THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 209 JR]

IN THE MATTER OF AN APPLICATION UNDER SECTION 40, 40A AND 40B OF THE GAS ACT 1976 (AS AMENDED)

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

MARTIN HARRINGTON, MAURA HARRINGTON, MONICA MULLER AND PETER SWEETMAN

APPLICANTS

AND

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SHELL E & P (IRELAND) LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice MacGrath delivered on the 8th day of June, 2018.

Introduction

1. The sole remaining applicant in these judicial review proceedings is Ms. Maura Harrington, the second named applicant. She is a retired teacher and describes herself as an acknowledged human rights defender. She has opposed the Corrib gas project since January, 2001 and has been involved in all statutory procedures in connection therewith. Ms. Harrington has been an applicant in previous judicial review proceedings in which certain aspects of the process were challenged. This is the latest challenge against the decision of the first respondent, made on 29th December, 2015, to grant a consent to operate the natural gas production pipeline from the Corrib Wellhead, some 65 kilometres offshore, to the Bellanaboy Bridge gas refinery which is approximately 8 kilometres inland from the pipeline's landfall at Glengad, north Mayo. What is known as the "*Corrib upstream pipeline*" comprises:-

> (a) the offshore and onshore sections of the 20 inch gas pipeline from the subsea manifold in the field to the gas processing terminal, including the landfill valve installation;
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> (b) the onshore and offshore sections of the control umbilical from the gas processing terminal to the subsea manifold;
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> (c) the subsea manifold and flowlines and control umbilicals connecting wellheads to the manifold; and
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> (d) water outflow pipe for discharging at sea treated surface water from the gas processing terminal.

2. The first respondent is empowered by virtue of the provisions of ss. 40, 40A and 40B of the Gas Act 1976, as amended ("*the Act of 1976*") to grant consents to both construct and operate the said natural gas production pipeline. A relevant consent to construct the natural gas pipeline was granted to the notice party on 25th February, 2011. The notice party made an application for the consent to operate the pipeline, which is being challenged in these proceedings, on 18th August, 2015. On granting any such consent, the first respondent may attach conditions. A consent granted under the Act of 1976 is but one of the number of licences, permissions, and approvals which the notice party is and was required to obtain prior to any entitlement to operate the pipeline. In granting the consent, licences and permissions, the Minister or other empowered entity must be satisfied that requirements of legislation and in particular various directives concerning the impact of such development on the environment have been complied with and that risks to humans and to flora and fauna, including those protected under Council Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora ("*the Habitats Directive*") and Directive 2009/147/EC of the European Parliament and of the Council of 30th November, 2009 on the conservation of wild birds ("*the Birds Directive*"), are appropriately addressed such that the flora and fauna are protected and preserved. Section 40 of the Act of 1976, provides, *inter alia*, as follows:-

> *"Restriction on construction and operation of pipelines by persons other than the Board.*
>
> *(1) A person, including the Board, shall not, without the consent of the Minister for the Marine and Natural Resources, construct or operate an upstream pipeline on, over or under the surface of land or of any sea bed that is situate in the territorial seas of the State or a designated area.*
>
> *(2) The Minister for the Marine and Natural Resources may revoke a consent given by him or her under subsection (1) of this section but such revocation shall not prejudice the validity of anything done previously pursuant to and in accordance with the consent.*
>
> *(3) Where the Minister for the Marine and Natural Resources gives his or her consent under subsection (1) of this section, he or she shall attach to the consent such conditions, with respect to the construction or operation of the relevant pipeline as he or she considers appropriate, including conditions analogous to all or any of the requirements of subsection (4) of this section.*
>
> *(4) In case the holder of a consent given under subsection (1) of this section constructs an upstream pipeline the holder shall take all reasonable measures to protect the natural environment and to avoid injuring the amenities of the area and, in particular, and without prejudice to the generality of the foregoing, the holder shall while constructing the upstream pipeline take all reasonable steps to prevent injury to any building, site, flora, fauna, feature or other thing which is of particular architectural, historic, archaeological, geological or natural interest, and when selecting the route for the upstream pipeline the holder shall have regard to any representations made*

to the holder as regards the route of such upstream pipeline by any local authority within whose functional area a proposed route, or any part of such a route would, if the upstream pipeline were constructed, be situate, or any of the following on, in or over whose land such route or part would in such circumstances be situate, namely:

(a) a harbour authority (within the meaning of the Harbours Act 1946),

(b) a company (within the meaning of the Harbours Act 1996),

(c) the Electricity Supply Board or any other electricity undertaker,

(d) Córas Iompair Éireann or any other railway undertaker, or

(e) a natural gas undertaking (other than the holder).

(5) Where the Minister for the Marine and Natural Resources attaches, under subsection (3) of this section, conditions to a consent given under subsection (1) of this section, the person constructing or operating the relevant pipeline shall comply with those conditions."

Sections 40A and 40B make provision in respect of Environmental Impact Assessments ("*EIAs*"). These are extensive provisions which I do not propose to reproduce here. Also relevant are ss. 40A(8) and (8A):-

"(8) When a decision is taken on an application by the Board or another person or arising from a notice given to the Commission or the Minister by a person other than the Board in the case of a proposed pipeline in respect of which an environmental impact statement was submitted in accordance with a requirement of or under subsection (1) of this section, the Commission or the Minister as the case may be shall:

(a) publish notice of its or his decision in the Iris Oifigiúil and in one or more newspapers circulating in the area of the proposed pipeline, and

(b) make arrangements to make the said statement and information on the decision available for inspection by members of the public during a period to be specified by the Commission or the Minister as the case may be.

(8A) (a) The notice under subsection (8)(a) shall inform the public that a person may question the validity of a decision of the Commission or the Minister by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (SI No 15 of 1986).

(b) The notice under subsection (8)(a) shall identify where practical information on the review mechanism can be found..."

The consent

3. The consent the subject matter of this challenge was communicated in the form of a letter dated 29th December, 2015, signed by Mr. Ciarán Ó hÓbáin, principal officer of the Petroleum Affairs Division of the Department of Communications, Energy and Natural Resources and issued by and at the direction of the first respondent. In the consent, reference is made to a considerable number of matters, reports and information considered by the first respondent, before the consent was issued. The letter of application, which was also considered included documentation comprising:-

a. An Environmental Impact Statement ("*EIS*") consisting of the Corrib field development offshore EIS prepared by RSK Environment Limited, comprising the offshore field to terminal EIS and appendices, 2001 (reprinted 2008) and an offshore supplementary update report and appendices, 2010.

b. The 2010 Corrib onshore pipeline EIS in three volumes, including a Natura Impact Screening Statement ("NISS") which was contained in an appendix to this EIS.

c. A non-technical summary, additional information relating to the May, 2010 onshore pipeline, a geotechnical data package and engineering integrity material.

d. A cumulative impact update report of July, 2015 which formed part of this EIS.

4. The first respondent also considered an Environmental Impact Assessment ("*EIA*") prepared by Ramboll Environ UK Limited ("*Ramboll*"), which was adopted by him as his EIA in respect of the operation of the pipeline. Ramboll is an international consultancy company with expertise in environmental and human health and safety issues. It was appointed by the Minister for its expertise in such environmental and human health issues. It was assisted in preparing its reports by Astrid Consulting Limited ("*Astrid*") in the assessment of safety, design and integrity aspects including abnormal events. In addition, Ramboll was assisted by the Centre for Marine and Coastal Studies ("*CMCS*") in the assessment of offshore activities and impacts. The Minister considered what is known as an appropriate assessment screening report ("*AA Screening Report*"), again prepared by Ramboll which was also adopted by him as his screening for appropriate assessment in respect of the operation of the pipeline.

5. Other information which was considered by the first respondent included recommendations contained in a briefing note prepared by Ms. Orla Ryan, principal officer in the Department of Communications, Climate Action and Environment, whose recommendations were in turn supported by Mr. Ó hÓbáin and a Mr. Manley (assistant secretary general in the Department).

6. In the consent it is stated that the first respondent also considered relevant legislation including European directives and regulations, such as the provisions of the Habitats Directive and the Birds Directive, a report prepared by Ramboll in respect of the Corrib gas pipeline construction consent condition compliance monitoring: closing report, which confirmed that the natural gas pipeline had been constructed in material compliance with the conditions attached to the consent to construct, granted by the Minister on 25th February, 2011; and the report of the Petroleum Affairs Division technical section of the first respondent which undertook an engineering integrity assessment of the pipeline design documentation as submitted by the notice party. It should also be recorded that under the heading "*Main Reasons and Considerations*" in the consent, the Minister also outlined that he had regard to various

other matters including:-

> (a) the provisions of European regulations concerning measures to safeguard security of gas supply from member states, and what is described as the strategic value of the Corrib development in contributing to Ireland's security of energy supply and sustainability (itself an essential element of public security);
>
> (b) the policy objective of seeking to maximise the return to the State from its indigenous oil and gas resources;
>
> (c) the necessity and suitability of the proposed pipeline as being the option which creates the minimum disruption and disturbance to the communities and environment which might be affected but which best meets the goal of bringing gas from the Corrib gas field to the downstream network;
>
> (d) the need to ensure that the application identified all reasonable measures to protect the natural environment and to avoid injury to the amenities in the area and representations made in this regard;
>
> (e) the range of prevention and mitigation measures set out in the application;
>
> (f) the proximity of the upstream gas pipeline to any European sites, the distance to such sites and the portion of the gas pipeline passing through three European sites being the Glenamoy Bog Complex Special Area of Conservation ("*SAC*"), the Broadhaven Bay SAC and the Blacksod Bay/Broadhaven Bay Special Protection Area ("*SPA*"); and
>
> (g) various previous consents, approvals, licenses, previous assessments and decisions to which reference shall be made later in this judgment.

7. The Minister concluded that subject to compliance with certain attached conditions, the operation of the Corrib natural gas pipeline:-

> (1) would not be likely to have any significant effects on the mentioned European sites either individually or in combination with other plans or projects, in the light of best scientific knowledge and the conservation objectives of the sites on the basis of objective scientific information set out in the AA Screening Report;
>
> (2) would not be likely to cause significant disturbance to any of the relevant species protected under the Habitats Directive or the Birds Directive, or cause significant disturbance to the relevant habitats, either alone or in combination with other plans or projects, in the light of best scientific knowledge and the conservation objectives of the sites; and
>
> (3) would not be likely cause any significant effect on the environment either individually or in combination with other plans or projects.

The first respondent also concluded that, separately and solely for the purpose of complying with Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) ("*the 2011 Habitats Regulations*"), having regard to the conclusions reached in the AA Screening Report that the operation of the Corrib gas pipeline would not adversely affect the integrity of any relevant European sites.

8. Thus, in exercise of the powers vested in him under s. 40, the first respondent was satisfied that it was appropriate to grant a consent to operate the natural gas upstream pipeline subject to certain conditions. One such condition, "*Condition 2*", imposed a requirement that the Corrib gas partners (Shell E & P Ireland Limited, Statoil Exploration (Ireland) Limited and Vermilion Energy Ireland Limited), within three months of the date of the consent, prepare management plans/procedures to ensure the mitigation and monitoring controls identified in the application were appropriately managed and implemented. The plans and procedures were required to establish and detail a set of protocols for certain maintenance activities to demonstrate compliance with Irish and European environmental law, such demonstration of compliance to include screening for appropriate assessment (and appropriate assessment, if required) in respect of:-

> a. Glanamoy Bog Complex SAC from maintenance activities related to repairs/remediation of the cliff face at Glengad;
>
> b. Broadhaven Bay SAC from maintenance activities related to rock placement on the offshore section of the Corrib natural gas pipeline; and
>
> c. West Connacht Coast SAC from maintenance activities related to seismic survey of the offshore section of the Corrib natural gas pipeline.

Such plans and procedures are required by the condition to be updated annually and to be revised prior to commencement of any activities that are not covered by the version of the current management plans and procedures. In this regard it is provided that should monitoring reveal that action is necessary "*to maintain there being no likely significant effects"*, then the Corrib gas partners must notify the Department of Communications, Energy and Natural Resources as soon as practicable, develop measures to prevent recurrence of the likely significant effects and submit proposals for these measures to the Department and other regulators as appropriate to the nature of the likely significant effects, for approval. The purpose of this condition is stated to be to ensure that all necessary environmental management controls are in place for the operation of the pipeline.

9. The consent was challenged by four applicants. Affidavits were filed by all parties. The principal affidavit grounding the application for relief was sworn on 23rd March, 2016 on behalf of all applicants, including the second applicant, by one of the then applicants, Mr. Peter Sweetman. Ms. Harrington had been originally represented in these proceedings, but her solicitor was discharged on 31st January, 2017. The first, third and fourth named applicants withdrew by order of the Master of the High Court made on 2nd February, 2017.

10. By order of Humphreys J. of 4th April, 2016, the then four applicants were granted leave to apply for judicial review, *inter alia*, for the following reliefs:-

> *"1. An order of* certiorari *quashing the decision of the Respondent to grant a Consent under Section 40 of the Gas Act on 29th December, 2015 subject to conditions, to the Notice Party in respect of operating a natural gas pipeline from the Corrib subsea facilities to the gas terminal at Bellanaboy Bridge, Bellagellys South, County Mayo such as to allow the development known as the Ballinaboy Gas Terminal to operate.*

2. A Declaration that no Environmental Impact Assessment (EIA) sufficient to comply with the requirements of 2011/92/EU (The Consolidated Environmental Impact Assessment Directive) in respect of the development the subject matter of the Consent to Operate dated 29th December, 2015, which is the operation of a gas refinery and a large combustion plant, associated pipe network including the pipe line conveying the raw gas from the wellhead and the pipe network connecting to the Bord Gais Eireann network, which assessment must be carried out in order to comply with the requirements of the aforesaid directive 2011/92/EU.

3. A Declaration that both the first named Respondent and the second named Respondent were required and obliged to take all general or particular measures to remedy any past failure to carry out an assessment of the environmental impact and or effects of a project as provided for under the Environmental Impact Assessment Directive and take the appropriate necessary measures to ensure that in carrying out an Environmental Impact Assessment the requirements of Directive 2011/92 were complied with and do so before the development, the subject matter of the Environmental Impact Assessment proceeds.

4. In the alternative, the second named Respondent failed to transpose the requirements of Council Directive 2011/92/EU in failing to provide for appropriate procedures to ensure that the requirements of the Environmental Impact Assessment Directive are fully complied with and through a system of law has created a procedure where no integrated Environmental Impact Assessment is carried out in respect of those projects specified under the Environmental Impact Assessment Directive and in particular that the full effects of such developments including direct and indirect effects of a project in accordance with Articles 3, 4 – 11 of the Directive on human beings, fauna and flora, soil water air climate and landscape, material assets and the cultural heritage and the interaction between these factors are carried out, and to nullify the unlawful consequences of a breach of laws out of the principle of cooperation and good faith laid down under Article 10 EC (Articles 4(3)) of the treaty of the European Union and filed to take appropriate measures necessary to remedy failure to carry out an Environmental Impact Assessment in respect of the whole of the project the subject matter of the Consent dated 29th December, 2015.

5. An Order requiring the Respondents to take such steps so as to carry out an Environmental Impact Assessment in respect of gas refinery at Bellanaboy Bridge gas terminal to include all the elements of the project and specifically the upstream gas pipeline conveying raw gas from the well head to the terminal, the gas distribution network conveying the completed gas in the pipe line specifically constructed for that purpose, the gas refinery and all associated plant and equipment, the waste water treatment pipe so as to accord with Articles 3 and 4 – 11 of the Environmental Impact Assessment Directive and in particular identify all likely significant effects both direct and indirect, the cumulative effects so as to fully comply with and have the project properly assessed pursuant to the requirements of that directive.

6. An Order requiring production of all reports and or draft reports and or all other documents prepared by or on behalf of the first named Respondent relating to or connected with the decision to grant the Consent dated 29th December, 2015.

7. If necessary an Order pursuant to Article 234 of the TEU for a referral to the European Court of Justice.

8. Interim and/or interlocutory relief.

9. Further and other relief.

10. The costs of these proceedings."

11. The basis upon which the relief was sought is set out in the statement of grounds at para. E. and considered at para. 48 below. Before considering the grounds of challenge pleaded, the application process requires to be considered; and it is also of assistance to consider the historical and contextual background to the application for this consent.

The consent and the application process

12. The background to the making of the consent by the first respondent is outlined in the affidavit of Mr. Ciarán Ó hÓbáin sworn on 30th September, 2016. Mr. Ó hÓbáin has worked in the Petroleum Affairs Division of the Department for more than ten years and has been involved in regulation of the Corrib gas field throughout that period.

13. Mr. Ó hÓbáin records that on 18th August, 2015, the notice party submitted an application to the Minister for a consent to operate the pipeline. The first respondent engaged Ramboll to assist him in fulfilling his obligations under the Act of 1976, the 2011 Habitats Regulations and Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment ("*the EIA Directive*") in respect of the application. Ramboll had previously been engaged by the first respondent to assist in the monitoring of, and compliance with, the conditions of the consent to construct the pipeline throughout the construction period from August, 2011 to September, 2015. Ramboll compiled a report in November, 2015 entitled "*Corrib Gas Pipeline Construction Consent Conditions Compliance Monitoring: Closing Report".* Post-construction surveys carried out by the notice party to assess whether there had been any change to the environment since the preparation of the EIS were submitted by the notice party as part of its application. Ramboll assessed these post-construction surveys and in its AA Screening Report concluded that it did not identify any significant effects on any European sites. Ramboll was assisted and supported by Astrid and the CMCS.

14. On 25th August, 2015, the notice party's application was published on the Department's website and advertisements were placed with local and national media. What is described as "*a full suite of documents*" was made available in garda stations, county council offices and libraries in the local area.

15. Submissions were received from a number of interested parties including the Health Service Executive, the Environmental Protection Agency ("*the EPA*"), the Department of Arts, Heritage and the Gaeltacht (all of whom are statutory consultees under the Act of 1976). A number of submissions, ten in all, were received from the public and non-governmental organisations, including one from Ms. Harrington.

16. Mr. Ó hÓbáin confirms that the Minister also had the benefit of advice from senior officials of his department, and had regard to an engineering integrity assessment of the as built pipeline compiled by the Petroleum Affairs Technical Section, which produced a recommendation document dated 4th December, 2015. The recommendation, which was subject to some questions and observations by the applicant during the course of her oral submissions, was authored by Mr. David Fox, consultant petroleum engineer, on behalf of the Petroleum Affairs Technical Section of the Department of Communications, Energy and Natural Resources. Mr. Fox notes that

the engineering integrity of the pipeline was considered predominantly at the construction phase and that the relevant assessment and conditioning was carried out at that stage. It was his opinion that, as built, the Corrib upstream pipeline system:-

> *"will be appropriate for ensuring maximised economic recovery of gas in accordance with the terms of the Petroleum Lease, and is to a design generally in accordance with the best national and international industry practice."*

17. Subject to certain conditions outlined in the said report/recommendation, Mr. Fox "*could find no reason that the consent to operate the upstream pipeline should not be granted*." The suggested conditions included:-

> *"1) the pipeline section to KP0 to KP25 will be visually inspected during the first few days of production, when it is operating at its maximum temperature, to ensure that any pipeline lateral movement as a result of buckling has not left the pipeline exposed to excessive spans.*
>
> *2) Subsea facilities and flowlines will be subject to annual inspection to ensure that protection measures remain effective and any remedial measure to prove additional protection will be undertaken as soon as practically possible. The first such inspection will be undertaken within the first month from the start of commercial gas production, when the flowlines are at maximum operating pressure and temperature."*

18. Mr. Ó hÓbáin avers that in making his appropriate assessment screening decision, the Minister had regard to and adopted the Ramboll AA Screening Report of 22nd December, 2015 and that similarly, in carrying out the EIA of the operation of the pipeline, he had regard to and adopted the Ramboll EIA report of 22nd December, 2015. The EIA report concluded that certain submissions which had been made by interested parties raised concerns that were not within the remit of the assessment of the operation of the pipeline or were legal queries. Otherwise, it is stated that the issues raised in the submissions had been adequately addressed in the documentation supporting the application.

19. Mr. Ó hÓbáin avers that the Minister was entitled to have regard to and to adopt, in whole or in part, any reports prepared by officers of the Minister's consultants, experts or other advisers, pursuant to s. 40B(7) of the Act of 1976 as amended. Ultimately, the Minister concluded that, subject to compliance with certain specified conditions, the operation of the pipeline either alone or in combination with other plans or projects would not be likely to have significant effects on the relevant European sites, would not be likely to cause significant disturbance of any of the relevant species or habitats protected under the Habitats or Birds Directives and would not be likely to cause any significant effect on the environment.

20. Mr. Ó hÓbáin states that Condition 2 is principally a standard type condition in regulatory consents. It requires the preparation of management plans and procedures to ensure that the mitigation and monitoring controls identified in the notice party's application are appropriately managed and implemented. The condition is framed to ensure that in the event that there are any unanticipated changes in the dynamic baseline environment, the future maintenance activities are assessed and carried out in the light of any such changes.

21. Regarding notification of the decision, Mr. Ó hÓbáin avers that the notice party was informed of the Minister's decision under cover of letter dated 29th December, 2015 and, on the same day, the public were notified by a posting of the decision on the first respondent's website at 4.38 p.m. This informed the public that consent had been granted for the operation of the gas pipeline linking the gas subsea facilities to the terminal at Bellanaboy, Co. Mayo. In addition, a press release was published on that day and the outcome of the decision featured on national news bulletins, including the six o'clock evening news. He confirms that any activity which the applicants may have referred to, (which I will return to later in this judgment) which is understood to relate to the operation of the pipeline which commenced on 30th December, 2015, occurred at a time after the public were informed of the Minister's decision on 29th December, 2015. The third and fourth named applicants were notified by email on 29th December, 2015 as were all members of a committee known as the Consent Condition Monitoring Committee, which had been established following the settlement of earlier proceedings.

22. Ms. Orla Ryan prepared the briefing note dated 23rd December, 2015, in which she outlined, *inter alia*, the nature of the decisions sought, the background, matters relating to the application for the consent to operate, ministerial obligations, the substantive decision, matters concerning the engagement of expert advisers, records of decisions, a summary of the application process and timeframes. The briefing note also detailed the matters relevant to the phased consent process (including the consent to construct the pipeline under s. 40 of the Act of 1976 granted by the then Minister on 25th February, 2011), the requirement for AA screening in the EIA process, EIA, submissions received pursuant to public consultation process (including submissions made by the applicant in this case), the Ramboll AA screening report and the EIA report. She recommended that the operation of the pipeline in light of best scientific knowledge, either alone or in combination with other plans or projects:-

> (a) would not result in any likely significant effects on European sites;
>
> (b) would not result in likely significant disturbance of species;
>
> (c) would not result in likely significant deterioration of habitats;
>
> (d) was not likely to give rise to significant environmental effects; and
>
> (e) did not have potential for significant trans-boundary effects on the grounds of there being no likely significant effects from operation of the pipeline.

Ms. Ryan further considered and observed that the Ramboll EIA report and AA screening report "*can be adopted as the Minister's EIA and AA screening in whole or in part or not at all*" and that the Minister was also entitled to adopt in whole or in part, the Department's Petroleum Department Technical Section report on the engineering integrity of the pipeline. Ultimately, it was her opinion that having regard to the various matters referred to in the said letter, the Minister was entitled to grant the consent to operate, should he be minded so to do. A draft framework decision was appended in the event that the Minister was minded to grant the consent. This set out the framework to ensure that the statutory obligations of the Minister in granting the consent to operate were met.

23. As stated previously, the consent at the heart of this challenge is but one of many required consents, licences and permissions. The historical path to these consents is best set out in a document submitted to the Court by the respondent entitled "*Chronology – History of Consents"* which has essentially been accepted by the applicant subject to certain observations which she has made thereon.

Contextual history
24. In November, 2001, the Minister for the Marine and Natural Resources, and the Minister for Finance granted a petroleum lease to the Corrib gas partners (Enterprise Energy Ireland Limited, Statoil Exploration (Ireland) Limited and Marathon International Petroleum Hibernia Limited) pursuant to the Petroleum and Other Minerals Development Act 1960, which conferred on them the right to enter onto, occupy and use a leasehold area of approximately 29 square kilometres. The lease required the submission of a plan of development to the Minister and an environmental impact statement ("*EIS*") showing the likely effects of the development on the environment.

25. On 4th March, 2002 the Minister for Public Enterprise issued to Bord Gáis Éireann a consent under the Act of 1976 for the construction of the Mayo to Galway BGÉ pipeline which served many towns in Connacht. This pipeline is neither owned nor operated by the notice party.

26. On 15th April, 2002, the Minister for Marine and Natural Resources granted approval for a plan of development which outlined the basis for the project and how it would operate. This plan of development included an EIS relating to the planning application for the terminal and the offshore development including the pipeline from the gas field to the terminal.

27. On 15th April, 2002, the relevant Minister also granted a consent under s. 40 of the Act of 1976 for the construction of the entire pipeline from wellheads to terminal, which has been termed "*the Original Pipeline Consent*", authorising the onshore and offshore sections of the pipeline. This consent application was also accompanied by an EIS.

28. On 15th April, 2002, pursuant to the provisions of the Continental Shelf Act 1968, the Minister for the Marine and Natural Resources issued a consent for the development of the Corrib field, which consent authorised the construction of structures on the designated area of the continental shelf.

29. On 17th May, 2002, the Minister for the Marine and Natural Resources granted a foreshore licence for the pipeline. At, or around that time, a committee known as the "*Marine Licence Vetting Committee*" prepared a report for the Minister assessing the environmental issues in relation to the plan of development application, the original pipeline consent application and the original foreshore licence application.

30. On 29th April, 2003, An Bord Pleanála refused planning permission for a gas terminal at Bellagelly South, Bellanaboy Bridge, Co. Mayo, it having concerns regarding the effectiveness of the surface drainage system in ensuring the integrity of peat repositories.

31. On 17th December, 2003, the notice party applied to Mayo County Council for planning permission for a gas terminal and associated peat deposition site at Srahmore which was granted by the local authority. That decision was appealed to An Bord Pleanála, and on 22nd October, 2004, planning permission was granted for the terminal and the associated Srahmore peat deposition site. The life of this permission was extended by Mayo County Council on 20th October, 2009 and again on 17th April, 2012. An EIS was submitted with the application for the terminal planning permission which considered the likely significant effects on the environment of the proposed development consisting of the terminal and peat deposition site. The EIS was not limited to consideration of the terminal and the peat deposition site, but also considered the interaction with, and cumulative impacts from, the onshore pipeline, the offshore pipeline, and the seabed installations, together with other issues such as road traffic and the export pipeline.

32. On 8th December, 2004, the notice party applied to the EPA for an integrated pollution control licence for the specific activity. That application was accompanied by an EIS which had been submitted to the planning authority in respect of the terminal and associated peat deposition site in December, 2003.

33. On 25th January, 2007, the EPA issued a proposed determination which was followed by a public consultation process by way of oral hearing between 16th April, 2007 and 9th May, 2007.

34. Following this, on 12th November, 2007, the EPA granted an integrated pollution prevention and control licence ("*IPPC licence*") for the terminal permitting the notice party to operate a gas refinery and various combustion installations (such licence is now termed an "*industrial emissions licence*").

35. In March, 2010 the notice party applied to the EPA for a review of the 2007 licence necessitated by an agreement entered into between the notice party and a group known as the Erris Inshore Fishermen's Association whereby the notice party agreed to use an alternative location for the discharge of treated produced water from the gas refinery. This agreement required a change in the location from the discharge point, further out to sea. The review application resulted in a decision of the EPA on 5th June, 2013 to grant a revised integrated pollution prevention and control licence to the notice party.

36. This decision was subject to judicial review proceedings brought by Mr. Martin Harrington in July, 2013 (the 2013 judicial review proceedings). Pursuant to an order of Kelly J. dated 15th October, 2013, the court, by consent, made an order of *certiorari* quashing the decision of the EPA to grant that revised IPPC licence and therefore the 2007 licence continued in force. This 2007 licence was subsequently amended by the EPA on 6th January, 2014 to bring it into conformity with the Industrial Emissions Directive – Directive 2010/75/EU of the European Parliament and of the Council of 24th November, 2010, on industrial emissions.

37. On 24th August, 2007, the Commission for Energy Regulation issued a consent to Bord Gáis Éireann for the operation of the Mayo to Galway BGÉ pipeline.

38. Between 2005 and 2009, further procedures were undertaken to obtain consents for a modified route for the onshore pipeline which involved the submission to An Bord Pleanála by the notice party of a revised EIS in respect of the Corrib Onshore Gas Pipeline and also which included an updated submission in respect of the use of the Srahmore peat deposition facility. The Corrib onshore pipeline EIS in 2010 was not confined to a consideration of the likely significant effects on the environment of the proposed development consisting of the onshore pipeline, but also considered the interaction with cumulative impacts from the offshore gas field development including seabed installations and offshore pipelines, the offshore umbilical, the Bellanaboy Bridge gas terminal, the Srahmore peat deposition site and the Mayo to Galway BGÉ pipeline.

39. On 19th January, 2011, An Bord Pleanála granted approval for the development of the Corrib Onshore upstream pipeline.

40. The notice party thereafter applied to the first respondent for a consent pursuant to s. 40 of the Act of 1976 and for the plan of development addendum approval for the Corrib Gas Field Development arising from the proposed modifications to the onshore pipeline. Those applications included an application for a consent for a relocation of the treated produced water discharge point as agreed

between the notice party and the fishermen.

41. On 25th February, 2011, the first respondent granted the plan of development addendum approval and also granted a s. 40 consent to the construction of the natural gas pipeline from the Corrib subsea facilities to the terminal at Bellanaboy Bridge.

42. On 22nd July, 2011, the Minister for the Environment, Community and Local Government issued a foreshore licence, which the notice party had applied for on 15th June, 2010. These applications were accompanied by an EIS consisting of several documents and reports and were described as the "*Offshore (Field to Terminal) EIS*" and the "*Corrib Onshore Pipeline EIS".* These reports also took into account updated information which had become available since 2001 including additional environmental monitoring data collated during 2008 and 2009 as well as modifications to the project description, construction activities and the construction schedule which evolved since 2001.

43. The Court has been informed that these EISs were not confined to a consideration and assessment of the likely significant effects on the environment of the proposed development consisting of the pipeline development but also considered the interaction and cumulative impacts of all facets of the construction and operation of the Corrib Gas Field Development and the Mayo to Galway BGÉ pipeline. At para. 15.9 of "*Chronology – History of Consents"* the following is recorded:-

> *"The DCENR's overall assessment comprised of a number of key elements including (i) an EIS review undertaken by Environ UK ('Environ'), an international consultancy with expertise in environmental and human health issues (ii) a safety review undertaken by Entec UK ('Entec'), one of the UK's largest environmental and engineering consultancies who are a subsidiary of AMEC Earth & Environmental UK Ltd, and (iii) an engineering integrity review to assess the applications in terms of engineering fitness for purpose which was undertaken by the DCENR's Petroleum Affairs Division (PAD) Technical Section."*

44. In October, 2004, a waste licence for the Srahmore peat deposition site was granted by the EPA to Bord na Móna Energy Limited. On 27th July, 2010 a revised waste licence was granted by the EPA to facilitate the deposit of peat arising from the construction of the onshore pipeline.

45. On 8th October, 2015, a revised industrial emissions licence was granted by the EPA to the notice party; the notice party having applied for a review of the industrial emissions licence on 5th February, 2014.

46. The decision to issue this licence was unsuccessfully challenged by way of judicial review by four applicants, including Ms. Harrington, but was pursued only by her in proceedings entitled *Harrington v. Environmental Protection Agency* (record number 2015/673 JR). Binchy J. delivered the judgment on 21st November, 2017 and the decision may be found at [2017] IEHC 767. He observed at para. 3:-

> *"The project has already been the subject of no less than eleven consents or licences … and in his affidavit, Mr. Costello states that he does not know of any other project in the history of the State that has been subjected to so many environmental impact assessments..."*

47. Finally, on 29th December, 2015, the first respondent granted the consent to operate which is the subject matter of this judicial review.

Grounds of challenge

48. The legal and pleaded grounds upon which the applicant relies and as evident from para. E of the statement of grounds are as follows:-

> (1) No appropriate EIA had been carried out by the respondent which is required to consider all likely significant effects, both direct and indirect, of the project on human beings, fauna and flora, soil, water, climate, landscape, material assets and cultural heritage and the interaction between these factors. These effects include short term, long term and cumulative effects so as to attain and comply with the primary objective of the Directive which is the protection of the environment and quality of life. A number of processes of assessment were carried out by separate authorities under separate legislation but there had been no integrated environmental impact assessment carried out in respect of the development in its entirety. There had been significant changes to the project including the alteration of the gas pipelines and the treatment installation. Such modifications had significantly altered the effects of the project. These effects had not been the subject of any assessment sufficient to comply with the requirements of the EIA Directive. There had been no attempt to reconcile the intervening changes in the project since the carrying out of these assessments.
>
> (2) The first respondent issued a consent permitting the activity to proceed which will allow for unrefined gas from the wellhead offshore to be treated at the facility, and transferred to the pipe network to the gas network's distribution system at Bellanaboy. The effects, both direct and indirect, of the project and the factors required to be considered under the directive had not been carried out, the interaction of these effects had not been considered, the cumulative effects had never been considered and the structure put in place to comply with the requirements of the directive are not such as to provide for compliance with those requirements.
>
> (3) The first plan of development dated 15th April, 2002 contained a terminal proposal that was subsequently refused. The gas pipeline both onshore and offshore had been significantly altered, the basis upon which the pipeline connecting the terminal to the gas network's distribution system and the consequent impact had never been appropriately or properly assessed. These changes and the impacts and interactions which continued until the making of this application, had never been properly assessed or considered for the purposes of the EIA Directive. No assessment had been made in respect of the whole project, as opposed to individual parts thereof, and there had been neither consideration of the cumulative effects or of the interaction of these effects. Therefore, it is alleged, that in consequence there could not have been devised a series of mitigation measures which would mitigate the negative impacts in a manner required under the EIA Directive. Further, the first respondent failed to have regard to part of the project, particularly the transmission pipe for which no environmental impact assessment had ever been carried out and which was an integral part of the project for which the consent of 29th December, 2015 had been granted. It is alleged that the first respondent had proceeded on the basis that the pipeline should be considered in the context of other plans and projects which was fundamentally incorrect, given that this was a single project (this is particularly referred to at para. 18 of the statement of grounds). Further, at para. 22, it is alleged that there had been no assessment carried out in respect of the project in its totality. Similar type allegations and grounds are advanced in other parts of the statement of grounds, although somewhat differently phrased.

(4) The EIS documentation submitted to the first respondent was inadequate and the first respondent was obliged to require the submission of an EIS which complied with the requirements of Irish domestic law; and he failed to adequately or properly direct his mind to Irish domestic law with regard to the requirement to carry out an EIA.

(5) The first respondent erred in law in delegating to others his function under the relevant statutory schemes.

(6) Although not something which was pursued with any great vigour by the applicant at hearing, it was contended that the second named respondent erred in law in enacting legislation in light of the judgment in Case C-50/09 *Commission v. Ireland* ECLI:EU:C:2011:109, and assigned the function of carrying out an EIA to a body which had neither competence nor capacity to carry it out. In doing so it is contended that the respondent failed to fulfil its obligations to remedy and nullify the unlawful consequences of the breach of European law as laid down in Article 10 EC Article 4(3) of TEU. It is also alleged in the statement of grounds that the assessments carried out in respect of the project by numerous bodies, not just the first respondent, predated this decision and that the respondents were therefore required to nullify the unlawful consequences of what is contended to be a breach of community law identified in that case. The respondent failed to properly consider the effects of *Commission v. Ireland*, which found that the previous considerations regarding the preparation of an EIA was contrary to European Community law and further, it is alleged that there was a duty to ensure that such lacuna was rectified in any subsequent EIA.

(7) The first respondent erred in law and acted contrary to the EIA Directive in furnishing a decision to the notice party days before the public were informed and at a time when major activity relying on the consent had occurred.

(8) The first named respondent erred in law in purporting to grant the consent in circumstances where the notice party represented and contended that the activity had already commenced.

(9) The decision of the first respondent was irrational, contrary to plain reason and sense.

(10) The first respondent erred in law in concluding that, notwithstanding the fact that there was potential for likely significant effects, the development was not subject to a Stage 2 assessment and the first respondent's determination was inconsistent with and contrary to the obligation in the Habitats Directive.

(11) The first respondent erred in law in formulating Condition 2 such as to avoid the requirement for an appropriate assessment for the purposes of the Habitats Directive, the imposition of such conditions being determinative as to the necessity to carry out a Stage 2 assessment.

(12) The consent with Condition 2 attached, did not comply with the requirements of the EIA Directive in that in the absence of such management plans, the likely significant effects of the development could not be assessed. It is therefore contended, as a matter of law, that Condition 2 of the consent was void for uncertainty. The applicant criticised this condition – describing it as somewhat "elastic". The applicant argues that this was an unsatisfactory provision, essentially delegating to the notice party the obligation to develop measures to prevent occurrences of the likely significant effects.

(13) Finally, it is pleaded that the first respondent erred in law and acted contrary to the Habitats Directive by inserting Condition 2, which it is alleged should have been prepared prior to and assessed as part of the appropriate assessment. This, it is argued, supports the fact that there was a likely significant effect and that therefore a stage two appropriate assessment should have been carried out. Therefore, it is alleged that the assessment carried out did not comply, and was inconsistent with, the obligations under the Habitats Directive. The decisions of the European Court of Justice in Case C-258/11 *Sweetman & Ors v. An Bord Pleanála* ECLI:EU:C:2013:220 and the decision of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400 were relied upon in this regard.

49. A further ground upon which review has been sought is that the second respondent failed to properly transpose into Irish law the requirements of the directive and to provide for an appropriate procedure to ensure the carrying out of an EIA in accordance with the requirements of both Irish and EU law. No firm basis for this contention has been outlined in either the statement of grounds, the application or in the affidavit evidence before the Court. The submissions of the applicant do not address this ground and it was not pursued with any particular vigour on the hearing of the application.

50. During the course of this hearing, it was suggested by the respondent and notice party that many of the arguments and grounds advanced by the applicant were based on a contention that there was an obligation on the first named respondent to conduct an integrated assessment (or an overarching assessment) of the entire project prior to, or in the process of, considering whether to grant the consent which is the subject matter of this challenge and that a failure to do so amounts to a breach of the first named respondent's obligations to comply with the requirements of the EIA Directive. I believe this to be a correct analysis of the basis on which many of the grounds of challenge are being maintained by the applicant and is borne out by the content of Mr. Sweetman's affidavit referred to below. There seems little room for argument but that this was a fundamental contention by the applicant's when this case was initiated.

51. In written and oral submissions, the applicant raised a number of other issues to which both the respondent and notice party objected on the basis that they were either not pleaded in the case upon which leave was granted; or they were pleaded without sufficient particularity as required by the rules and decided authority.

Applicant's affidavits

52. The evidence in support of the applicant's challenge is to be found in an affidavit of Mr. Sweetman who swore the principal grounding affidavit, and a later affidavit of Ms. Harrington sworn on 15th May, 2017. Mr. Sweetman is described in his affidavit as a retired gentleman with an address at Rossport South, Ballina, County Mayo. It is not stated that he has any particular expertise or qualification in relation to environmental matters, although it is noted by the Court that he has been involved in a number of previous challenges. It may be of some significance that his affidavit was sworn (and these proceedings brought), before Binchy J. delivered his decision referred to above in *Harrington v. Environmental Protection Agency* [2017] IEHC 767.

53. The thrust of Mr. Sweetman's evidence on affidavit is that it is impossible to separate the various components of the development given what has transpired, including alterations which have taken place to the development. He queries the legal status and basis upon which a pipe leading to the terminal had been constructed and the legal status of a pipe from the facility, joining the gas network at Bellacorick and maintains that it was never the subject of a proper EIA. He maintains that this was an intricate part of the pipeline bringing gas in its treated form from the wellhead and cannot be separated from it. It is alleged that the permitted

transmission pipeline was substantially different from that as constructed.

54. Mr. Sweetman avers that he has participated at every stage of the process and nevertheless, remained confused as to the precise details of the project, primarily because the approach adopted was to split the project into different component parts and not to engage in an integrated and proper assessment thereof. Such assessment is a fundamental obligation under the EIA Directive. In support of this contention, significant emphasis is placed, in the pleadings and in his affidavit, on the decision in *Commission v. Ireland*, which it is submitted, held that the type of approach adopted in this case, namely that multiple consents without a systematic and comprehensive overarching analysis, could not comply with the relevant directives. At para. 13 of his affidavit, Mr. Sweetman reiterates that a critical issue at the heart of his objection is the failure of any one authority to have carried out an EIA. He contends that the Corrib gas project is a single project and required to be assessed as such under the EIA Directive, something which did not occur. Therefore, it is alleged that no EIS could be carried out if it was restricted in such manner. He maintains that the definition of project for the purposes of the EIA directive was completely misunderstood by the first respondent as they wrongly and inappropriately limited the consideration only to the pipeline in the definition of project. As the consent under s. 40 was a precondition to the commencement of the development, it is maintained that the assessment must be carried out in respect of the totality of the project. The Court should now require the first named respondent to engage in such a process and conduct a single assessment. Mr. Sweetman had in fact made submissions to the first respondent on 24th September, 2015 before the consent was granted. The first respondent in the consent which issued states that he had regard to this submission and those made by others. Mr. Sweetman, in that submission, also placed significant reliance on *Commission v. Ireland*; and consistent with the arguments made before this Court on this application, he urged that the development of the Corrib gas project before all parts of the EIA are in place is in contravention of European law. Ms. Harrington, who made submissions on 25th September, 2015, supported the written submission of Mr. Sweetman and those of Ms. Monica Muller (the third named applicant in these proceedings when initiated) – the latter, in her submission of 8th September, 2015 – emphasising the requirement of a single type of consent.

55. Mr. Sweetman, at para. 25 of his affidavit, expresses a fundamental concern that the information provided was so inadequate relative to what must be submitted that no EIA could be carried out. He avers that because the likely significant effects, both direct and indirect, that the factors required had not been submitted in the appropriate form. Because the interactions had not been submitted, and because the cumulative effects had not been addressed, no EIS as required by Irish domestic law had been submitted.

56. Regarding the allegation that it was impermissible to delegate the task of carrying out the EIA on a private consultancy (Ramboll), in submissions made by the applicant, at hearing it was further contended that there was a frailty surrounding the report prepared by Mr. Fox. While Ms. Harrington did not believe that a BSc (Hons) qualification from Brighton Polytechnic was sufficient to be relied upon, nevertheless she did not go so far as to plead that Mr. Fox did not have the appropriate expertise. Ms. Harrington did however query where Mr. Fox's professional indemnity cover now lies since his company was apparently dissolved. The respondent objected to Ms. Harrington raising this issue during the course of the trial and I upheld his objection on the basis that this was not pleaded and was therefore an inadmissible argument.

57. Mr. Sweetman avers that there was a deficiency in the public participation process, that the directive required not just that certain information be contained within documents available for public viewing and that the information provided was inadequate. He argues that the information provided was so inadequate that no EIA could be carried out, specifically because the likely effects, both direct and indirect, on all factors required had not been submitted in the appropriate form or indeed at all:-

> *"...and because the interactions had not been submitted and because the cumulative effects had not even been addressed, no appropriate Environmental Impact Statement that complied with the Irish Domestic Law had even been submitted."*

He further avers:-

> *"The Directive requires, as its core obligation, that an Environmental Impact Assessment be carried out which shall identify, describe and assess, in an appropriate manner, the direct and indirect effects of the project on human beings, fauna, flora, soil, water, air, climate and landscape and in respect of these matters the interaction between these factors be identified, assessed and described."*

58. Mr. Sweetman also avers that the nature and extent of the project altered. For example, the location of the pipelines, the treatment and the processes involved and the location of the terminal itself altered. It is pleaded that the pipe conducting the treated gas in the refinery had never been subject to the planning process and in considering the application, the Minister granted a consent, not just without an EIA, but where a significant part of the project in respect of which the consent was granted was an unauthorised development.

59. Mr. Sweetman avers that the Court should intervene and review the decision of the Minister because inadequate notice was provided of his decision and that the activity the subject of the consent commenced on 31st December, 2015 at 7.56 p.m., at a time when the applicant was entirely unaware of the decision to grant the consent.

60. Regarding the contention that a stage 2 appropriate assessment should have been carried out for the purpose of the Habitats Directive, Mr. Sweetman avers that three European sites were identified for significant effects and that the screening report for appropriate assessment records that the development, and in particular, future unauthorised activities have the potential for likely significant effects. The insertion of a condition in the consent, namely, Condition 2, in the applicant's view, does not cure any difficulty in this regard. This condition, it is submitted, is incapable of definition, as are the obligations thereby placed on the notice party which, it is maintained, are inappropriate. It is thus argued that the imposition of this condition is an unlawful substitute for the requirement of a second stage assessment. It is to be observed that while Mr. Sweetman exhibited the Screening for Appropriate Assessment report prepared by Ramboll, he does not highlight or illustrate in any clear or particular manner how it is contended by him that it is deficient – save to argue that case law *dicta*es that a second stage assessment should have been undertaken because in his view that report recorded that the development, and in particular future unauthorised activities, had the potential for likely significant effects on three European sites.

61. In an affidavit sworn on 15th May, 2017, which was in fact a replying affidavit to certain affidavits sworn on behalf of the respondents and the notice party, Ms. Harrington expressed her belief that Condition 2 was not in compliance with EIA directives, that the first respondent made his decision to grant the consent in a manner whereby a liability for potentially punitive and crippling costs might occur. It was unclear to her upon whom liability might rest for environmental damage and the status of any professional indemnity of the external expert was also unclear.

62. Ms. Harrington alleges in that affidavit that there is no evidence that the screening process assessed by the Minister and his

advisers was based on anything other than the original Natura Impact Screening Statement ("*NISS*") which was prepared by the notice party. She believed this to be insufficient and deficient. Referring to an affidavit of Ms. Neff, which will be considered in more detail later in this judgement, and upon whose NISS the screening process was premised, she avers that this is insufficient and deficient. Thus, the assumed premise upon which subsequent decisions were based, was therefore unacceptable. In that regard, she believed that clarity on this only could be achieved through discourse before the court, rather than exchange of affidavits.

63. The Court notes that in this affidavit, Ms. Harrington does not point to any specific deficiency in the NISS or the appropriate assessment. One of the exhibits in this case is the NISS which was prepared and collated by Ms. Neff. It is a considerable and extensively detailed document. Ms. Harrington does however raise many questions in relation to efforts made by Ms. Neff to access local knowledge, to engage in baseline studies capable of showing a roadmap of what he describes as the environmental degradation of Glengad or whether Ms. Neff paid heed to a report of a Ms. Karen Gaynor which had been obtained in 2007 in relation to the effect of solidarity camps on the dunes. This is addressed further at paragraph 80 et seq below.

64. In response to Mr. Ó hÓbáin's affidavit, Ms. Harrington believes that most of the content of this affidavit could in fact be read as an admission that the EIA and the AA process carried out by and on behalf of the Minister is in fact deficient. Unlike in an EIA, for purposes of AA there is a strict requirement to establish that there "*will definitely be no adverse effect*" rather that there is unlikely to be an effect. She avers that the burden of proof therefore lies on the developer to demonstrate there be will no adverse effects on designated features of the site. The failure and refusal to proceed to a stage two appropriate assessment went against common sense and the precautionary principle which is intrinsic to proper adherence to the letter and spirit of environmental law.

65. Ms. Harrington also suggests that "*to obviate any doubt surrounding EIA transposition into Irish law and the minutiae of EIA and AA interpretation, it would be prudent that this matter be referred to the European Court of Justice under an Order pursuant to Article 234 of the TEU".*

66. Finally, she contends that she was not informed of the Minister's decision on 29th December, 2015, did not listen to news bulletins and did not become aware of the decision until the following day. She believes that there has been a clear *inegalité des armes* in the manner in which she was treated as opposed to the manner in which the notice party was treated.

67. In this affidavit, Ms. Harrington also raised a number of issues which were not contained in the initial pleadings, and these are further considered below.

The respondents' response

68. The respondents contest the application on all grounds upon which it is based. While it had been pleaded by the respondents that the application was out of time, this was not pursued at the hearing. It is accepted that the application is in time. In addition, while the statement of opposition relied, as a jurisdictional objection, on a breach of a settlement agreement reached between the parties, this ground was not particularly pursued at hearing, presumably because the first, third and fourth named applicants had withdrawn from the proceedings.

69. The respondents' position can be summarised as follows:-

> (1) Properly construed, central to the applicant's challenge is that there was a failure to have a single integrated assessment. This is not required as a matter of law.
>
> (2) These proceedings constitute an impermissible collateral challenge to a number of decisions and consents made earlier, relating to assessments carried out by An Bord Pleanála, the Department of Communications, Climate Action and Environment (formerly the Department of Communications, Energy and Natural Resources), the EPA, and the Department of Housing, Planning, Community and Local Government. These decisions and consents were made many years ago and the time limits prescribed for proceedings to question their validity had long since expired.
>
> (3) That an estoppel arises and/or the rule in *Henderson v. Henderson* (1843) 3 Hare 100 is applicable in circumstances where two of the applicants (not Ms. Harrington), had initiated judicial review proceedings in 2011 in respect of the previous consent. They are estopped from raising the same issues in these proceedings, or issues that could have been raised in those proceedings. This includes such issues as the alleged failure to transpose the requirements of the EIA Directive, the allegation that the EIA Directive required that there be a single EIA carried out by a single competent authority and any allegation that Article 3 of the EIA Directive required an integrated assessment. Again, these grounds of defence, based on estoppel/the rule in *Henderson v. Henderson*, were not particularly pursued at the hearing. They appeared to relate primarily to the first, third and fourth named applicants, save, in relation to the point concerning the alleged requirement for a single integrated assessment.
>
> (4) A further ground of defence was based on an alleged material non-disclosure to court during the *ex parte* application for leave of the existence of the 2011 judicial review proceedings, and to exhibit the settlement of those proceedings was also not particularly emphasised during oral arguments before the Court. The significance of such contention diminished once the first, third and fourth applicants departed these proceedings.
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> (5) Failure to particularise claim. The respondent argues that the statement of grounds is vague, repetitive, and the grounds are not adequately or appropriately particularised.
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> (6) In the applicant's submission and in argument before the Court, she purported to rely on many grounds other than those upon which this Court granted leave to apply for judicial review. These included the following:-
>
> > (i) A post consent flaring incident. Ms. Harrington refers to an uncontrolled flaring incident which occurred on 31st December, 2015, which resulted in action being taken by the EPA. Both the notice party and the respondents, while arguing that such information and evidence is not admissible in this judicial review, indicated their willingness to permit the Court to consider such evidence, on a *de bene esse* basis. The Court availed of the opportunity to review materials submitted by the applicant but for the reasons outlined hereunder, the Court does not consider this information to either be relevant or admissible in the context of this application for judicial review;
> >
> > (ii) the indemnification issue;
> >
> > (iii) the alleged hasty manner in which the decision to grant the consent was made (implying that the

documentation was not appropriately considered by the Minister). Ms. Harrington in her affidavit, addressing this heretofore unpleaded issue, referred to what she described as the Minister's indecent haste in signing the consent. She believes that the reason for this was to facilitate the notice party and queries why the Minister should sign this consent in the middle of a holiday period. She avers that there were no deadlines which were required to be adhered to and that, in summary, given the voluminous information which was placed before the Minister, that he could not have given the matter due or proper consideration before giving his consent;

(iv) complaints regarding a meeting of 3rd December, 2015, between the first respondent and a representative of the notice party (a meeting described by the notice party as concerning the fibre installation contract and had nothing to do with the challenged consent);

(v) complaints regarding the requirement for "*alternatives*" – the notice party submits that in the context of the consent to operate there are really no alternatives to be considered, save the option of a refusal, an option that was open to the respondent;

(vi) an argument in respect of the complaint to the European Commission in 2001 (Reference No. 2001/4619, SG (2001) A/8537);

(vii) references to the solidarity camp or to the cliffs at Glengad; and

(viii) complaints regarding conditions no. 19 and 20 of the consent, which relate to inspections of the pipeline and annual inspections of the subsea facilities and flowlines. The notice party submits that the applicant does not make any complaint as to the *vires* of the conditions but comments that the allegation is that the conditions could not be met within the timeframes provided.

70. In so far as it is contended that there was an issue regarding planning permission for the construction of the transmission pipeline, the respondents submit that such planning permission was not required as it constituted "*exempted development*" in accordance with Part III of S.I. No. 86 of 1994 Local Government (Planning and Development) Regulations 1994 (as amended) and as applied under the Planning and Development Regulations 2001.

71. The respondents also argue that the Minister's decision authorised the importation of natural gas through the pipeline, not the operation of the terminal, which is under the jurisdiction of the EPA. The Minister in making his decision to grant the consent to operate the pipeline, had regard to the EPA's decision to grant the revised industrial emissions licence. Further, the commission and testing of the terminal using back feed gas (i.e. gas from the transmission pipeline) constituted operating the terminal for the purposes of conditions set out in the industrial emissions licence. No natural gas from the Corrib gas field was introduced to the terminal and the commissioning and testing phase should not be confused with the consent to operate the pipeline.

72. The respondents also deny that there was any failure to comply with the EIA Directive or that the interaction of effects and cumulative effects had not been considered by the respective competent authorities. They refer to s. 40A(5)(a) of the Act of 1976, as express statutory provision for the Minister having regard to the submissions of various prescribed bodies including all local authorities, the EPA, the Health Service Executive, An Taisce and others. Section 40A(5)(a) provides:-

> *"Where an environmental impact statement has been submitted in accordance with a requirement of or under subsection (1) of this section, the Commission or the Minister for the Marine and Natural Resources, as the case may be, shall have regard to the said statement, to any submissions or observations made to him during the prescribed period in relation to the effects on the environment of the proposed pipeline, and to the views, if any, furnished by other Member States of the European Communities pursuant to subsection (7) of this section."*

It should also be noted that s. 40A(5)(b) provides:-

> *"The Commission or the Minister for the Marine and Natural Resources, as the case may be, may, where an environmental impact statement has been submitted in accordance with a requirement of or under subsection (1) of this section and where he considers it necessary so to do, require the Board or other person, as the case may be, to furnish to him such further information in relation to the effects on the environment of the proposed pipeline as the Commission or the Minister for the Marine and Natural Resources, as the case may be, may specify."*

73. Regarding the Habitats Directive, the respondents contend that An Bord Pleanála and the Minister had previously carried out habitats assessments in respect of the operation of the pipeline and the information prepared for consideration by those authorities was sought and considered by the Minister in making the decision in this case. It is submitted that in reaching the decision to grant the consent, the Minister had regard to previous consents and assessments of various other consent authorities including:-

(a) the decision of the Department of the Environment, Community and Local Government in granting a foreshore licence for the construction of the revised route for the pipeline to the notice party on 22nd July, 2011;

(b) the decision of An Bord Pleanála in granting approval for a revised routing of the onshore section of the pipeline to the notice party on 19th January, 2011;

(c) the decision of the Commission for Energy Regulation in issuing a production safety permit to the notice party in November, 2014;

(d) the revised production safety permit for the pipeline in June, 2015; and

(e) the decision of the EPA in issuing the revised industrial emissions licence for the operation of the gas refinery to the notice party on 8th October, 2015.

It is argued that it cannot be said that the system created had failed to allow for consideration of the interaction of effects and cumulative effects of the project, or that the competent authorities had somehow failed to coordinate the assessment of the effects of the whole project.

74. Regarding the allegation of failure to carry out an appropriate assessment, the respondents deny that they failed to do so or that they incorrectly formulated the test in relation to the requirement of an appropriate assessment as set out in *Kelly v. An Bord Pleanála*

[2014] IEHC 400. Reliance is placed on the preparation by the notice party of an NISS which concluded that the operation of a pipeline, when taken either individually or in combination with other plans or projects, was not likely to have any significant effect on any European site. External consultants engaged by the respondent, Ramboll, prepared a Stage 1 AA Screening Report which determined that the operation of the pipeline with the implementation of certain consent conditions would have no likely significant effects on relevant European sites and no likely significant disturbance of relevant protected habitats. Having regard to the Ramboll AA Screening Report, the respondent had taken into consideration the earlier assessments carried out in relation to the pipeline and other plans or projects such as the terminal, the transmission pipeline and a wind farm. The Minister had regard to Ramboll's advices and had adopted its AA Screening Report in respect of the operation of the pipeline, something which was in accordance with Article 6(3) of the Habitats Directive and that the negative result from such AA screening meant that there was no requirement to carry out a second stage screening, in accordance with the test approved in *Kelly v. An Bord Pleanála*. The Ramboll report specifically stated that given the distance of the pipeline from the Carrowmore special area of conservation and the lack of potential impact pathways (as the Carrowmore Lake special area of conservation lies upstream of the pipeline) there were no likely significant effects and no likely significant deterioration of the habitats from the operation of the pipeline. Further, the Minister, in the context of the 2011 Habitats Regulations considered the decision of the EPA in issuing the industrial emissions licence in respect of the operation of the gas terminal into which the pipeline would connect. Thus, it is contended that the Minister considered the Ramboll AA Screening Report which itself referred to the EPA grant of the revised industrial emissions licence (PO 738-03) including the EPA inspector's report dated 23rd March, 2015. The inspector's conclusion was that the operation of the gas terminal, individually or in combination with other plans or projects, would not adversely affect the integrity of any of the specified European sites. The respondents therefore state that it cannot be reasonably argued that the first respondent could not have reached the conclusion that he did, given the evidence which was available to him and upon which his decision to make the consent was based.

75. In so far as it is argued that the EIS and the EIA are noncompliant with Irish law, the respondent pleads that if this is an attack on the whole project, then it is effectively a collateral attack on previous consents and permissions which is not permissible by law.

76. Responding to the allegation that Condition 2 of the grant of the consent is contrary to the EIA Directive, the first respondent maintains that Condition 2 is a standard type condition in regulatory consents. Management plans and procedures ensure that the mitigation and monitoring controls identified in the notice party's application are appropriately managed and implemented. The condition is framed so as to ensure that in the event that there are any unanticipated changes in the dynamic baseline environment, the future maintenance activities are assessed and carried out in the light of such changes.

77. In coming to his conclusion to grant the consent, the Minister was entitled to seek and obtain expert advice from within his own department and from external advisors and all relevant materials in this regard had been made available to the public. Section 40B(7) of the Act of 1976 entitles the Minister to have regard to, and to adopt, in whole or in part (or not at all) any reports prepared by such persons. Reliance is also placed on *Kelly v. An Bord Pleanála* and *Buckley v. An Bord Pleanála* [2015] IEHC 572 as authority for the proposition that public consent authorities such as a Minister have an implied entitlement to adopt an AA screening report as their own screening for AA.

78. In so far as it is contended by the applicant that the notice party was notified of the decision to consent in advance of the public, the first respondent pleads that while the notice party was informed of the Minister's decision under cover of letter 29th December, 2015, the public were also notified of that decision on the same day by the posting of the decisions on the first respondent's website and the publication of a press release. The decision featured on the national broadcaster's news bulletin for that day. The first respondent also submits that the third and fourth named applicants (who are no longer participating in this application) and who were members of what is known as a *"consent condition monitoring committee"* were also notified directly by email on the same day, 29th December, 2015. All statutory consultees and members of the public who had submitted observations to the consultation process, including the applicant, were formally notified by letter dated 4th January, 2016.

Notice party

79. The notice party submits that all necessary consents for the construction and operation of the Mayo to Galway BGÉ pipeline were obtained by Bord Gáis Éireann and were in place before its construction or operation. The carrying out of a development pursuant to and in accordance with the consent given by the Minister under s. 8 of the Act of 1976 (dated 4th March, 2002, to Bord Gáis Éireann for the construction of the Mayo to Galway BGÉ pipeline) is exempted development for the purpose of the planning code and therefore the Mayo to Galway BGÉ pipeline is not an unauthorised development as alleged by the applicant. The Mayo to Galway BGÉ pipeline was subject to an appropriate EIA and all relevant documentation, in this regard, was presented to Ramboll when it conducted its EIA, which EIA was adopted by the Minister.

80. Significantly, the notice party pleads that the applicant has not identified any matter which the Minister had excluded from his consideration or which was not properly assessed. The decision of the Minister to grant the consent clearly stated that the Minster had adopted the EIA prepared by Ramboll in respect of the operation of the gas pipeline as his EIA. Further, the consent made it clear that the decision to grant the consent was one ultimately made by the Minister himself.

81. In so far as Condition 2 is concerned, mitigation measures and monitoring controls were assessed as part of the application for consent by Ramboll, and it was evident that the management plans referred to in Condition 2 included such measures proposed and assessed as part of the application. Further, Condition 2 required that the notice party prepare management plans and procedures to ensure mitigation and monitoring controls identified in the documentation submitted with the application for consent were appropriately managed and implemented. Those mitigation measures and monitoring controls, as proposed, identified in the documentation submitted with the application, were assessed as part of the application for consent to operate. In so far as any possible future unknowns or unplanned maintenance activities are concerned, if they are required, the condition provides that such maintenance activities will themselves be subject to screening for appropriate assessment. The preparation of the management plans or procedures as mandated by Condition 2 will not negate any further screening as required in respect of future unknown or unplanned maintenance events and activities.

82. The notice party relies, *inter alia*, on affidavits sworn by Ms. Reynolds and Ms. Neff in support of its opposition to this challenge. Much of what is contained in the notice party's pleadings is repeated and averred to in those affidavits. Ms. Aoife Reynolds is an environmental scientist and an adviser to the notice party. In her first affidavit sworn on 23rd October, 2016, she avers that she was the environmental adviser in a number of the applications for the various consents, approvals, permissions and licences obtained by the notice party and was specifically involved in the application for the consent to operate which is the subject matter of this application for judicial review. She has been involved in the Corrib gas field since 2006 and directly involved in the implementation of the environmental management and controls during the construction phase of the Corrib Gas Field Development. Each of the applications such as the application for the original pipeline consent, the application for the planning and development approval, the application for the original foreshore licence, the application for the terminal planning permission and the application for the 2007 industrial emissions licence, were accompanied by an EIS. All involved a process of public consultation. The EIA repeats that elements

of the Corrib Gas Field development were considered and assessed together with the cumulative impacts and impact interactions before these consents, approvals, licences or permissions were granted. Ms. Reynolds details the extent of consideration and assessment of the environmental effects of the Corrib Gas Field development, its direct and indirect effects and the cumulative effects and the actions of other plans in progress including the Mayo to Galway BGÉ pipeline, which, she avers had been carried out in such a manner that demonstrably complies with the EIA Directive. There are, therefore, no gaps or lacunae in the assessments thus carried out. Any changes or alterations that necessitated the preparation of an EIS were fully considered or assessed in an EIS and were the subject of an EIA by the relevant competent authority. Ms. Reynolds observes that a number of complaints made in these proceedings appeared to be directed towards the decision of the EPA in respect of the revised industrial emissions licence (which itself was subject to the matter of a challenge by way of a judicial review, record no. 2015/673 JR). Thus, for example, a notable example of a complaint that could only be directed towards a decision on the revised industrial emissions licence application is that which is stated at the end of para. 28 of the statement of grounds, relating to discharges at Carrowmore Lake. Ms. Reynolds avers that there is no effect on Carrowmore Lake from the operation of the pipeline as there were no discharges as a result of the operation of the pipeline. The discharges referred to were considered and assessed as part of the revised industrial emissions licence application.

83. When the notice party made an application to the Minister for consent to operate the pipeline in August, 2015, the application enclosed considerable information including a cumulative impact update report dated July, 2015. The Natural Impact Screening Statement (August, 2015) was also enclosed with the application documentation. The road map was submitted with the application documentation, in ease of the Minister and the public. Having been involved in the preparation of the application to the Minister and the submission to the EIS documentation to the Minister on 18th August, 2015, she is satisfied that the EIS documentation complies fully with the requirements of the EIA Directive providing as it does sufficient information, detailed design and data upon which the Minister could assess the environmental impacts of the operation of the pipeline and all indirect and cumulative effects and impact interactions. The Corrib onshore pipeline EIS which was submitted as part of the application for the consent to operate was prepared in respect of the route of the pipeline that was altered during the strategic infrastructure development process and therefore Ms. Reynolds avers that the applicant is wrong to suggest that the EIS documentation was prepared at a time when the design was materially different. Further, the EIS documentation that was before the Minister took into account and reflected any changes or alterations that had taken place.

84. Ramboll confirmed in their EIA report that the EIS documentation had been reviewed and assessed in relation to the environmental effects of the operation of the pipeline and that they were supported in making such assessment by Astrid and the CMCS. Ramboll ensured that the documentation considered changes to the project since the 2011 s.40 consent, including those to environmental designations, new environmental information, the cumulative impacts of the various different elements of the Corrib gas field development and any other existing, new or planned and neighbouring developments.

85. Significantly, Ms. Reynolds avers that while the various EISs were prepared for the particular development in respect of which consent was sought, it was evident from the detail of the previous assessments that each EIS was set in its larger context and any cumulative environmental impacts that arose, whether from existing parts of the Corrib gas field development or partly completed parts thereof, were identified and considered. She rejects the applicant's contention that the assessments carried out were of limited scope. She avers that the various EIAs carried out in respect of the various consents, approval and licences for the Corrib Gas Field development considered the subject matter of the applications and the wider context in relation to other aspects of the Corrib Gas Field development and the Mayo to Galway BGÉ pipeline, all of which themselves had been the subject of EIA.

86. Regarding the Habitats Directive it was evident from the Minister's decision of 29th December, 2015, that he had adopted the screening for appropriate assessment by Ramboll.

87. Ms. Jenny Neff is a director and principal ecologist of Ecological Advisory and Consultancy Services. She is also a qualified botanist, vegetation scientist and ecologist. She swore an affidavit on behalf of the notice party on 13th October, 2016, in which she avers that she has a special interest in the implementation of the appropriate assessment process under Article 6 of the Habitats Directive and 2011 Habitats Regulations. Dealing specifically with the allegation made by the applicant (contained in Mr. Sweetman's grounding affidavit) in relation to the stage 1 screening for appropriate assessment, she avers her understanding that given the conclusion in respect of Stage 1 screening, that the operation of the pipeline would not be likely to have significant effects on the European sites, there was no requirement for the Minister to proceed to Stage 2 appropriate assessment.

88. Article 6(3) of the Habitats Directive provides for an assessment process which consists of four stages. Ms. Neff states that an important aspect of the process is that the outcome of each successive stage determines whether a further stage in the process is required. The first stage, stage 1 screening assesses whether a plan or project which is not directly connected with or necessary to the management of the site as a European site, either alone or in combination with other plans and projects, is likely to have significant effects on the European site. The outcome of the Stage 1 Screening exercise *dicta*tes whether the competent authority proceeds to the next stage of the process – generally referred to as a Stage 2 Appropriate Assessment. If the result of the Stage 1 Screening exercise is negative ,or that the plan or project is not likely to have significant effects on the European site, then she states that there is no further requirement to proceed to Stage 2. It is only if the Stage 1 Screening exercise concludes that there is likely to be significant effects on the environment that Stage 2 is required and that therefore a Stage 2 Appropriate Assessment is not an automatically required procedure.

89. Ms. Neff was responsible for the preparation of the Natural Impact Screening Statement which was submitted as part of the application for the consent. The screening report considered aspects of both offshore and onshore elements of the power plant. Emphasising the fact that what was under consideration by the Minister was the operation of the pipeline, the transmission of gas to the pipeline had no potential for impact on the surrounding environment including European sites. She accepts that inspections, service and maintenance of the pipeline and the landfall valve installation will be required during the operation of the pipeline. These activities were described and assessed in the screening report. Operational activities had previously been assessed in documents submitted as part of the application for the 2011 consent to construct the pipeline. The screening report prepared in this instance details previous assessments, consents and approvals in relation to the pipeline. Numerous aspects of the planned and previously assessed activities in relation to the offshore pipeline were considered in that report. Similar consideration applied to the onshore pipeline.

90. As there had been some changes to the European site designations since previous assessments were undertaken, the screening report also considered previously assessed offshore and near shore surveys, and rock placement in the context of changes to the European site designations. It was concluded that the offshore service had been thoroughly assessed, that the assessments remained valid, and that there will be no significant impact as result of the planned activities on the conservation objectives of any European site. Previous assessments carried out in relation to rock placement remain valid. The screening report in connection with the operational maintenance of the landfall valve installation, which had been assessed in the Corrib onshore pipeline EIS and were

submitted as part of the 2011 s. 40 consent application, remain valid. The cumulative impacts of the operation of the pipelines with other plans and projects such as the Oweninny wind farm, the Corrib Gas Field development and the Mayo to Galway BGÉ pipeline were also considered. The screening report concluded that there was no potential for any cumulative impact on the European sites, thus, the information which was before the Minister included the conclusion of the screening report that, the operation of the pipeline, either individually or when taken in combination with other elements of the Corrib development, the Gas Networks Ireland Mayo to Galway BGÉ pipeline and plans or projects in the wider locality, was not likely to have a significant effect on the European sites under consideration.

91. The approach taken by Ramboll, regarding the three European sites, namely Glenamoy Bog Complex SAC, Broadhaven Bay SAC and West Connacht Coast SAC, was that if certain remedial works and surveys had to be undertaken (and it had not been established at this stage that the work surveys will have to be undertaken), that the work surveys themselves would have to be the subject of screening for appropriate assessment and/or appropriate assessment if required. Ms. Neff states that in her opinion this is the correct approach. She rejects the suggestion of the applicant that a Stage 2 Appropriate Assessment should have been concluded. What Ramboll did, with which she fully agreed, was to take into account the possibility of future unknown events in accordance with the Habitats Directive and the 2011 Habitats Regulations. There was "*simply no question of a Stage 2 Appropriate Assessment being required based on what is now known and assessed"*. What Ramboll was prudently providing for was what should happen in the event of any storm damage to the cliff at Glengad, changes occurring in the marine environment in Broadhaven Bay SAC, future changes to the environment in the West Connacht Coast SAC, and future changes to the activity of the highly mobile bottlenose dolphin population for which the SAC is designated. She agreed with Ramboll's conclusion that there were no likely significant effects on any European sites from the operation of the pipeline and therefore no requirement to proceed to a Stage 2 Appropriate Assessment.

92. Ms. Neff also avers that it is proposed as part of the application to operate the pipeline that there will be regular inspections of the reinstated cliff at Glengad particularly following storm events, and if such inspections discover that damage has occurred, remedial action/works will be undertaken to restore the integrity of the cliff. At this stage it is not possible to tell if in fact any damage to the cliff will occur or whether remedial works will be required. Therefore, it is not possible at this stage to assess the likely impact of any remedial work which may have to be undertaken, as no such works may ever be required and the nature of any such work is simply unknown. She reiterates that Ramboll did not conclude that there would be such an impact. Regarding Broadhaven Bay, and the conclusion that it was not possible to assess currently the potential significant effects on features that "*currently do not exist*", she states that this is entirely different to suggesting that there would be an impact. In so far as the West Connacht Coast SAC was concerned and the requirement of management plans, these had been included in conditions to other consents to operate.

93. Ultimately, in her professional opinion, Ramboll was entirely correct in advising the first named respondent to condition the putting in place of management plans and protocols so that any possible future unplanned/unknown maintenance activities required will follow correct procedures at that time. Importantly, she avers that the preparation of the management plans will not negate any further screening for appropriate assessment if required in respect of possible future unplanned or unknown maintenance activities which may have to be undertaken. Such activities, it is noted, will still be subject to assessment under the 2011 Habitats Regulations.

94. Ms. Harrington, in her affidavit of 15th May, 2017 takes issue with many of the matters outlined in the statements of opposition of both the respondent and the notice party. She raises an issue as to whether the cumulative total rock placement and concrete mattressing had ever been properly assessed. She also takes issue with certain observations made by Ms. Neff in respect of the cliff at Glengad and reiterates that the attempted defence of a failure of and a refusal to proceed to a Stage 2 AA Assessment went against common sense and the precautionary principle which is "*intrinsic to proper adherence to the letter and the spirit of environmental law*". Ms. Harrington refers to a report of Dr. Gaynor, which had been prepared in 2007 as illustrating that there are two diametrically opposing expert views on the impacts on the dunes. Dr. Gaynor is a coastal ecologist, and at that time prepared a report on the impacts of Glengad solidarity camp on the dunes at Rossport. Dr. Gaynor in that report had referred to the poor rate of recovery from negative impacts caused by the presence of the solidarity camp and that it could take ten to fifteen years for the site to fully recover from the presence of such structures once they are removed. She had recommended that the solidarity camp should be moved from the dunes at Rossport and that the habitats be allowed to recover naturally. This report, it is asserted by Ms. Harrington, was not referenced in the voluminous documentation produced by the notice party to be assessed by the EIA or considered in the context of Stage 1 of the screening process.

95. Ms. Harrington further refers to the annual environmental report in respect of the operation of the gas refinery and states that seventeen incidents were reported in respect of alleged breaches of discharges, emissions etc. She also contends that there was no evidence adduced that a fit and proper examination was carried out in respect of the notice party which was a wholly owned subsidiary of its parent company, Royal Dutch Shell.

96. Ms. Harrington states that there is nothing in the respondents' statement of opposition or grounding affidavits concerning measures taken to protect the State and ultimately its citizens from liability, either for the imposition of punitive fines for breaches of environmental process/procedure and/or law, or from any possible future findings from the European Court of Justice in relation to the project. It is not possible to say that such damage will or will not ever occur. Ms. Harrington also raises a concern relating to the absence of any arrangement should the notice party decide to dispose of the asset.

97. In response to this these aspects of Ms. Harrington's affidavit, Ms. Neff, in a second affidavit sworn on 6th June, 2017 addresses what she describes as a number of factual inaccuracies in Ms. Harrington's affidavit. She disputes that there is a strict requirement, as contended for by Ms. Harrington, to establish that there will definitely be no adverse effect, rather that there is "*unlikely to be an effect*". She believes that Ms. Harington had confused the test applied at Stage 1 screening, with Stage 2. She reiterates that she was responsible for the preparation of the NISS that was submitted by the notice party prior to the application for consent to operate the pipeline.

98. Concerning Dr. Gaynor's report, Ms. Neff avers that the solidarity camp which was a subject of this report was located in the Glenamoy Bog Complex SAC which is the same SAC where the landfill valve installation is located and through which part of the pipeline runs. However, the solidarity camp was located on the dunes and some considerable distance from the landfall valve installation. While she was aware of Dr. Gaynor's report on the Glengad solidarity camp, it was not referenced in subsequent reports which were prepared on behalf of the notice party as it had *"no bearing on the Pipeline route which runs to the south of Annex 1 habitats at Glengad, completely avoiding the dune system and its associated fixed dune grassland".*

99. Ms. Neff also disputes certain comments and observations of the applicant regarding the status of the cliff at Glengad and whether it had a stony face until one was constructed by the notice party; or whether it had been excavated by the notice party with the resulting distress alleged to have been caused to returning parent birds. Ms. Neff avers that prior to construction, the landfall cliff at Glengad was a vertical stony face, largely devoid of vegetation and with no sand martin burrows present.

100. Ms. Reynolds in her second affidavit sworn on 6th June, 2017, also takes issue with certain matters raised by Ms. Harrington in her replying affidavit. She reiterates that Ramboll concluded, from an examination, analysis and evaluation of all relevant data, and information, that the operation of the Corrib Natural Gas Pipeline would have no significant effect on stony reef features.

101. Regarding the annual environmental report, this is a report prepared by the notice party and presents the environmental monitoring data with respect to the operation of the activity at the terminal. It is a report which must be prepared on an annual basis in accordance with the conditions attached to the notice party's revised industrial emissions licence, and lists complaints received in relation to the operation of the activity at the terminal and outlines actions taken. Ms. Reynolds states that such complaints have been dealt with and at the time of the swearing of her affidavit there were no open compliance investigations pending in relation to the operation of the activity of the terminal arising out of the 2016 reporting period.

102. Dealing with issues relating to previous planning permissions granted in October, 2004 in respect of the terminal, Ms. Reynolds confirms that as a result, *inter alia*, of certain conditions attached to the 2007 licence, and advancement in best practice and technology since December, 2003, that it was necessary to lodge a number of planning applications to amend certain aspects of the terminal planning permission. Mayo County Council confirmed by letter of 28th January, 2014 than an EIA was not required by or under the Planning and Developments Act 2000 as amended in respect of such amendments.

103. Ms. Orla Ryan, in her second affidavit sworn on behalf of the first respondent on 6th June, 2017, denies that the Minister signed the consent with indecent haste. The application was received on 18th August, 2015, over four months prior to the Minister making his final decision. During this time, considerable work was undertaken by the Minister's officials and advisers on his behalf which culminated in the Ramboll EIA and screening for AA reports dated 22nd December, 2015 and the submission to the Minister from the petroleum affairs division dated 23rd December, 2015. She avers that the Minister in making his decision had access to all relevant documentation and reviewed the relevant reports. It was clear that he was satisfied that he had adequate time to consider the material.

104. She disputes that there is any basis for the applicant's assertion that the State has an exposure to liability for potentially punitive and crippling costs at some future date. In so far as subsequent uncontrolled flaring referred to by the applicant is concerned, the impugned consent relates to the operation of the pipeline and not the gas terminal and therefore allegations in relation to uncontrolled flaring are not relevant to these proceedings.

Legal submissions of the applicant

105. The applicant, who is a lay litigant, prepared written legal submissions. Many of her arguments were in fact outlined in her affidavit and the affidavit of Mr Sweetman. In her submissions she raises a number of issues which might be described as being of an inquisitive nature – for example at para. 13 she submits that it is "*not clear*" where and at what definitive time the Irish and EU legal requirements for protection of the environment were fully complied with. She also raised queries regarding what she described as the legal relevance of the phased consent process, given the length of time from when the project was initiated in 1996 to the present day, in the context of the Minister having due regard to all relevant environmental law in his grant of the consent. She questioned how and at what time environmental law had been demonstrably shown to be adhered to which it is contended had an effect on the Glengad landfall site. At para. 15 of her submissions the applicant stated her belief that it would aid the Court if the respondents provided clarity in relation to complaint 2001/4619, SG (2001), A/8537 with particular reference to correspondence from the European Commission, Directorate General, Environment, to the Irish authorities dated 1st October, 2001. She described the importance of this document being to consider whether the original premise was flawed although she did not believe that this constituted an impermissible challenge to previous consents.

106. Ms. Harrington also submits that it is indisputable that the matter of alternatives was not considered; and she asks how and at what time has environmental law been demonstrably shown to be adhered to.

107. She indicated that she did not intend to make any legal argument in respect of *Commission v. Ireland*. Nevertheless, it is to be noted that the respondent and the notice party felt it necessary to address this decision as part of their response.

108. It is clear that in her submissions, and indeed in her replying affidavit, the applicant effectively sought to expand the grounds upon which she is seeking to review or question the consent or the process leading to its making. These include, for example, alleged indecent haste with which the first respondent had considered documentation and signed off on the consent, a flaring incident at the terminal, professional indemnity insurance issues (to which I have previously referred), conditions 19 and 20 of the consent which she submitted could not be met within the time frame set out and the requirement to consider alternatives within the EIA/AA process.

109. Ms. Harrington placed reliance on the decision of Humphreys J. in *Holohan v. An Bord Pleanála* [2017] IEHC 268 in the context of a letter from the legal and enforcement section of the European Commission and in the context of her contention that alternatives were not considered.

110. In *Holohan*, the applicant sought an order of *certiorari* quashing the decision of An Bord Pleanála which approved the proposed Kilkenny northern ring road extension. It was claimed that An Bord Pleanála had fallen into error in failing to consider the environmental effects of a main alternative study, that an appropriate assessment purportedly carried out by the respondent was deficient and that the respondent erred in approving the proposed development and endorsing a natural impact statement submitted by the County Council because the Council failed to carry out pre-consent ecological surveys. Additionally, it was claimed that the respondent had erred in granting a development consent in circumstances where there was a failure to establish whether derogation licences were required pursuant to the Habitats Directive and the Wildlife Act 1976, as amended. Humphreys J. had to consider whether the Habitats Directive meant that a natura impact statement must expressly address the impact of the proposed development on protected species and habitats located on the SAC site as well as species and habitats located outside its boundaries.

111. Ms. Harrington refers to *dicta* of Humphreys J. at para. 55 as follows:-

> *"A fourth alleged error is the contention that it has not been demonstrated that the methodology employed in the NIS is 'in accordance with the statutory requirements set out in the EU Habitats and Birds Directives' because it is submitted that there is no such statutory methodology. I read this as a reference to the Court of Justice caselaw on the exacting approach to be adopted in the AA. Ms. Butler says that the Court of Justice does not set out methodology. But that is to engage in semantics. EU law clearly requires quite an exacting approach to the appropriate assessment process. It is to that exacting approach that the inspector must be taken to be referring. One might argue as to whether the assessment is adequate or not, but it is hair-splitting to contest the use of the term 'methodology' to describe the approach required by statute and EU law."*

112. Ms. Harrington relies on para. 82 of Humphreys J.'s judgment where he referred to the decision of McMahon J. in *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59, a decision which he described as somewhat unsatisfactory on the question of whether a full assessment of alternatives is required, Humphreys J. stated that:-

> *"It is quite clear that a precautionary principle applies by virtue* inter alia *of art. 191 of the Treaty on the Functioning of the European Union, which states that 'union policy on the environment shall aim at a high level of protection…based on the precautionary principle' and on principles including 'that preventive action should be taken'. It is also clear that the overriding requirement of a purposive interpretation of EU law means that the directive must be given an interpretation which enhances its effectiveness and facilitates its application in a proportionate and transparent manner. These foundational principles of EU law are not fully taken into account in Klohn, although in fairness to McMahon J., that decision was handed down on 23rd April, 2008, which was after the adoption of the Lisbon Treaty but before it came into force on 1st December, 2009."*

Humphreys J. continued at para. 83:-

> *"Having regard to the precautionary principle, there can be no presumption in favour of any particular development, especially, one might add, developments effecting European sites where a high level of protection is required. Thus, it is not the concern of the court to equate development with 'progress', to ally itself with those who commend such progress, or to become unduly exercised as to whether such 'commendable progress' is being stifled by applicants. Rather, the function of the court on judicial review is to assess the lawfulness of the decision in question, in the overarching context of the Charter-level commitment to a high level of environmental protection and the need to ensure effective implementation of EU environmental law overall."*

113. It appears that Ms. Harrington also relies upon the decision in *Holohan* as authority for the proposition that judicial review operates as a form of limited appeal from a decision. In *Holohan*, at para. 99 Humphreys J. referred to a Bar Review article by Hogan, "Judicial Review, the doctrine of reasonableness and the immigration process", (2001), 6 Bar Rev. 6, at p. 329:-

> *"…it is curious that this statement should be regarded as so authoritative, since part of it is clearly wrong … it is beyond argument that certain central doctrines of judicial review – reasonableness, irrationality and proportionality – are, of course, concerned with the merits of the decision itself and not simply with the decision-making process. Although it may seem heretical to say so, in those cases, judicial review operates as a form of limited appeal from the decision-maker".*

Legal submissions of the respondents

114. The respondents submit that no legal basis or sufficient grounds have been advanced by the applicant upon which a valid legal challenge may be maintained against this decision of the Minister. It is to be observed that many of the legal arguments and submissions made by the parties are a repeat of, or are reflected in the various affidavits to which reference has been made above. The respondents categorise the central complaint made by the applicant as being that the entire of the Corrib gas field, from wellhead to the gas terminal and onwards to the pipe network connecting to the Bord Gais Éireann network should have been subject to a single integrated assessment. They submit that the decision of the European Court of Justice in *Commission v. Ireland* is authority for the exact opposite to what the applicant contends. Similarly, the respondents rely on the decision of Binchy J. in *Harrington v. Environmental Protection Agency* [2017] IEHC 767 to which the applicant was party. The principal finding in that judgment is directly applicable to the instant case. First, the court rejected the argument that the entire of the Corrib gas field should have been the subject of a single integrated assessment. There, Binchy J. placed reliance upon the judgment of the Supreme Court in *Martin v. An Bord Pleanála* [2008] 1 I.R. 336 and the judgment in *Commission v. Ireland* referred to above. He held that it was not a requirement of the EIA Directive to provide such an integrated or overarching assessment and that it was open to the Member State to entrust the task of EIA to several entities if they considered it appropriate.

115. The respondents also submit that, to the extent that the applicant seeks to challenge the validity of earlier consents, such is an impermissible collateral attack on decisions and consents which retain their validity and in respect of which the applicant is now out of time to challenge. The respondent cites the judgment of Binchy J. as authority for the proposition that the applicant in this case is not entitled to use the occasion of a subsequent consent application, to pursue an argument which involved questioning the validity of earlier consents, many years after they had been granted. It is submitted that the decision in *Harrington v. Environmental Protection Agency* is not only persuasive authority in this Court but it is an authority which the Court should apply. The notice party goes further and submits that the issue is res judicata as between the parties. Further, most of the development consents in respect of the Corrib gas field had been issued years earlier and in so far as the applicant may have wished to pursue a single assessment argument, the grounds of challenge crystallised, at the very latest, at the stage of consent to *construct* the pipeline (emphasis added). Any proceedings based on this argument should have been taken then and therefore the time to challenge the said consent has long since passed. It is also argued that in so far as the applicant wished to pursue an integrated assessment argument it could and should have been done at that time. Two of the original co-applicants in this case had raised the single assessment argument in the 2011 proceedings which were subject to compromise. Counsel for the respondent Mr. Simons S.C. argues that it is quite clear that in the proceedings leading up to the two decisions of 2011, one of the principal issues being considered and being assessed was precisely the impact of gas and what could be done to ensure that it was not a cause for concern to the public. It is argued that it is clear from the face of the decisions that it was a live issue in 2011 and it was dealt with. If the applicant had any complaint in relation to this she should have taken judicial review proceedings at that stage.

116. Reliance is placed by the respondent on the decision of the Supreme Court in *Sweetman v. An Bord Pleanála* [2018] IESC 1. There the court emphasised the requirement of legal certainty and observed that the rationale behind the collateral attack jurisprudence is that a party having the benefit of an administrative decision which is not challenged within any legally mandated timeframe, should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings. Applying that jurisprudence to the instant case, the respondent submits that Ms. Harrington, who was an objector, was not entitled to use of the occasion of challenge to this consent in an attempt to pursue an argument which involved questioning the validity of previous consents or permissions, many years after they had been granted.

117. In *Commission v. Ireland*, the Commission had criticised the transposition by the Irish legislation of Articles 2 to 4 of Directive 85/337, on the grounds that the procedures put in place by that legislation did not ensure full compliance with those articles where several national authorities take part in the decision making process. The Commission maintained that it had identified a lacuna in the Irish legislation. While the court had made a decision that there was a gap in the legislation, Mr. Simons S.C. argues that what was significant about this is that the gap was historic and has been amended by regulations in 2012. It was mandatory for the Minister to call for an EIA because the length of the pipeline exceeded the threshold of 40 kilometres. Counsel further submits that it did not

follow that EIAs carried out prior to 2008 were in any way suspect or defective. If they were, they would be covered by the principle of legal certainty and time limits would apply; and it is not and has never been suggested that a result of the decision in *Commission v. Ireland* that every single planning consent process prior to 2008 had to be reopened. In any event, that is not a case that the applicant was making in these proceedings.

118. The respondents further submit that the applicant has failed to particularise her claim as she was required to do pursuant to O. 84, r. 20(3) of the Rules of the Superior Courts and rely on *dicta* of Cregan J. in *Malone v. Mayo County Council* [2017] IEHC 300 as authority for the proposition that it is impermissible to attempt to proceed on vaguely pleaded grounds which do not provide sufficient clarity to enable the parties or the court to understand the nature of the legal case being made by the applicant. It is submitted that the applicant makes vague complaints about condition 2 of the consent and that, in any event, the mitigation measures and monitoring controls provided in that condition had been assessed by Ramboll as part of the application for consent and that it was obvious that the management plans therein referred to include those measures proposed and assessed as part of the application. Condition 2 does not in any way affect the conclusion reached by Ramboll, in the context of its EIA, that there would be no likely effects on the environment from the operation of the pipeline. The condition does not relate to the effectiveness of any mitigation but simply requires that management plans and procedures be prepared to ensure the mitigation and monitoring controls are appropriately monitored and implemented.

119. Regarding any alleged deficiencies in the screening assessment, the respondent argues that at no stage does the applicant claim that the Minister was misdirected in law as to the appropriate test nor does she make the case that the conclusions reached in the report were unreasonable. The respondent therefore maintains that that is the beginning and end of the habitats case argument. The applicant makes no specific criticism of what was done by the Minister and even though what was done is considerably detailed, it is submitted that any reference to the screening process in the pleadings is unclear and imprecise. No details are submitted by the applicant, nor is it pleaded why a stage 2 screening process should have been undertaken. It is also submitted that any allegation that the decision was irrational or contrary to plain reason and sense was not elaborated upon, with sufficient particularity, or at all.

120. Concerning reliance by the applicant on the *Holohan* decision, Mr. Simons S.C. states that a key distinction between that case and the instant case is that there, the Board had inserted a standard condition requiring details of construction management. This was to be agreed subsequently. However, the difficulty for the Board was that under the Roads Acts, the developer was the local authority. The concern expressed by Humphreys J. was that a condition leaving over matters to be agreed was effectively permitting the developer unilaterally to decide on matters of detail. Mr. Simons S.C. submits that this is a key point of distinction between the cases because here, the management plans are to be agreed by the independent consent authority. There is no question of the developer self-certifying or self-agreeing. In addition, in *Holohan*, the matter had proceeded to a stage 2 appropriate assessment and therefore the board had made a determination that the project required a full stage 2 appropriate assessment. On the facts of the instant case, for the reasons which were set out in the Ramboll report, it was decided that the screening exercise was negative. Further, it is contended that Humphreys J. had to address his mind to what constituted a main alternative for the purposes of the EIA directive. Under the EIA Directive, Article 5, the developer must outline, through an EIA submitted, the main alternatives considered by him. The debate in that case was whether something that was discounted at an earlier stage could ever be said to be an alternative considered by the developer. Counsel noted that Humphreys J. ultimately submitted to the European Court of Justice a question as to who decides what the main alternatives are. In other words, is it the developer or does An Bord Pleanála have to objectively consider what should have been taken into account. Again, the respondent takes issue with the fact that the "*alternatives*" has not been pleaded and therefore is not in the case. In any event, the respondents submit that the concept of alternatives has to be seen in context and at the stage of the licence for the operation consent. The real debate in relation to alternatives was at the construction stage in 2011 relating to where the pipeline should be positioned and the pressure it should be at. Once again, the first respondent makes the case that if the applicant was dissatisfied with the consent to construct, it should have been challenged at that time. By the time the consent the subject matter of these proceedings came to be decided, the pipe was *in situ* and there was no reality in saying that a different route should have been adopted. In 2011, there was controversy as to where the pipe should go and that was resolved in a particular way. There was no factual basis for the applicant's contention that there was no consideration of alternatives. In addition, the respondents submit that the applicant does not state what such alternatives should have been.

121. Regarding the suggestion of indecent haste, it is submitted that there is no minimum period within which an application may be determined and that in reality the application was progressing over a period of months, drafts were being prepared and once the report came in in final form, a submission was put together and sent to the Minister. In any event, this is not an argument which was pleaded. Regarding this and all other unpleaded matters, reliance is placed on *Alen-Buckley v. An Bord Pleanála (No. 2)* [2017] IEHC 541, where Haughton J. observed as follows:-

> *"15. The rules of pleading governing judicial review are quite clear and require applicants to state specifically each ground advanced and to particularise matters as appropriate. Linking new matters back to generally pleaded grounds is not permissible, nor is pointing to information which was before the Board. The Court is concerned with the contents of the documentation before the Board only in the context of arguments which have been correctly pleaded.*
>
> *16. Where new arguments or evidence arises, an application should be made to amend the pleadings to include such arguments or evidence (as per O.84, r. 20, s.4)."*

122. It is accepted that the Minister is obliged to publish notice of his decision in *Iris Oifigiúil* and in one or more newspapers circulating in the area at the proposed pipeline. He is also obliged to make arrangements to make the statement and information on the decision available for inspection by members of the public during a period to be specified by the Minister or the Commission as the case may be. The section does not seem to suggest that there is an obligation, statutorily imposed, to notify consultees. Further, Mr. Simons S.C. submits that the publication or notification does not have to be in any particular form. On the evidence the publication requirements had been complied with.

123. The notice party made submissions largely supportive of the respondent's submission. The purpose of the EIA report was to determine whether the operation of the pipeline, either alone or cumulatively with other plans and projects, was likely to have significant effects on the environment, something which Ramboll identified, described and assessed in its report. Mr. Murray S.C., on behalf of the notice party, submits that there was no reasonable basis for the applicant's challenge to the Minister's adoption of the Stage 1 screening report, which report concluded that the operation of the pipeline would not be likely to have significant effects on the European sites, and that there was therefore no requirement for the Minister to proceed to the Stage 2 Appropriate Assessment.

124. The applicant upon whom the onus of proof lies had not adduced any reasonable evidence sufficient to challenge the first respondent's decision in this regard. The notice party relies on the decision of Hedigan J. in *Rossport Properties v. An Bord Pleanála* [2014] IEHC 557. They also rely on *Kelly v. An Bord Pleanála* [2019] IEHC 84 and *Ratheniska v. An Bord Pleanála* [2015] IEHC 18 as

authority for the proposition that the Minister can adopt, in whole or in part, any reports prepared on his behalf.

125. In so far as alleged inadequacies in the EIS are concerned, the notice party argues that it is a matter for the first respondent to consider the adequacy of the information included in an EIS, although this may in itself be subject to a review in accordance with the principles set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. In *People Over Wind v. An Bord Pleanála* [2015] IEHC 271, Haughton J. at para. 98 stated as follows:-

> *"It has been consistently held in the courts that it is for the deciding authority to determine whether the EIS and the information contained therein satisfies the requirements of the Regulations and is adequate."*

Later, Haughton J. re-emphasised that the standard of review applicable to the board's decision in that regard was that set out in *O'Keeffe*. Haughton J. quoted the decision of Finlay C.J. in *O'Keeffe*, where at para. 101 he stated:-

> *"The Court can not interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."*

In order to show that the board has acted irrationally, it is necessary for the applicant to establish that the board "*had before it no relevant material which would support its decision".*

Decision

126. I have set out the background to the current proceedings in some detail. It is clear that a multitude of issues have been addressed and canvassed through the years in the context of the Corrib project. However, it is important to reiterate that on this application for judicial review, this Court is concerned with a challenge to the legality of the decision of the first respondent to grant a consent to operate of the pipeline. Further, it is clear from the authorities that this Court when considering the grounds of challenge, submissions or arguments is concerned, and concerned only, with the grounds upon which leave to apply for judicial review was granted and the matters contained in statement of grounds and supporting affidavits. Adopting *dicta* of Haughton J in *Alen-Buckley v. An Bord Pleanála (No.2),* matters that fall outside the grounds upon which such leave was granted do not come within the remit of this Court on this review and therefore despite the applicant's strongly held and passionate views on certain matters, unless they are grounds or a basis upon which leave was granted, cannot come within the Court's consideration in deciding whether the Minister acted lawfully when granting the consent. It follows that the Court should exclude from its consideration as grounds or basis upon which a challenge might be maintained, arguments and submission concerning a number of matters, particularly those referred to at para. 69(6) above.

127. It is also important to recall the purpose of judicial review in a case such as this. A useful summary is contained in Fordham, *Judicial Review Handbook*, 5th Ed., (Hart Publishing, 2008) at p. 7 as follows:-

> *"Para. 2.1: Supervising public authorities. Judicial review is a central control mechanism of administrative law (public law) by which the judiciary take the historic constitutional responsibility of protecting against abuses of power by public authorities. It is an important safeguard which promotes the public interest, assists public bodies to act lawfully, and ensures that they are not above the law, and protects the rights and interests of those affected by the exercise of public authority powers. This special supervisory jurisdiction is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done but whether there is some recognisable public law wrong. The procedure has evolved and the rules have been reformed and refined."*

Thus, it is necessary for the applicant to satisfy the Court that a clear illegality has taken place – *i.e*. that the Minister had either acted outside, or not in accordance with, his powers or that the decision which he has come to is an unreasonable and irrational one in law. It seems to me that provided the Minister has a reasonable basis and evidence before him to support the conclusion made by him in arriving at the decision, it is not open to the Court to review such a decision on the basis that others or indeed the Court might have made a different decision.

128. This Court agrees with the respondents and the notice party that certain of the grounds put forward by the applicant in this case upon which she seeks to challenge the decision of the Minister to provide the relevant consent to operate are based on a fundamental misconception by the applicant of the proper interpretation of the CJEU's judgment in *Commission v. Ireland*. This matter was considered by Binchy J. in *Harrington v. Environmental Protection Agency*, wherein he rejected the argument that the entire of the Corrib gas field should have been the subject of a single integrated assessment. Referring to the decision of the Supreme Court in *Martin v. An Bord Pleanála* [2008] 1 I.R. 336 and also to the decision in *Commission v. Ireland*, Binchy J. stated at para. 61 as follows:-

> *"The applicant's other principal argument under this heading is a legal rather than a factual argument to the effect that the entire project should be the subject of a single, integrated assessment, but it is very clear from the authorities referred to above, i.e. Martin v. An Bord Pleanala and a Case C-50/09, that not only is this argument unsupported by the authorities, but these authorities make it clear that this is not a requirement of the EIA Directive and that it is open to the competent authorities in Member States to entrust the task of EIA to several entities if they so consider appropriate. Accordingly, I am satisfied that the applicant has failed to establish that the EIA conducted by the EPA was not carried out in accordance with the EIA Directive. The applicant's challenge to the issue of the licences insofar as it is grounded upon a failure to conduct an EIA in accordance with the EIA Directive must therefore fail."*

129. In *Martin v. An Bord Pleanála* [2008] 1 I.R. 336, Murray C.J. observed at p. 362:-

> *"104. It is also relevant to note that nowhere in the directive is it in any sense suggested that one competent body must carry out a 'global assessment' nor a 'single assessment' of the relevant environmental factors and the interaction between them. Those terms simply do not appear in it.*
>
> *105. On the contrary the directive, having specifically envisaged that more than one authority may be responsible at different stages for exercising obligations arising from the directive expressly acknowledged in article 2(2) that the 'environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this directive'. In so stating, it is manifestly clear that the directive did not envisage that that so called integrated assessment, that is to say the interaction between the various factors, could only be carried out by one competent*

authority with global responsibility for that."

Later, the learned judge stated as follows at p. 363:-

> *"108. It seems to me that it would be absurd to interpret the directive so as to suggest that in permitting two or more competent bodies to carry out an environmental impact assessment of the factors referred to in article 3, including the interaction between them, by each body at the relevant stage of the process with which it was concerned, that nonetheless it was intended that there must be one body only that carries out an assessment of all the factors as if there was only one stage in the process and it was the only body making the assessment. This would run contrary to the plain meaning of the provisions and scheme of the directive."*

130. I have considered the arguments of the applicant, the respondents and the notice party, and I am satisfied based on the decision of Binchy J. in *Harrington v. Environmental Protection Agency* and that of the Supreme Court in *Martin v. An Bord Pleanála* that any grounds for challenge by the applicant in this case, which seek to rely, as a fundamental premise, and without more, on the stated requirement for an overarching single integrated assessment, must fail. No clear authority for the contrary proposition was cited by the applicant and in the circumstances it is appropriate that the decision and *dicta* of Binchy J. in *Harrington v. Environmental Protection Agency* (noting as I do that the applicant herein was the applicant in that case) must apply *mutatis mutandis* in respect of the challenge to the consent, as it did to the licence. I also accept the contention of the respondents and notice party that any reliance placed by the applicant on the decision in *Commission v. Ireland*, for the reasons outlined by Binchy J. in *Harrington v. Environmental Protection Agency*, is misplaced. While the notice party contends that the matter is *res judicata*, I do not believe it is necessary to so conclude in the light of my decision that the decision of Binchy J. applies to the arguments made by the applicant on this point.

131. I have outlined in some detail above the nature of the information which was before the Minister when he decided to grant his consent to operate the pipeline. Ramboll prepared an EIA. In doing so it assessed the documentation submitted by the notice party to ascertain whether all operational aspects of the pipeline were comprehensively considered in the application. As the respondents and notice party submit, Ramboll also reviewed whether the documentation considered any changes to the project since the 2011 consent to construct. It considered changes to new environmental designations and new environmental information, the cumulative impacts of the various different elements of the Corrib gas field development and what they describe as any other existing, new or planned neighbouring developments. Ramboll concluded that the documentation provided in the application was adequate for completing the EIA and no further information was required to undertake that assessment. The notice party and the respondents submit that the briefing note prepared by Ms. Orla Ryan reminded the Minister of the requirement that the information in the EIS was adequate. Ms. Ryan also advised the Minister that the EIS was adequate and could only be challenged on the basis that it was irrational.

132. The applicant has made a number of submissions in relation to the adequacy of the EIA, some of which are vague or based on beliefs, and most of which are unsupported by evidence, expert or otherwise. There is no expert opinion or evidence before the Court to the effect that from an environmental impact perspective, there was a failure on the part of the Minister to take into account relevant matters or to suggest that he took into account irrelevant considerations when arriving at his decision. This Court should be slow to intervene on the basis of submissions such as made by the applicant in this case. The reports considered by the Minister are detailed and considered documents. No specific shortcoming is pleaded by Ms. Harrington nor, in my view, is any such clear shortcoming or alleged illegality significantly advanced in the submissions before the Court. While Ms. Harrington contends that there is no evidence that the screening process was assessed by the Minister and his advisors was based on anything other than the original Natura impact screening statement and that this was deficient, in truth, no real evidence has been advanced of any deficiency or illegality in this regard.

133. Similar considerations apply in the context of the applicant's arguments regarding Condition 2. I do not believe that it is open to me to conclude that an illegality has been established when one considers the extensive evidence placed before the court by the respondent, particularly the extensive information and reports referred to in Ms. Ryan's briefing note which were considered by the first respondent and to which I have referred to in some detail above. This is supported by the evidence on affidavit of Ms. Neff and Ms. Reynolds on behalf of the notice party. To adopt and adapt *dicta* of Clarke J. in *Sweetman v. An Bord Pleanála* [2008] 1 I.R. 277, on a fair reading of the reports, the extensive EIA report prepared by Ramboll dated 22nd December, 2015, the Ramboll Screening for AA report prepared by Ramboll dated 22nd December, 2015 (which itself considered as part of the assessment the very extensive NISS prepared and collated by Ms. Neff on behalf of the notice party, and submitted as part of the application for the licence), the first respondent was entitled to be satisfied that there would be no likely significant impacts on the European sites referred to therein. Clarke J. stated in *Sweetman* at p. 306:-

> *"10.1 The fact that certain marginal doubts were expressed about this does not alter that underlying conclusion. There was more than ample material in the E.I.S. from which the inspector could reach that conclusion. While raising the issue in general terms the applicant did not put forward any specific evidence or argument to the first respondent to suggest that the conclusions in the E.I.S. were incorrect.*
>
> *10.2 It would, therefore, appear to be appropriate to characterise the decision of the inspector as amounting to a decision that the risk of any adverse consequences was so small that it did not warrant refusing the application but that, for an abundance of caution, it was appropriate to impose a monitoring requirement so that, not only the local authority but the public generally, could be made immediately aware of any unexpected consequences."*

Later in his judgment, Clarke J. stated that it did not appear to him that it could be said that the inspector considered any inappropriate factors, failed to consider any appropriate factors or came to an unreasonable decision in the materials. In my view, similar considerations apply to the decision of the first respondent in respect of the EIA and screening for appropriate assessment in this case, and their adoption. To adopt Clarke J.'s wording, while raising issues in general terms the applicant did not put forward any specific evidence or argument to suggest that the conclusions in the EIS were incorrect. The Minister took into consideration the materials which were placed before him when arriving at his decision to provide the consent. These included the opinion and advices of Ramboll in respect of the requirement for an appropriate assessment. Nothing in the applicant's case suggests that immaterial or irrelevant matters were taken into consideration or that there was a failure to take into account relevant considerations.

134. I am therefore not satisfied that the applicant has made out a case of irrationality. I am satisfied that the applicant has failed to discharge the onus of proving that the Minister, when he made his decision, did not have before him adequate information. In my view, on the evidence submitted on this application it cannot reasonably be said that there was no material before the Minister upon which the decision to grant the consent could be reached. The Minister had the benefit of numerous reports and documents relating to the effect which the operation of the pipeline may have on the surrounding environment. While the applicant has purported to criticise a number of aspects of the reports of the briefing note of Ms. Ryan, the reports of Ramboll and Mr. Fox, most of the

submissions and challenges made by the applicant both in writing and orally, were of an inquisitive nature, querying the basis on which certain conclusions were arrived at and raising questions as to whether further enquiries should take place. It is no part of the function of this Court in an application for judicial review to convert itself into a tribunal of inquiry. The fact that an applicant may raise queries regarding the basis upon which conclusions were arrived at by such experts, no matter how strongly he or she feels about such questions or issues, or the adoption of them by the Minister when making the decision to grant a consent or the granting of such consent, in this Court's view, can not and should not be elevated into the status of a valid and legal challenge to the reasonableness of the decision taken by the Minister.

135. Further, with regard to the applicant's challenge that the Minister had failed to carry out a Stage 2 appropriate assessment and her reliance on the imposition of Condition 2 of the consent in support for such a contention, Article 6(3) of the Habitats Directive provides as follows:-

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

136. I have considered both the decisions of Hedigan J. in *Rossmore Properties Ltd v. An Bord Pleanála* [2014] IEHC 557 and the decision of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400. Again, in the context of this aspect of the case, it seems to me that no sufficient evidential or legal basis has been advanced by the applicant such that this Court could conclude that there was an irrationality or illegality in the Minister's decision to adopt the Ramboll screening report, or that he has insufficient information before him to so do. In *Rossmore*, Hedigan J. considered the difference between the test that is to be applied at Stage 1, and the test to be applied at Stage 2 of the appropriate assessment process. That decision concerned an application for a certificate for leave to appeal the court's substantive judgment in the proceedings. A question which arose for certification related to the standard that the court should use in assessing a decision taken by a competent authority on the appropriate assessment and screening for appropriate assessment. Hedigan J. distinguished the decision in *Kelly*, stating that in his opinion, *Kelly* concerned the approach to be adopted in a Stage 2 appropriate assessment, which required a very specific type of analysis, evaluation and decision. Hedigan J. continued at para. 4:-

> *"This is because it occurs where, on a Stage One screening, it has been determined that it is likely a certain project will have a significant effect on a European site. Thus, she finds a stage two assessment must be accompanied by a more detailed reasoning than would occur in the wider jurisdiction of a normal 'planning decision'. I think the rationale of this decision is limited to stage two assessments because the stage two appropriate assessment with which it deals must analyse the probable (likely) effects the better to deal with them or justify outruling them. Where the finding is that there is no such likelihood of effects, then there is, by definition, very much less to find, analyse and assess. That seems to be exactly the case here. The Board determined, on the basis of the Eirgrid and FERS report that there was no need for a Stage Two assessment. Thus, the high level of reasoning required in Kelly did not arise here. Finlay Geoghegan J. in the last sentence of para. 49 held that different levels of reason were required by different types of decision. Here, the decision at Stage One not to have a Stage Two assessment required much less elaborate reasoning than that required upon such a Stage Two assessment."*

It appears to me that such reasoning applies in this case also. I am not satisfied that the applicant has adduced any specific or adequate reasons or evidence to demonstrate any illegality or irrationality in relation to the first respondent's decision in this regard. I also accept the submissions of the respondent on the relevance and applicability of the *Holohan* decision, which for the reasons outlined above, concerned an entirely different factual circumstance. In so far as it might be suggested that a different test for review was considered or adopted in that case, it should be observed that in *Holohan* Humphreys J. stated:-

> *"101. The answer appearing from case law to this question is that the court cannot decide that the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong (or even clearly wrong) on the merits, if there is material to support it and if the conclusion is reached by a logical process, without factual error and supported by reasons, and does not disproportionately interfere with rights.*
>
> *102. The underlying reason why a court should not be permitted to find that an administrative or executive decision is wrong, or even clearly wrong, is the separation of powers. To do so the court would, as Lord Brightman said, 'be itself guilty of usurping power' (Chief Constable of North Wales Police, p. 1173)."*

137. In my view the applicant's submission that the Minister unlawfully delegated his function under the EIA Directive to a private consultancy is unsustainable. The decision was in fact one taken by the first respondent and I agree with the submissions of the respondent and notice party in this regard. The provisions of s. 40B(7) of the Act of 1976 empowers the Minister:-

> *"In carrying out the consideration and the environmental impact assessment of the application, the Commission or the Minister may have regard to, and adopt in the whole or in part, any reports prepared by officers of the Minister or the Commission, as the case may be, or by consultants, experts or other advisors."*

Neither in the evidence before this Court, nor in her submissions, has the applicant called into question in any significant or reasonable way the competency of Ramboll to conduct such an EIA in respect of the operation of the pipeline. Decisions such as *Buckley v. An Bord Pleanála* and *Kelly v. An Bord Pleanála*, in my view make it clear that it is within the competence of the Minister to adopt an appropriate assessment and by extension a screening report for appropriate assessment, as his own. In *Buckley*, (at para. 151) Cregan J. was satisfied on the evidence that An Bord Pleanála in adopting an inspector's report had made a determination on an appropriate assessment as he was required to do under legislation.

138. The applicant contends that the Minister failed to notify the general public of the decision to grant the consent to operate simultaneously with the notification to the notice party. I am not satisfied that the facts, as deposed on affidavit, bear this out. Even if they did, unless it was a statutory requirement that notification to the notice party and to the general public be simultaneous, it is difficult to understand any legal basis upon which notification of the making of the decision could have the effect of vitiating such consent. Indeed, the applicant in oral submissions before the Court did not suggest that the consent might be vitiated in such manner. Further, the applicant in submissions conceded that she was not prejudiced by any delay, even if there was an obligation to notify her personally. It may be that the delay in notification might provide grounds for the extension of time in which to bring a challenge by way of judicial review, but in and of itself, no authority has been open to this Court to substantiate such allegations of

illegality or that any delay in notification might vitiate the consent. The Court must therefore reject this ground of challenge also.

139. With regard to the contention of the applicant that this Court should refer a question for determination of the European Court of Justice under Article 234 of the Treaty, I am not satisfied that the applicant has established a case that such a question should be referred either in relation to the test which should be applied (as outlined in *Kelly* and in *Sweetman*) or the wording of that test. I am not satisfied that the applicant has identified any particular point of law which arises relating to interpretation of European legislation for which the guidance of the European Court of Justice is required. The notice party has submitted on this point that the law in this regard an *acte clair*, which I accept.

140. For the reasons stated, I must refuse the applicant's application for judicial review.