THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 52 JR]

BETWEEN

LORD BALLYEDMOND

APPLICANT

AND
THE COMMISSION FOR ENERGY REGULATION
AND MICHAEL WARD

RESPONDENTS

AND
BGE (UK) LIMITED

NOTICE PARTY

Judgment of Mr. Justice Clarke delivered on the 22nd day of June, 2006

1. Introduction

1.1 The notice party is a subsidiary of Bord Gáis Éireann ("BGE"). It is engaged in a project for the construction of a natural gas transmission pipeline from Gormanstown in Co. Meath to the border with Northern Ireland. The purpose of the pipeline is to provide security of supply for natural gas in Northern Ireland and to facilitate the supply of natural gas to certain towns along the route. BGE is mandated, under s. 8(1) of the Gas Act, 1976 to develop a gas supply network.

1.2 A number of permissions are required in order that the project can go ahead. Firstly consent is required from the first named respondent ("the Commission") for the construction of the pipeline under the procedure regulated by s. 39A of the Gas Act, 1976, as inserted by s. 12 of the Gas (Interim) (Regulation) Act, 2002. Secondly, it was, in practice, necessary for the notice party to seek to acquire compulsorily rights over land along the proposed route in order that the pipeline might be constructed. Such orders are governed by s. 32 of the Gas Act, 1976 as amended and adopted by s. 7(2) of the Gas (Interim Regulation) Act, 2002. In substance the rights to be acquired consisted of an entitlement to enter onto the lands for the purposes of constructing the pipeline together with a permanent way-leave in respect of the pipeline once constructed. Finally, a licence will require to be granted by the Commission in order to operate the pipeline.

1.3 The applicant ("Lord Ballyedmond") is a landowner along the route of the proposed pipeline. After a process, which I will describe in the course of this judgment, the Commission made the Acquisition (Right Over Land) (No. SN 154) Order 2005 ("the order") on 7th December, 2005. That order was made under the Gas Act, 1976 as a result of an application by the notice party for an acquisition order over the land set out in the schedule to the order. The lands are situate in the townland of Dungooley, Co. Louth and are owned by Lord Ballyedmond. Other land owners along the proposed route were the subject of other acquisition orders as a result of a similar process. It would appear that separate orders were made in respect of each land holding.

1.4 Lord Ballyedmond seeks to quash the order on three grounds:-

> (a) It is contended that the decision to grant the order was disproportionate and/or irrational in that it was based on a proposition for which no evidence was given, namely, that the increased costs associated with an alternative route proposed by Lord Ballyedmond were of such significance that it was preferable to follow the route sought by the notice party;
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> (b) It is contended that the interference with the applicant's property rights as guaranteed by Article 40.3.2 and Article 43 of the Constitution and as interpreted in the light of the European Convention on Human Rights Act, 2003, was unjustified and disproportionate in the absence of evidence being given at the inquiry held to consider the project, to support the proposition upon which the interference was based. The underlying basis for this ground is substantially the same as that referred to at (a) above.
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> (c) The applicant contends that there was an absence of fair procedures in the inquiry hearing referred to, as the cost issue (to which I have referred under grounds (a) and (b)) was not adequately notified or dealt with in such a manner to give Lord Ballyedmond a reasonable opportunity of dealing with same.

1.5 It can be seen, therefore, that each of the three grounds stems from a contention arising out of the decision of the Commission on what might be termed the "costs issue". It is therefore necessary to set out the course of the acquisition proceedings with particular reference to the emergence of that issue. It should also be noted that Lord Ballyedmond challenges the report of the second named respondent ("the inspector") who was an inspector appointed to conduct the inquiry hearing and report on it to the Commission. An additional issue arises as to whether it is open, in the circumstances, to challenge the report of the inspector, in addition to challenging the final decision of the Commission made subsequent to the hearing conducted by and report of the inspector.

2. The Acquisition Process

2.1 Under the second schedule of the Gas Act, 1976, where an application is made by Bord Gáis Éireann to the Commission for an acquisition order, and where an objection is received, the Commission is required (if requested by the objector) to direct that an oral hearing be conducted. The statutory scheme further provides that in the event of there being an oral hearing, the Commission is to appoint a person to conduct the hearing and to report to the Commission on the hearing. As a result of, amongst other things, the objection of Lord Ballyedmond, the Commission appointed the inspector to conduct an oral hearing.

2.2 By way of background it should be noted that prior to the formal process for acquisition, there had been contact between Lord Ballyedmond and the notice party. During an initial meeting and consultation between the parties the notice party informed Lord Ballyedmond that its preferred route for the pipeline was the most direct route across Lord Ballyedmond's property. This route became known as route A. Lord Ballyedmond in turn proposed an alternative route which became known as route B. That route was undoubtedly longer than route A but took the pipeline further away from Lord Ballyedmond's house. Route B also required that the pipeline travel through the lands of other adjoining landowners. In reply the notice party proposed a compromise route (which became known as route C) which, it was suggested, represented an acceptable balance of both the notice parties and Lord Ballyedmond's rights. The compromise route was not acceptable to Lord Ballyedmond.

2.3 With the permission of Lord Ballyedmond, the notice party entered onto the property for the purposes of carrying out an ecological, archaeological and engineering survey of route B. On 1st July, 2005, the notice party sent a report dated June 2005, (which had been prepared by Kirk McClure Morton) ("the report") to Lord Ballyedmond advisors. The report assessed the feasibility of routes A, B and C. It would also appear that the report was sent to the Commission on the same date. The report contained a comparative analysis of each of the three routes based on the results of the surveys. The report recommended route A. It should be noted that the report was concerned with the optimum route for the whole of the pipeline and sets out the range of factors such as safety, environmental construction, cost and the like taken into account.

2.4 Thereafter an oral hearing took place on 27th and 28th September, 2005, for the purposes of hearing objections to a number of acquisition orders sought in relation to the construction of the pipeline, including the objection of Lord Ballyedmond.

2.5 The factual contention which lies behind each of the three grounds upon which it is sought to have both the inspector's report and the Commission's order quashed, suggests that the entire focus of the hearing, insofar as it related to Lord Ballyedmond's lands related to engineering, ecological and archaeological issues and not a cost issue. The decision, however, it is said, was based largely if not exclusively on the costs issue. It will be necessary to return to the hearing in due course.

2.6 The inspector produced a report for the Commission dated 26th October, 2005. The inspector concluded that route A was the most economic route and route B the least economic. The inspector concluded that the unit cost of construction of route A would be less than route B because the land along route A was good agricultural land, while there were sections of poorly drained land along route B which would have the effect of increasing construction costs. In addition the inspector expressed the view that route B would present engineering problems of crossing drainage ditches, trench excavations, plant movement and other similar matters, all of which could be overcome but with some difficulty and cost.

2.7 The inspector further expressed the view that neither the ecological nor archaeological factors were in themselves of sufficient substance to make a choice between route A and route B. On that basis the inspector in his report recommended that the Commission should grant permission for the construction of the pipeline as a whole and secondly, make the acquisition orders sought by the notice party including the order affecting Lord Ballyedmond's property which is the subject of this case. That order provides for the rights necessary to construct along Route A.

2.8 Thereafter the Commission considered the inspector's report. It would appear that officials of the Commission made a presentation to the Commission itself from which the reasons for the Commission's decision may be inferred. Insofar as it related to Lord Ballyedmond's lands the relevant portion of the submission reads as follows:-

> "Ballyedmond (SN. 054N)
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> Issue: Preferred route B (BGE-Route A, proposed compromise route C) -
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> Finding:
>
> (i) No reason given for rejection of A, didn't accept compromise C,
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> (ii) Neither ecological/archaeological factor substantive A vs. B,
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> Engineering/Cost sig – Poorly drained land, longer length (244m
>
> i.e. 25% longer);
>
> (iii) No. other landowners affected routes B and C,
>
> (iv) Consent granted BGE may agree alternative route with landowner."

2.9 There does not seem to be a basis for coming to any other view than that those reasons represented the basis upon which the Commission decided to make the order.

Against that background it is next necessary to turn to the legal principles applicable to a challenge of the type involved in these proceedings.

3. The Law

3.1 I had recent occasion to consider the authorities applicable to a challenge to a decision of an expert body in *Ashford Castle Limited v. SIPTU* (Unreported, High Court, Clarke J., 21st June, 2006). While that case involved an appeal on a point of law under the relevant statute it seems to me that the jurisprudence of the courts concerning the deference which is properly paid by the courts to decisions of expert bodies is, at least in general terms, equally applicable to an application for judicial review. Indeed, if anything, the circumstances in which it may be possible to successfully obtain an order of *certiorari* may be more limited than those in which it may be proper for a court which to allow an appeal in circumstances where the court is given an express statutory jurisdiction to deal with an issue by way of appeal where that appeal is confined to a point of law. Having reviewed authorities such as Henry Denny and Sons (Ireland) Limited, trading as *Kerry Foods v. Minister for Social Welfare* [1998] 1 I.R. 34; *Orange v. Director of Telecommunication Regulations and Another (No. 1)* [2002] 4 I.R. 159 and others set out in the course of the judgment, I added the following at paras. 5.5 to 5.10:-

> "5.5 To those authorities I would merely add one further observation. The tasks which administrative bodies are given under statute vary significantly. The issues which have to be decided can be of very different types. At one end of the spectrum are issues which involve the same sort of mixed questions of law and fact with which the courts are frequently faced. A person may, for example, be entitled to a social welfare benefit provided that a certain set of facts, as specified by statute, are found to exist. The issue at a hearing within the social welfare system may well, therefore, turn on whether, as a matter of fact, the necessary qualifying requirements have been established or disqualifying requirements have been shown to exist. In such cases the findings of fact will be very similar to the facts which will be found by a court should a comparable issue arise in judicial proceedings.
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> 5.6 At the other end of the spectrum, expert bodies may be required to bring to bear upon a situation a great deal of their own expertise in relation to matters which involve the exercise of an expert judgment. Bodies charged with, for example, roles in the planning process are required to exercise a judgment as to what might be the proper planning and

development of an area. Obviously in coming to such a view the relevant bodies are required to have regard to the matters which the law specifies (such as, for example, a development plan). However a great deal of the expertise of the body will be concerned with exercising a planning judgment independent of questions of disputed fact. In such cases the underlying facts are normally not in dispute. Questions of expert opinion (such as the likely effect of a proposed development) may well be in dispute and may be resolved, in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence. However above and beyond the resolution of any such issue of expert fact, the authority concerned will also have to bring to bear its own expertise on what is the proper planning and development of an area.

5.7 Some of the cases use terminology such as "evidence" and "finding of fact" which are borrowed from the approach of the courts. That terminology is entirely apposite where the issue which the statutory body has to decide is towards the end of the spectrum identified above which most closely approximates to the sort of issues which a court has to determine.

5.8 Where applied to decisions towards the other end of the spectrum, language such as "evidence" and "findings of fact" has, in my view, a capacity to mislead and has to be adapted to reflect the different sort of matters which statutory bodies dealing with issues of that type have to consider. It may, in those circumstances, be more appropriate to talk of "materials" rather than "evidence". It may also be more appropriate to speak of "conclusions" rather than "findings of fact".

5.9 Subject to the overriding requirement that any party who may be potentially effected in an adverse way by the result of the process, is entitled to a reasonable opportunity to deal with any factors (to use a neutral term) which may influence the decision, a body may well have an entitlement to place reliance on "materials" which might not be "evidence" in the sense in which that term is used in the courts. This will be particularly the case were the nature of the matter to be determined by the body concerned does not resemble, to any significant extent, a finding of fact (or even a finding of expert fact) in the sense in which the courts use such a term.

5.10 Furthermore such bodies will have to reach conclusions which involve the exercise of their expertise within the statutory framework as a whole. A decision, for example, that a particular project is in accordance with good planning and development is, in my view, better described as a "conclusion" rather than a "finding of fact"."

3.2 It seems to me that the role of the Commission, when exercising its remit in relation to decisions concerning the grant of consent to the construction of a pipeline and the making of acquisition orders necessary for the construction of such a pipeline, is similar to the role of the Labour Court as described in Ashford Castle, with both bodies exercising a role at the end of the spectrum where such a body can be expected to bring to bear, in reaching its conclusions, its own expertise on the issues concerned. Included in such expertise will be a facility in the assessment of expert evidence within its own field.

3.3 I should also emphasise the point made at para. 5.9 of the judgment in Ashford Castle that there is, nonetheless, an overriding requirement to ensure that any party who may, potentially, be affected adversely by the result of the process is entitled to a reasonable opportunity to deal with any factors which might influence the decision. The fact that an expert body can, therefore, bring to bear its own expertise on the matter under consideration, does not absolve it from ensuring that any party potentially affected has a reasonable chance to deal with any factor that might mitigate against its interest. In my view, in coming to an assessment in respect of whether such a reasonable opportunity has been given, the court should look at the process as a whole. The process should not be viewed in a manner that places undue emphasis on a comparison with a court process or, indeed, the sort of process that may be necessitated where an expert body has to make a true finding of fact in a hearing which falls at the other end of the spectrum which I identified in *Ashford Castle*.

3.5 As pointed out by Murphy J. in *The State (Haverty) v. An Bord Pleanála* [1987] I.R. 485 while speaking of the requirements of natural justice:-

> "What will be required must vary to the circumstances in the case. At one end of the spectrum it will be sufficient to afford a party right to make informal observations and at the other constitutional justice may dictate that a party concerned should have the right to be provided with legal and to cross examine witnesses supporting the case against him".

Murphy J. placed an objector in the planning process at the former end of the spectrum. A person from whom land might be acquired by compulsory purchase, while not fully at the other end, is at least well beyond the centre. The spectrum spoken of by Murphy J. is concerned with the separate role of an individual in the process and can even in the case of the same process, differ from one party to another. The spectrum that I spoke of in *Ashford Castle* is concerned with the role of the deciding body. There is no necessary coincidence between the two principles.

4. The Issues

4.1 In considering whether or not to approve of the pipeline project as a whole and, in particular, to specify the route of that pipeline by making acquisition orders in relation to rights over properties along that route, the Commission is not carrying out the sort of role which requires it to make specific findings of fact *per se*. It may well have to come to conclusions as to certain factual matters as part of its overall assessment of the question of whether it should approve of the project and in determining whether the route proposed should be followed. However those matters are not necessary "proofs" in themselves, in the sense in which that term might be applied to specific factual matters that need to be established in order that a court may come to a conclusion or, indeed, in order that a statutory or administrative body may come to a similar type of conclusion. Questions such as cost, archaeological consequences, engineering difficulty and the like are but a means to an overall end which is to determine whether the project, as proposed, should go ahead.

4.2 The procedural issue is, therefore, in my view, one which boils down to a question of whether, taken as whole, it can be said that Lord Ballyedmond had a reasonable opportunity to make any case which he wished to as to why the project should not proceed in a manner which affected his lands to any greater extent than the way in which they would have been affected by the adoption of route B. As part of that issue it is, of course, necessary to consider whether Lord Ballyedmond had a reasonable opportunity to deal with any case adverse to his contention.

4.3 While finding that the true question requires me to look at the process as a whole I should enter two caveats to that statement. Firstly where the statute itself (or instruments made under it) mandates any particular form of procedure then, of course, that procedure must be followed. Any significant and unauthorised deviation from a procedure mandated by statute could not be ignored

by the court.

4.4 Secondly the statutory body may, to an extent, circumscribe its procedural freedom by indicating to parties the process that it intends to follow. A process which might not be intrinsically unfair may become unfair because a party is informed as to the manner in which the process is to be conducted, and prepares itself for the process on that basis, only to find that the process is conducted (without reasonable notice of the change) in a materially different fashion. Therefore the court must take into account, in assessing the overall fairness of the process, any statements made by or on behalf of the statutory authority as to the way in which the process was intended to be conducted.

4.5 Insofar as the non procedural issues are concerned it seems to me that, in substance, the two issues are in reality the same. It hardly needs to be said that there is ample authority for the proposition that, in principle, the acquisition, in the public interest, of property or interests in property with the payment of proper compensation is a permissible interference with the property rights of those from whom those rights might be acquired, provided that the purpose for the acquisition justify same. That this situation applies equally under the provisions of the European Convention on Human Rights is clear. See for example James v. United Kingdom (1986) 8 EHRR 123. It is not, in this case, contended that the overall project would not justify the exercise of compulsory purchase powers. Indeed it would be difficult to see how such a case could be made.

4.6 It is not, therefore, contended that the undoubted interference with the property rights of Lord Ballyedmond is, in itself, inconsistent with either the Constitution or the European Convention on Human Rights. It is alleged that it is the absence of a proper basis for the conclusions reached by the Commission, as justifying the acquisition, which leads to the contention that the interference with Lord Ballyedmond's property rights are disproportionate. If, therefore, there was a proper evidential basis for the findings of the Commission (or, if it arises, the recommendation of the Inspector) then I cannot see how this ground could be sustained. In substance, therefore, the non procedural issues concern whether there was a proper basis for those findings.

4.7 Therefore, in summary, it seems to me that the facts need to be assessed for the purposes of answering two questions namely:-

> (a) were there materials before the Commission sufficient to justify the decision which the Commission actually made (and to the extent that it arises to justify the recommendation of the Inspector); and
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> (b) did the process, taken as a whole, give Lord Ballyedmond a reasonable opportunity to deal with the issues which influenced the Commission's decision.

4.8 Before turning to the application of those principles to the facts of this case I should, firstly, deal with the discreet issue as to whether it is open to Lord Ballyedmond to seek to quash the Inspector's report at the level of principle. Similar factual issues provide the grounds for seeking to challenge the Inspector's report. However the Commission and the Notice Party argue that judicial review of the Inspector's report is misplaced and ought not to be entertained. I turn to that issue.

5. Inspector's Report

5.1 In seeking to justify the entitlement of Lord Ballyedmond to seek to quash the Inspector's report, counsel placed heavy reliance on *The State (Shannon Atlantic Fisheries Limited) v. Minister for Transport* [1976] I.R. 93. That case concerned a challenge to a report made on foot of a preliminary inquiry under s. 465 of the Merchants Shipping Act 1894. Such a report did not, it was correctly urged by counsel for Lord Ballyedmond, give rise to any automatic consequences nor was there any intention to publish the report.

5.2 However Finlay P. in *Shannon Atlantic Fisheries* was satisfied that in carrying out the relevant inquiry under the section and making the report, the Inspector concerned was carrying out a decision making function which was amenable to judicial review. The reasoning was as follows:-

> "First it seems to me that on the terms of s. 465 itself, an implying into the necessity for the person making the inquiry to report upon it to his superior (the Minister for Transport and Power), the section itself necessarily may involve in any particular case reaching a decision on the facts and a decision as between conflicting evidence of facts. A consideration of the report in this case and the findings contained in it, and the depositions obtained for the purposes of that report, clearly indicates that, in relation to times of sailing and to the length of fishing set out in the report, the second respondent decided between the conflicting evidence of the witnesses. Therefore, it seems to me that, both in theory and in practice in making the report itself the investigating officer was necessarily reaching a decision and in a sense entering a verdict in precisely the same way as a jury is asked to reach a decision and to enter a verdict on facts".

5.3 Later on in the course of the judgment Finlay P. expressed the view that the provisions of the Act, to which he had referred, seemed to him "to create a definite area in which there is an obligation upon the person carrying out the preliminary inquiry to reach a decision". On that basis Finlay P. held that the report was amenable to judicial review.

5.4 Counsel for the Commission suggests that the statutory regime within which an Inspector reports to the Commission under the Gas Act 1976, may be distinguished from the statutory regime under consideration in *Shannon Atlantic Fisheries* in three respects vis:

> (a) it is suggested that there is no equivalent to s. 466 under the Gas Act 1976;
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> (b) it is suggested that there was no question of the Inspector in this case coming to a decision which was equivalent to entering a verdict in the manner described by Finlay P. in *Shannon Atlantic Fisheries.* On the contrary, it is suggested, the Inspector's report consists mainly of a summary of the evidence and arguments put forward at the inquiry with the recommendations only forming a small part of the report;
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> (c) Finally it is suggested that the report of the Inspector is not a stand alone procedure, as under the Merchant Shipping Act, but is simply part of a process leading to the making of the final decision (being whether to grant or refuse consent to the pipeline as a whole and to make or refuse to make any or all of the acquisition orders sought).

5.5 I am satisfied that the argument put forward on behalf of the Commission is correct. If, for example, the Commission had, for whatever reason, declined to make the acquisition order sought, notwithstanding a recommendation to the opposite effect by the Inspector, could there be any basis for challenging the Inspector's report. If the Inspector's report were to contain a mis-description of the process of the inquiry, and if it were to be clear that that mis-description influenced the decision of the Commission, then it would be the Commission's decision which would be open to challenge on that basis rather than the report itself. The Commission might, in such circumstances, be found to have taken into account an inappropriate factor (because, for example, of the inclusion of materials in the Inspector's report which were not fairly the subject of the inquiry as conducted).

5.6 The very point in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 is that a deciding body (such as, in that case, *An Bord Pleanála* and, in this case, the Commission) is perfectly entitled to come to a different conclusion than recommended by an Inspector authorised to conduct a hearing, provided that there are materials before the deciding body which entitles it to come to that view. Therefore the Inspector's report is simply one of the materials which the Commission considers. The Commission is required to consider all of the materials which were before the inquiry and to come to its own view. In coming to that view it can, of course, take into account the recommendations made by the Inspector based on the same materials. However, it seems to me, the decision which ultimately affects a party is the decision of the Commission on the materials before it.

5.7 The Inspector's report is not, therefore, a stand alone report which is an end in itself. It is merely a step in a process. Either that process, taken as a whole, is sustainable, or it is not. It should also be added that it is a step in the process where the conclusions of the Inspector conducting that step have no formal effect on the process at all. It can thus be distinguished from schemes where, in order that someone might be adversely affected by the process, two separate decisions require to be made. For example certain disciplinary processes require that a *prima facie* case be established before one body with a full hearing, in the event that the first body is satisfied that a *prima facie* exists, being conducted by a second body. In such a case there are formal consequences of the decision of the first body in that without it making a decision against the interest of a person against whom accusations are made, the matter can go no further.

5.8 The statutory scheme with which I am concerned is different. The matter goes to the Commission for a decision on all of the relevant materials irrespective of the views formed by the Inspector. The situation might well be different in the event that there was some formal consequence for the process as a whole resulting from a decision or recommendation by the Inspector. For example if it were not, on the basis of the terms of the Act, open to the Commission to make a compulsory acquisition order unless the Inspector recommended in favour of same, then the situation might well be different.

5.9 I have therefore come to the view that the report of an Inspector appointed to conduct a hearing for the purposes of enabling the assembly of materials which are required to be considered by a statutory body fulfilling a role such as the Commission in this case, is not open to judicial review, notwithstanding the fact that such report may contain recommendations where those recommendations are neither binding nor give rise to any formal consequences for the process as a whole.

5.10 It is, therefore, necessary to return to the facts insofar as they relate to the decision of the Commission itself.

6. The Facts

6.1 It seems to me that the starting point for a consideration of the facts must be the grounds upon which the Commission actually came to its conclusion. Either there were materials which justified the Commission in coming to the conclusion which it did on those grounds or there were not. Either the process which led to the overall conclusion being reached on the basis of those grounds was fair or it was not. In either case it is the grounds upon which the decision was actually made that forms the basis of the analysis.

6.2 It seems to me that counsel for both the respondent and for the notice party were correct in their analysis of the decision. There can be little doubt but that the decision was influenced by the view taken by the Commission (and indeed taken by the Inspector in his recommendations) to the effect that cost was a significant factor. I will return to that point in due course. However there are other factors taken into account and, indeed the way in which costs were dealt with needs, itself, to be analysed.

6.3 The starting point must be the view taken by the Commission that a pipeline of the general type being proposed was one for which consent should be given. No challenge is made to that aspect of the decision making process. On that basis there was, necessarily, going to be a pipeline. The only issue between Lord Ballyedmond and the notice party was the route. Where there was going to be a pipeline in any event, then it necessarily follows that there would have to be some interference with property interests along whatever route was ultimately chosen. It is in that context that the reasons to which I have referred above must be analysed.

6.4 As will have been seen, the Commission took the view that Lord Ballyedmond had not really put up any real basis for the rejection of Route A. He simply indicated that he would prefer Route B because it would, presumably, interfere less severely with his right of enjoyment of his property. In that context it should be noted that while there would be a significant impairment of the enjoyment of the property concerned during the construction phase, there was ample evidence for the view that once the pipeline had been laid, and the ground resorted, any such interference on a continuing basis would be minimal, save for the possibility that certain development might be excluded in the future. This latter point needs to be seen in the context of the fact that the land was agricultural land. The only reason put forward for not following Route A was, therefore, that, to the extent which I have outlined, that route would have a more severe effect, principally during an initial period, on the enjoyment of Lord Ballyedmond's house.

6.5 Against that has to be seen the fact that the alternative route proposed would necessarily involve an interference with the rights of other landowners. It is always open to a person in respect of whom a compulsory purchase order is sought to suggest that different lands may meet the requirements of the acquiring authority. However any such case needs to be seen in the context of the fact that the parties who own the alternative lands suggested have their own rights. It is hard to see how shifting the burden from Lord Ballyedmond to third parties is a factor which could, of itself, reasonably be taken into account by the Commission, unless there were objective reasons for suggesting that the alternative route was preferable.

6.6 In *Crosby v. Custom House Docks Development Authority* [1996] 2 I.R. 531 Costello P. rejected a challenge to a compulsory purchase order. Amongst the grounds relied upon by the plaintiff was a suggestion that the Minister (who was the deciding person in respect of the compulsory acquisition scheme under consideration) had failed to consider the respective merits of developments proposed by the landowner (against whom the compulsory acquisition order was made) and the acquiring authority. Costello J. rejected that argument. While the issue in this case is somewhat different it does, however, seem to me to offer an appropriate analogy. Once the Commission was satisfied that the pipeline project as a whole was to go ahead, then property rights of some persons along whatever route was ultimately chosen would, necessarily, have to be interfered with. While it would be wrong, in the context of a process such as that with which I am concerned in this case, to use a term such as the onus of proof, it nonetheless does seem to me that the Commission is entitled to have regard to the route chosen by a statutory undertaking for the purposes of a public project such as this. It is open to persons who disagree with that route to put forward alternatives.

6.7 However the specific issue which the Commission has to decide is not whether an alternative may be preferable but whether the acquisition sought should be made. Clearly if there were a demonstrably better route with significant advantages and/or significantly less adverse effects on a range of material factors then, at a certain point, it might be said that a body such as the Commission was acting irrationally or disproportionately in making an acquisition order for property along a route which was demonstrably less favourable. The question which the Commission had to ask itself was not, therefore, a narrow one of deciding whether Route A was necessarily better than Route B, but rather whether it was inappropriate to make acquisition orders in respect of Route A because of any demonstrated superiority of an alternative. In that context it seems to me that grounds (i) and (iii) as set out above were

entirely proper considerations for the Commission to take into account and were sustained on the evidence.

6.8 Insofar as cost is concerned the only conclusion that appears to has been reached under item (ii) is that the cost difference between routes A and B was significant by virtue of two factors, that is to say that there was poorly drained land on Route B and that it had a longer length. I will turn shortly to the procedural issues concerning cost which have been raised. However it seems to me that there was an ample basis for the conclusion that the nature of the land over which Route B would have to travel was such as gave rise to engineering difficulties which could be solved but at a price. The factual statement that Route B was 25% longer, also could not be challenged. What is said is that there was no evidence to put an overall financial cost (if any) on that extra length and those engineering difficulties.

6.9 Attention is drawn to the fact that Mr. Gleeson S.C. (who acted on behalf of the notice party at the public inquiry) opened the inquiry by indicating that the shortest route was not necessarily the cheapest. That fact is obvious. Terrain and other factors which would make a particular route more difficult to construct might well outweigh length on the facts of a particular case. However here it is clear that there was more than ample evidence to sustain the view that Route B would be more expensive per unit length by virtue of terrain and thus when coupled with extra length there was more than ample evidence to sustain the finding that the additional costs would be significant. In that context it is important to note that the factor as taken into account by the Commission was limited. It did not purport to put a monetary value on the cost. It was not, in my view, required so to do. Given that there were few factors operating in favour of Route B (in reality only the fact that Route B would give rise to a lesser short term interference with the amenity to be enjoyed by Lord Ballyedmond in his house – a fact that would itself have to be set against the undoubted interference which the selection of Route B would have with the rights of other property owners) then there was very little to choose between the two routes other than the question of cost.

6.10 The evidence made it clear that the costs of acquisition itself was based on a known rate of unit per length. The Commission (and indeed all the parties) would be well aware of that fact. It was clear that Lord Ballyedmond's advisor (who gave evidence) was an experienced professional who had dealt with many cases involving acquisitions under the Gas Acts. Entirely separate from the additional costs of construction, the extra length would have given rise to a significant and additional cost of acquisition. Given the finding (for which I have indicated there was ample evidence) that Route B was a more difficult route from a construction point of view, it seems to me that there was more than ample basis for the narrow conclusion reached by the Commission to the effect that there would be significant adverse cost implications for the choice of Route B. For the reasons which I have already analysed it does not seem to me that the Commission needed to go any further to enable it to reach the overall conclusion (which it did) that the alternative proposed was not such as would render it unreasonable or disproportionate to make the compulsory acquisition order sought.

7. Procedural Issues

7.1 In an analogous argument counsel for Lord Ballyedmond suggests that the hearing was procedurally unfair because of the fact that no witness called on behalf of the notice party gave evidence as to the amounts of extra costs involved. This is factually correct. It would appear that the only actual mention of the amount of the cost of construction was made by counsel for the notice party in his closing submissions. It should be noted that the evidence before this court was to the effect that the Commission did not, in fact, take into account the figures mentioned by counsel in his closing submission. I accept that evidence.

7.2 I should comment that while I would, in general terms, (having regard to my reference in *Ashford Castle* in relation to reliance on "materials" rather than what might in a court context amount to "evidence") be prepared to accept that a body, such as the Commission, can rely on matters put forward in any credible way (such as in the submissions of counsel where no challenge is made to those materials) I would have had some concern on the facts of this case if reliance had been placed specifically on that information.

7.3 The procedure which was adopted was one where all of the materials were presented in a somewhat court like format with witnesses being called, led in evidence by the party seeking to introduce their evidence, and cross examined by any other parties. Having adopted that process it would, it seems to me, be open to question as to whether the closing submissions of counsel for the notice party might be said to have been a procedurally acceptable way of introducing new materials. However having regard to the fact that I am satisfied that no reliance was placed upon that material it does not seem to me that I should express a concluded view on same.

7.4 It is also important to note that, on the evidence, it is clear that for some time before the hearing Lord Ballyedmond was aware (see his letter of 14th April, 2005) that cost was likely to be a factor in any decision. Cost was also raised in the reply of the 9th May, 2005 to that letter and is referred to in the report (which, of course, pre-dated the hearing). This is not, therefore, a case where the party seeking to challenge the order was not on notice that cost would be a factor. If there was no reasonable basis for a party in a position such as Lord Ballyedmond to conclude that costs might be a significant factor, and it nonetheless was taken into account, then a different situation might apply.

7.5 For the reasons which I have set out above, it does not seem to me that it was incumbent upon the Commission to reach any view as to the precise cost. In the light of its other findings, it was only necessary for it to be of the view that the cost implications of Route B would be significant. There was, for the reasons which I have indicated above, evidence to support such a conclusion. If Lord Ballyedmond wished to contest that matter it was open to him to put forward his own evidence to suggest that the cost implications of Route B were insignificant (or, perhaps, favoured Route B). No such evidence was put forward. It was, after all, Lord Ballyedmond who proposed Route B. If he wished to persuade the Commission that it was not proper for it to approve the compulsory purchase order as sought on the grounds of the alternative of Route B then he was well aware that the cost of Route B could be a factor and that he was entitled to put up whatever evidence he wished to support his case.

7.6 An inquiry into a possible compulsory purchase is not like a criminal trial where the defendant is entitled to require proof of each and every element of the criminal offence charged. It is a general inquiry into the appropriateness of making the compulsory purchase order sought. It was open to any objector, such as Lord Ballyedmond, to address the cost issue in more specific terms if it wished. However it does not seem to me that the Commission was required, as a necessary part of the process, to reach a specific view as to cost. It was entitled to act upon a general view. If Lord Ballyedmond wished to have the Commission consider the matter on a more specific basis then it was incumbent upon him to lead what ever evidence he felt it appropriate to that end.

7.7 I am not, therefore, satisfied that, taken as a whole, there was any procedural unfairness. Lord Ballyedmond had ample notice of the fact that cost would, to some extent, be a material factor. He had, in my view, a reasonable opportunity to address the question of cost. The Commission was not required to consider precise figures in relation to cost having regard to the decision which it had to make. If Lord Ballyedmond had wished the Commission to consider precise figures he could have called an expert to give that expert's views which (in the absence of any contrary evidence on behalf of a notice party) would necessarily have informed the Commission's

decision. This was not done.

7.8 In all the circumstances I am not satisfied that it has been shown that there was any breach of fair procedures in the process.

8. Conclusion
8.1 I am not, therefore, satisfied that any of the gourds contended for have been established and in those circumstances I dismiss the applicants claim.