to the position of Irish language speakers do not constitute substantial grounds for contending that the decision was invalid and that is so, even if it is to be assumed that the applicant had the necessary standing to raise the arguments in the first place.

Further Arguments
24. The applicant has advanced a number of subsidiary criticisms which can be dealt with quickly. It has complained that there was an inadequate opportunity to cross-examine a particular witness which it referred to as "Mr. Owens". The issue in this regard which relates to the opportunity to cross-examine the lead consulting engineer to the local authorities was dealt with by Mr. Michael Walsh, who conducted the oral hearing at para. 7 of his affidavit. He states that the witness in question, Mr. Ray Owen, was available every day of the hearing and was indeed subjected to cross-examination at some length by members of the applicant organisation. In that regard, I note that the recital of the evidence given at the public hearing which forms part of the inspector's report refers to Mr. Owen responding to questions that were posed by a number of different individuals on a number of different topics. It seems to me that a considerable degree of latitude must be afforded to inspectors as to how hearings are to be conducted and how business is to proceed. Otherwise there is real risk that hearings will become inordinately lengthy. Hearings that are allowed to become over lengthy may place a serious burden on interested members of the public and actually serve as an obstacle to effective participation.

25. The applicant has also complained that no transcript of the public hearing was made available to it. There was no obligation that this should have happened. By way of comparison, it may be noted that in neither the civil courts nor the criminal courts, is it the general practice to make transcripts available to litigants. Unlike what routinely happens in these courts, a CD Rom was made available to the applicant. It is true that the provision of the CD Rom rather than a hard copy transcript disappointed the applicant which believes that it had been promised that it would be given a written document, but it seems to me that the arrangements actually made were pragmatic and entirely adequate.

The Environmental Impact Statement and the Environmental Impact Assessment
26. A number of linked arguments were advanced by the applicant in this regard which might be summarised as follows: it is said that the Environmental Impact Statement was inadequate and incomplete; what was presented as a non technical summary did not in fact offer a non technical summary in plain and ordinary language; there was a failure to assess alternatives; what was being assessed was not the final detailed proposal but only an outline or preliminary proposal; and that mitigating measures which would be adopted by the local authority were not spelled out with sufficient clarity.

27. When a hearing has actually taken place and when participants on all sides have made their contributions, one would be slow in the extreme to retrospectively invalidate the procedures by reference to the adequacy or inadequacy of the Environmental Impact Statement. It must be appreciated that there is no statutory provision as to the form that an Environmental Impact Statement should take. The judgment as to whether what is being produced by way of Environmental Impact Statement is adequate for the purposes required is pre-eminently a matter for the Board itself and it is an area where a court should be particularly slow to substitute its views. It must also be appreciated that the Environmental Impact Statement is not cast in stone and is part of a process. In many ways, its function is to set the agenda and define the parameters for what is to follow. This issue was considered by McMahon J. in *Klohn v. An Bord Pleanala* [2008] I.E.H.C. 111, (Unreported, High Court, McMahon J., 23rd April, 2008) who made this observation:-

> "One cannot be overly formalistic in considering the arguments advanced by the applicant in relation to these matters. To adopt such an approach would stifle commendable progress and render the planning system unworkable. Bearing in mind that the assessment is a dynamic process which is much more important than the original EIS, which merely sets out the agenda, and that substance is more important than form, *the crucial question is: whether the EIS is so deficient as to prevent a subsequent proper assessment by the decision maker or is such as to deprive the relevant parties in the process (or the public where relevant) of a real opportunity to participate.* Furthermore, to accept the applicant's arguments in these matters would mean that the Court would be second guessing the Board, something I am not willing to do in this case for the reasons already stated". (*Emphasis added*)

In relation to the applicant's claim that there was no assessment of what has now actually been authorised to proceed, as distinct from an assessment of the entire project as originally proposed by the local authorities, the Board asserts, quite rightly in my view, that it is the nature of an application for development, that the proposal is submitted and assessed and if the decision is ultimately to grant a permission, what is actually permitted or authorised may be a departure from what was originally applied for and will very often not be identical to what was originally sought. There is absolutely nothing legally objectionable in that. It is part and parcel of the planning process whereby applications are considered by an expert body and during that exercise details evolve and are adapted based on observations and suggestions made or queries raised. It is part of the nature of the detailed planning system to allow for a degree of flexibility in the processing of applications. If the law was to insist on a rigidity whereby all applications either stand or fall as submitted, it would bring chaos to the planning process. It might well see applications and proposals approved without the incorporation of beneficial mitigating and ameliorating measures. If that was the situation, and I am firmly of the view that it is not, what would be the point of providing that a permission or authorisation can be granted subject to conditions? While saying that I do

accept, as I indicated during the course of argument, that it is possible to conceive that an approval or authorisation may depart so fundamentally from what was originally proposed, that arguments advanced in support of the original proposal lose their validity. I do not believe that it can be seriously contended that that was the situation there. In saying that, I have very much in mind that what was before the inspector and the Board had started off as two applications, had then been brought together only to be ultimately separated once more by the Board's decision to authorise, subject to conditions, part of the overall proposal and to refuse approval for a portion of the road, an option which has been identified by the inspector.

28. In relation to the applicant's protest, that there has been a failure to consider alternatives, two points must be made. In the first instance, it may be noted that under the Directive and the Regulations the question of establishing the absence of alternatives arises after a conclusion has been reached that the integrity of a relevant site will be affected but that it is nonetheless desired to proceed. In the case of the GCOB, of course, that point was never reached because the view was taken that so far as the part of the proposal under discussion was concerned, that while it would have a severe adverse localised impact, the integrity of the site would not be affected.

29. More fundamentally, it seems clear that alternatives were in fact considered and that the availability of alternatives was a matter of real significance for both the Board and the notice parties. In particular, the question of enhanced and improved public transport was considered. Indeed, it is clear from the contents of his report that the inspector was supportive of this but felt that improved pubic transport was not an alternative to the proposal in the sense that it was not a substitute for building a road. Several alternative routes were also dealt with in the EIS, but were regarded as less suitable. In relation to this demand for more extensive consideration of possible alternatives, one must bear in mind that the authorisation came only after many years of consideration, study and debate. The proposal for such a road development goes back to 1997 when the case for such a development was identified in the Galway County Council development plan of that year. Against a background of a gestation period of that length, it would not be at all surprising if there were those who would suggest that the time for study and debate had concluded and that the time for making decisions had arrived.

Mitigation Measures

30. A complaint was made that there was a lack of specificity in relation to mitigation measures, a suggestion which is roundly rejected by the Board and notice parties. There is no doubt that Art. 9 of Council Directive 85/337/E.E.C. requires a decision maker to inform the public of the decision reached and the main reasons and considerations on which it is based and to also provide a description of the main measures to avoid, reduce and if possible offset major adverse affects. The complaints made in this regard by the applicant were made at the general level. Indeed, they are something in the nature of a formal plea that the treatment of mitigation measures was inadequate with a view to thereby putting the onus on the Board and the notice parties to establish the converse. In fact, the question of mitigation measures was the subject of detailed treatment in the EIS and was a major pre-occupation for the inspector, as indeed it was for many of those who participated in the hearing. During the course of the hearing in response to questioning and due to demands for additional measures, the local authorities gave a number of commitments and in some instances entered into specific agreements with individuals affected by particular aspects of the proposals. At the conclusion of the oral hearing a document was prepared on behalf of the notice party reflecting all of the commitments made, understandings reached and agreements entered into. As one would expect, the question of adhering to the mitigation measures proposed was made a condition of the decision. In these circumstances, in my view, there is no substance in the complaint that insufficient attention was paid to identifying and recording mitigation measures and I reject this ground of challenge.

31. The applicant has argued that the material that was before the Board was not in its final form and so was incapable of being authorised. It is suggested that what was being sought was something in the nature of an application for outline planning permission. The applicant would seem to have been tempted into making this argument because certain plans and drawings submitted to the respondent by the applicant local authorities were labelled preliminary design only and/or bore abbreviations indicating that they were sketches. It seems to me that this point is entirely misconceived. In respect of infrastructural projects such as this one, there is no provision for outline planning permission. The applicant has referred to reported decisions to establish that if there was a two stage process there would be a need for an environmental assessment at both stages and that the precautionary principal would apply at both stages, but that is really not the point. It was for the Board to determine whether the proposal submitted, along with the accompanying information, was sufficiently detailed to enable it to make a decision or whether additional information was required. The Board is very clearly the body that is best positioned to determine whether the information available is sufficient for its purposes. Again, it is an area in respect of which a court should be particularly slow to become involved in second guessing.

Some Further Arguments

32. The applicant claims that there was no proper proof of the existence of an agreement between Galway County Council and Galway City Council which authorised the County Council to act for the City Council. In contrast, the local authorities say that there was indeed such an agreement and that it was available at all stages. The reality of course is that the two local authorities are entirely at one in their approach to this issue. The protests that there was a failure to formally prove the existence of an agreement are quite misplaced in the current context. This is not a case where a statute has permitted a particular fact in issue to be proved in a manner that would normally be impermissible, such as the prosecution giving evidence in relation to blood alcohol levels in drunk-driving prosecutions by way of a certificate, where the formal production of the certificate is a necessary proof. What is at issue here is a matter of substance. Here, the ability to carry the proposal through depended on the two local authorities coming together and co-operating. It is abundantly clear to all concerned that that has, in fact, been the situation.

33. Even if the applicant is correct that the agreement between the two authorities was not made available and even if formal proof was required, I would not be prepared to grant leave to seek judicial review on this point. Given that as a matter of reality, the two local authorities clearly are in agreement, and as that was fully known to everyone, any failure to prove the existence of that agreement would amount to the merest technicality and would be utterly without substance and I would in my discretion refuse leave.

Costs

34. A further argument was raised in relation to the entitlement of the applicant to be paid costs in respect of the oral hearing. This argument arises against the background of an application by Mr. Podger, a representative on behalf of the applicant, purportedly made pursuant to s. 145 of the Planning and Development Act 2000, for an order from the Board that Galway County Council pay its costs and expenses. In fact, s. 145 of the Planning and Development Act 2000 does not appear to have any application. However, a later section, s. 219(1) (b) is of relevance. It provides that where an oral hearing is held (in relation to a proposed road development) the Board, may in its absolute discretion direct the payment of such sum as it considers reasonable by a local authority concerned in the oral hearing to any person appearing at the hearing as a contribution towards the costs. It appears therefore that the Board had and indeed still has an absolute discretion to make an order for costs against the local authorities and in favour of the applicant company. However, it must be noted that it is a matter for the absolute discretion of the Board and it is for the applicant to persuade the Board to exercise that discretion in its favour. The applicant has no automatic entitlement to have its costs paid in whole or in

part.

35. I should say that it seemed to me that in advancing this argument Ms. Ohlig was really presenting an equality of arms argument. However, while members of the public and sections of the public are fully entitled to participate in the process, there is no provision for having the costs of all those who choose to do so paid for out of the public purse. Given the very large number of bodies and individuals that might wish to intervene and given that fundamental differences of approach may exist even between those ostensibly on the same side, it is entirely understandable why that should be so.

The Fruit of the Poison Tree Argument
36. The applicant claims that in 2003, without the prior consent of the competent authority and at the behest of the county council, heavy machinery moved into the site and in the process damaged the habitat and destroyed or endangered priority species. It is claimed that in the course of that site investigation, the local authority collected data which was subsequently used in the Environmental Impact Statement. The applicant claims that such information was collected illegally and cannot be legally used and that as a consequence it should have been struck out or ruled inadmissible by the respondent. Essentially, the applicant complains that as this material was put before the respondent and as the respondent relied upon it in reaching its decision, that the decision to approve the development is tainted and fundamentally flawed and must be quashed.

37. This point is misconceived. Even if it is to be assumed that the local authorities did something wrong in 2003 and if they did, one would have expected that it is a matter that would have been dealt with by the National Parks and Wildlife Service, then the remedy was to stop them doing it back in 2003 and 2004. If individual landowners were affected, surely it was for them to bring actions in trespass or if the belief was that it was damaging to the environment, it was for people concerned to injunct the investigation works or take other appropriate action. That did not happen. That was a preliminary investigation phase and the investigation phase is now over. It seems to me that the fruit of the poison tree argument, as it has been described by Ms. Ohlig, has no application to the facts of this case. It may be noted by way of contrast that in certain circumstances, even in criminal trials, illegally obtained evidence can be admissible. This is a project which its promoters contend will advance the public good. Those required to assess it and to adjudicate upon it have concluded that is so. Is the public to be denied the benefits of the proposal so that the local authorities can be punished? In my view the suggestion that the inspector, who was not legally qualified, should adjudicate on the admissibility of evidence, is a remarkable one. I am quite satisfied there is no basis whatever for suggesting that even if the local authorities acted beyond their powers in 2003, that this served to prevent the proposal being assessed in 2008. Accordingly, I would refuse leave on this ground also.

Conclusion
38. I have already indicated that in relation to the two main issues in this case which were common to the present proceedings and to *Sweetman*, that while granting leave in relation to the misinterpretation point I am refusing to quash the decision. So far as all of the additional grounds that are specific to this set of proceedings are concerned, I am satisfied that none of them constitute substantial grounds for contending that the decision is invalid, and I refuse leave on all these grounds. Lest my attempts to summarise and group the arguments advanced do not find favour, I should make it clear that I am satisfied that none of the arguments that were presented in either the written submissions or in oral argument constitute substantial grounds, and I am refusing leave. As in *Sweetman*, the question of a reference to the European Court of Justice has been canvassed, but, as in the earlier set of proceedings, having regard to the conclusions that I have reached, I do not regard this as appropriate or necessary at this stage.