Neutral Citation Number: [2006] IEHC 99

THE HIGH COURT

2005 No. 840 P

BETWEEN

SHELL E & P IRELAND LIMITED

PLAINTIFF

AND

PHILIP McGRATH, JAMES B. PHILBIN, WILLIE CORDUFF, MONICA MULLER, BRÍD McGARRY, PETER SWEETMAN

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 23rd March, 2006.

The Proceedings

1. In order to put the two applications which are dealt with in this judgment in their proper context, it is necessary to identify in a general way the issues which arise in the proceedings, having regard to the current state of the pleadings. I hope to do so in a neutral manner.

2. The proceedings, which were initiated by a plenary summons which issued on 4th March, 2005, arise out of the proposed construction of an onshore gas pipeline, (the pipeline) to connect the sub-sea wells of the Corrib Gas Field with an on-shore gas terminal which the plaintiff proposes to construct in north Mayo. In its statement of claim delivered on 18th April, 2005, the plaintiff pleads the following matters:

> · That on 15th April, 2002, the predecessor of the Minister for Communications, Marine and Natural Resources (the Minister) granted the plaintiff a pipeline consent pursuant to s. 40 of the Gas Act, 1976 (the Act of 1976), as amended, for the construction of the pipeline.
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> · That on 3rd May, 2002 and 5th June, 2002, the Minister granted compulsory acquisition orders pursuant to s. 32 of the Act of 1976, as amended, in respect of ten plots owned by individuals (including the first defendant and the second defendant) and one plot of commonage, on foot of an application made by the plaintiff on 23rd November, 2001.
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> · That by letters dated 7th May, 2002 and 6th June, 2002, each of the landowners was notified of the making of the relevant compulsory acquisition order and served with a notice of entry pursuant to the Act of 1976.
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> · That on 22nd October, 2004, An Bord Pleanála granted planning permission for the on-shore terminal.
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> · That by letter dated 6th December, 2004, the plaintiff notified the relevant landowners of the intention of the plaintiff to exercise its right of entry on or after 10th January, 2005.

3. Insofar as is relevant for present purposes, the wrongs alleged by the plaintiff against the defendants are that they obstructed or interfered with the plaintiff's entry on certain of the plots the subject of the compulsory acquisition orders and prevented the plaintiff from carrying out works thereon, which it is alleged amounted to trespass, and that they interfered with the use and enjoyment by the plaintiff of its interest in those plots, thereby creating a nuisance to the plaintiff. The remedies sought by the plaintiff include perpetual injunctions to restrain obstruction and interference with the plaintiff's entry of the plots, trespass and nuisance and also damages for trespass and nuisance. The plaintiff's entitlement to do what they allege they were prevented from doing and believe they will continue to be prevented from doing, as pleaded, is based expressly on the pipeline consent and the compulsory acquisition orders, and implicitly on the planning permission.

4. The current position is that the six defendants are represented by three legal teams: the first and third defendants by one legal team; the second and fifth defendants by another legal team; and the fourth and sixth defendants by the third legal team.

5. As regards the first and third defendants, the solicitors currently on record for them delivered an amended defence and counterclaim for each on 5th August, 2005, pursuant to an order of this Court made on 25th July, 2005. On 4th October, 2005 their solicitors delivered further particulars of their defence and counterclaim. By way of general observation, these defendants deny wrongdoing on their part, and allege wrongdoing on the part of the plaintiff in respect of which they seek injunctions, a declaration and damages. The elements of their pleadings which are relevant for present purposes are:

> · A denial that the Minister gave consent, or a valid consent, under s. 40 of the Act of 1976.
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> · A denial that the compulsory acquisition orders have the effect contended for by the plaintiff.
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> · An assertion, in the particulars delivered on 4th October, 2005, that the compulsory acquisition orders made in respect of the lands of these defendants are void and of no effect for the reasons stipulated, which are premised on the assertion that European Communities (Internal Market in Natural Gas) (Compulsory Acquisition) Regulations, 2001 (S.I. No. 517 of 2001) (the 2001 Regulations) is ultra vires the powers of the Minister and is null and void and is of no effect having regard to the provisions of the European Communities Act, 1972 and the Constitution.
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> · An allegation that certain provisions applicable for compensating these defendants contained in the Acquisition of Lands (Assessment of Compensation) Act, 1919 (the Act of 1919), as amended, together with the Act of 1976, as amended, are repugnant to the Constitution and incompatible with the European Convention on Human Rights (the Convention), in respect of which allegation notice has been served on the Attorney General pursuant to Order 60 of the Rules of the Superior Courts, 1986 (the Rules).
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> · Allegations that, if authorised, the pipeline exposes these defendants to such risk to their personal safety, bodily integrity and damage to their property as to constitute a breach of their constitutional rights and, in particular, their rights under Article 40 of the Constitution.
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> · An allegation that there is no planning permission for the proposed pipeline.
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> · An oblique attack on the planning permission granted on 22nd October, 2004.

6. The plaintiff delivered amended replies and defences to the counterclaims of the first and third defendants on 24th August, 2005. In relation to the elements of the defences and counterclaims which I have just outlined, the plaintiff:

> · Reiterated reliance on the consent granted by the Minister on 15th April, 2002 and asserted that the first and third defendants cannot challenge or impugn the validity of that consent, having failed to do so by judicial review proceedings within the time limits provided for in Order 84 of the Rules.
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> · Asserted that, insofar as the first and third defendants may attempt to do so, they cannot challenge or impugn the validity of the compulsory acquisition orders relied on by the plaintiffs, having failed to do so by judicial review within the Order 84 time limits.
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> · Denied that the Act of 1919 is repugnant to the Constitution or incompatible with the Convention.
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> · Admitted that the proposed pipeline does not have planning permission, but asserted that it constitutes an exempted development.
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> · Joined issue on the oblique attack on the planning permission granted on 22nd October, 2004.
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> · To the extent that the first and third defendants' attempt to do so, asserted that they cannot seek relief under s. 160 of the Planning and Development Act, 2000 (the Act of 2000) and any claim for relief under that section is inadmissible.
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> · Denied that the implementation of its proposal in relation to the pipeline would constitute a breach of the constitutional rights of the first and third defendants.
>
> · Denied that the Act of 1919 is repugnant to the Constitution or incompatible with the Convention.
>
> · Asserted that the first and third defendants do not have locus standi to challenge the compensation provisions contained in the Act of 1919 and asserted that any such challenge is premature and hypothetical on the facts.

7. The fourth and sixth defendants, in person, delivered their respective defences and counterclaims on 9th June, 2005. They are now represented by solicitor and counsel in the proceedings, who stand over those pleadings. These defendants deny wrongdoing and allege wrongdoing on the part of the plaintiffs and counterclaim for injunctions, a declaration and damages. The elements of their defences and counterclaims which are relevant for present purposes are:

> · A denial that the Minister gave consent, or a valid consent, under s. 40 of the Act of 1926.
>
> · Putting the plaintiff on proof of the extent of the compulsory acquisition orders.
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> · A denial by the fourth defendant that the compulsory acquisition orders have the effect contended for by the plaintiff.
>
> · An assertion by the fourth defendant that the compensation regime contained in the Act of 1919 is repugnant to the Constitution and incompatible with the Convention.
>
> · An assertion that neither the requisite planning permission nor consent under the EU Environmental Impact Directive 85/337/EEC (the Directive)as amended, exists for the pipeline.

8. On 23rd June, 2005 the plaintiff delivered replies and defences to the counterclaims of the fourth and sixth defendants, in which the plaintiff asserted that these defendants cannot seek relief under s. 160 of the Act of 2000 and that the claim for relief under that section is inadmissible. However, the time constraints contained in Order 84 of the Rules were not raised by way of defence against these defendants. As regard to the sixth defendant, the plaintiff pleaded that he is not an owner or occupier of any lands affected by the pipeline and does not have *locus standi* to make the claims or seek the reliefs sought, nor is he entitled to plead or raise a *jus tertii*.

9. The second and fifth defendants delivered defences in person on 27th May, 2005, in which they included counterclaims. The plaintiff delivered replies to those defences on 3rd June, 2005, in which the plaintiff objected to the format of those pleadings, in that they strayed into evidence and submissions, and into matters which are irrelevant to the issues in the proceedings. As I have stated, the second and fifth defendants are now represented by the same legal team. In the interim, between 27th May, 2005 and the date on which his current solicitors came on record for him, two firms of solicitors came on record at different times for the second defendant. The solicitors now on record for the first and third defendants delivered a defence and counterclaim on 11th July, 2005 on behalf of the first, second and third defendants. As regards the first and third defendants, that pleading has been superseded by the amended defences and counterclaims delivered pursuant to order of the court on 5th August, 2005. Taking a pragmatic view of the situation, I think that, as regards the second defendant, the pleading delivered on 11th July, 2005 must be regarded as having been overtaken by events. I would also comment that, were the proceedings to go to hearing on the basis of the defences delivered by the second and fifth defendants in person on 27th May, 2005, that would unquestionably add to the complexity of the hearing.

The current applications

10. The earliest in time of the motions now before the court is a motion on behalf of the second and fifth defendants, which issued on 29th November, 2005, seeking:

> (a) an order under Order 28, r. 1 of the Rules granting liberty to the second and fifth named defendants to deliver amended defences and counterclaims; and
>
> (b) if necessary, an order pursuant to Order 15 of the Rules joining the Minister, Ireland and the Attorney General as defendants to the counterclaims.

11. The second is the plaintiff's motion, issued on 30th January, 2006, and addressed to the solicitors for the first and third defendants, the solicitors for the fourth and sixth defendants and the solicitors for the second and fifth defendants, seeking the following relief:

> (1) An order pursuant to O. 19, r. 27 of the Rules striking out as unnecessary and prejudicial and/or frivolous and vexatious such part of the defences and counterclaims of the defendants as seek to raise public law issues.

(2) In the alternative, an order pursuant to O. 19, r. 2 and/or O. 21, r. 14 of the Rules, directing a separate trial of the counterclaims raised or sought to be raised by the defendants.

(3) Directions as to the justiciability in these proceedings of the public law issues raised or sought to be raised by the defendants.

(4) If necessary, an order pursuant to O. 25, r. 1 and/or O. 34, r. 2 directing the trial of a preliminary issue as to whether the defendants can raise public law issues in these proceedings.

The application of the second and fifth defendants

12. The solicitors currently on record for the second and fifth defendants filed and served notice of change of solicitor on 28th September, 2005. These defendants were represented by a member of their current legal team when the matter was before the court on 30th September, 2005, 10th October, 2005 and 25th October, 2005, on each of which occasions it was intimated that these defendants intended seeking the leave of the court to deliver amended pleadings. It would seem that these defendants' legal teams and the plaintiff's solicitors were under the impression that on 25th October, 2005, these defendants were given leave to deliver amended defences and counterclaims. On 4th November, 2005 these defendants delivered the proposed amended defences and counterclaims in issue on this application to the plaintiff's solicitors. Subsequently, when the matter was again before the court on 15th November, 2005 to deal with discovery issues, the plaintiff objected to the amended pleadings and, apparently pursuant to a direction of the court, that led to this application, which has proceeded on the basis that these defendants seek the leave of the court to deliver amended defences and counterclaims in the form of the pleadings delivered on 4th November, 2005.

13. A significant feature of the proposed amended defences and counterclaims is that the Minister, Ireland and the Attorney General, which, for the sake of brevity, I will refer to as the State parties, are named as defendants to the counterclaim. On 7th November, 2005 the proposed defences and counterclaims were served on the Chief State solicitor on behalf of the State parties. However, the State parties object to being joined in these proceedings as defendants to the counterclaims and they were heard on this application.

14. In broad outline, if given leave to deliver amended defences and counterclaims in the proposed form, the case which these defendants propose to make would contain the following elements:

· A denial that the Minister granted a consent pursuant to s. 40 of the Act of 1976 and, specifically, a denial that the letter of 15th April, 2002 amounts to a proper and valid consent, coupled with an alternative plea that if a consent was granted it was conditional and the conditions have not been fulfilled, so that it is inoperative and of no effect.

· An explicit challenge to the validity of the compulsory acquisition orders encompassing –

- a denial that the plaintiff submitted valid applications for compulsory acquisition orders by impugning the validity of the 2001 Regulations,
- putting the plaintiff on strict proof of the extent of the land covered by "the purported applications",
- a denial that the Minister made compulsory acquisition orders pursuant to s. 32 of the Act of 1976,
- a denial that the "purported" compulsory acquisition order made in respect of the land of the second named defendant was valid and of legal effect, and
- taking issue with the plaintiff's assertion as to the legal effect of compulsory acquisition orders made.

· A challenge to the constitutionality of certain provisions of the Act of 1919, as amended.

· A denial that the plaintiff has obtained all necessary planning permissions, coupled with a denial that the construction of the pipeline is an exempted development and a specific denial "that the use of the lands and pipes for the purposes of carrying untreated natural gas" is an exempt development.

· A denial of the entitlement of the plaintiff to a, and assertions as to the extent of any, statutory easement under the Act of 1976 in favour of the plaintiff to construct the pipeline.

· An assertion that the exercise of any statutory right which exists to construct the pipeline would be in breach of the provisions of the Constitution.

· Typical answers to the plaintiff's allegations of trespass, nuisance and intimidation and loss – denials and assertions of matters which it is alleged deprive the plaintiff of its entitlement to relief.

· An assertion that the construction of the pipeline which it is alleged will contain "untreated natural gas flowing under unprecedented pipe pressure" constitutes a risk to the person safety and to bodily integrity of these defendants disentitling the plaintiff, by virtue of the Constitution and, in particular, Article 40 thereof, to pray in aid the jurisdiction of the court for the purpose of giving effect to its proposal.

· An assertion that the proposed pipeline would constitute a nuisance.

15. The proposed counterclaim would repeat the defence and make, *inter alia*, the following allegations:

· That the "purported" consent granted by the Minister under s. 40 of the Act of 1976 is null and void and has no force or effect, that the procedures adopted in respect of the granting thereof were in breach of the principles of basic fairness of procedures and of natural and constitutional justice, and that the Minister acted unreasonably, *ultra vires* his powers and in breach of these defendants' constitutional rights.

· Alternatively, that the "purported" consent was conditional upon a number of fundamental conditions being complied

with which have not been complied with, so that the consent is inoperative and of no effect.

· That the "purported" compulsory acquisition orders in relation to certain plots are null and void and of no force or effect, in that they were granted in the absence of any valid applications therefor and, further, that the Minister purported to exercise his power in breach of the principles of basic fairness of procedures and natural and constitutional justice and acted unreasonably*, ultra vires* his powers and in breach of these defendants' constitutional rights.

· That the decision of the Minister to make the compulsory acquisition orders and the purported orders are invalid having regard to the provisions of the Constitution, Articles 40.3.1, 40.3.2, 43.2.1 and 43.2.2 being invoked.

· That ss. 32 and 40 of the Act of 1976, as amended, are invalid having regard to the provisions of the Constitution, Articles 40.3.1, 40.3.2 and Article 43 being invoked, and that these defendants are entitled to a declaration of incompatibility pursuant to s. 5 of the European Convention on Human Rights Act, 2003.

· That an "approval for the Phase 3 preparatory works" granted by the Minister on 9th July, 2002, which was pleaded by the plaintiff by way of special reply to the counterclaim of the first and third defendants, does not authorise the construction and installation of the pipeline.

· That the provisions of the Act of 2000 and the Planning and Development Regulations made thereunder are invalid having regard to the provisions of the Constitution, insofar as they exempt the construction and/or use of the pipeline from the requirement to obtain planning permission, Articles 40.3.2 and Article 43 being invoked, and are incompatible with the Convention.

· That the compulsory acquisition orders are null and void and have no force or effect insofar as they are contrary to European Union law, in that they amount to a threat to the environment and the health*, inter alia*, of these defendants, and, if necessary, that the provisions of s. 32 of the Act of 1976 and the European Communities (Environmental Impact Assessment) Regulations, 1989 – 2001 are in breach of European Union law in that the orders disregard, and the legislation and regulations fail to uphold, "the precautionary and protection principles embodied" in European Union law.

· That the State parties, other than the Attorney General, have at all relevant times acted in a mode and manner calculated to defeat these defendants' rights to access to environmental information under the Directive, as amended, and that the Environmental Impact Statement submitted by the plaintiff was inadequate and failed to comply with the Directive.

· That the Directive has not been properly transposed into Irish law.

· Alternatively, that the Directive has direct effect in the State.

· That a "Construction Compound" erected by the plaintiff adjacent to the homes of these defendants constitutes a nuisance.

16. These defendants counterclaim for no less than thirty-two specific reliefs by way of declaration, injunction and damages on the back of the allegations made, which encompass declarations as to:

· The invalidity of the consent dated 15th April, 2002 and the absence of any valid consent under s. 40 of the Act of 1976.

· The invalidity of the compulsory acquisition orders, the effect of the compulsory acquisition orders and the absence of any valid compulsory acquisition orders or statutory easements.

· The absence of planning permission for the proposed pipeline, its construction and use being alleged not to be an exempted development.

· The repugnancy of certain statutory provisions (the provisions of the Act of 1919, ss. 32 and 40 of the Act of 1976, and the Act of 2000 and the Regulations made thereunder) to the Constitution.

· The incompatibility of certain statutory provisions with the Convention.

· The failure of the State to give effect to the Directive in Irish law.

· That the exercise of the statutory powers will be in breach of these defendants' constitutional rights.

17. Order 28, rule 2 of the Rules provides as follows:

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

18. That rule was recently considered by the Supreme Court in *Croke v. Waterford Crystal Limited* [2005] 1 I.L.R.M. 321. In his judgment, Geoghegan J., with whom the other four judges concurred, commented on that rule as follows (at p. 331):

> "While undoubtedly there is a discretion in the court as to whether to make the order or not and other factors may come into play, the primary consideration of the court must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation."

19. Geoghegan J. identified the priority which must be given to the procedural conduct of the party seeking the amendment by reference to the judgment of the Supreme Court in *O'Leary v. Minister for Transport, Energy and Communication* [2001] 1 I.L.R.M. 132, in which the following passage from the judgment of Lynch J. *in Director of Public Prosecutions v. Corbett* [1992] I.L.R.M. 674 at p. 678 was quoted with approval:

> "The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other

party. While courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendment should be made. If there might be prejudice which could be overcome by an adjournment then the amendment should be made and an adjournment also granted to overcome the possible prejudice and if the amendments might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnify the other party against such expense."

20. Having commented that there has been an overemphasis on an obligation to give reasons for having to amend the pleadings in some High Court decisions, Geoghegan J. stated as follows (at p. 335):

> "An important High Court decision is *Krops v. Irish Forestry Board Limited* [1995] 2 I.R. 113; [1995] 2 I.L.R.M. 290 where Keane J. (as he then was) carefully considered the ambit of Order 28, rule 1 and held that the court has a wide discretion to amend pleadings in such manner and on such terms as it considers just in the circumstances. He went on to hold that as a matter of principle pleadings carry with them from the time they are issued or delivered the potentiality of being amended by the court and that since their issue the proceedings were always capable of amendment by the court in such manner as might be just and in order to allow the real question and controversy between the parties to be determined. The mere fact that if a new cause of action sought to be included in the statement of claim had been brought by a separate action it would be statute barred does not prevent the amendment being granted."

21. The plaintiff has advanced a number of grounds for its contention that these defendants should not be allowed to deliver amended defences and counterclaims.

22. First, it is suggested that what is proposed is not in reality an amendment at all; it is a completely new and expanded case, involving a multiplicity of new causes of action, which have not been previously raised. Further, in the main, these causes of action have not been raised by the other defendants. The radical nature of what is proposed is underscored by the necessity to join the State parties. Notwithstanding that, in answering those submissions, these defendants have been able to demonstrate a considerable degree of concordance between the issues proposed to be raised by them and issues which have already been raised on the pleadings of the other defendants, it has to be acknowledged that the issues which will arise and the reliefs which will be claimed, if the amendment is allowed, will go considerably beyond what was in the case hitherto. However, it seems to me that this is very much the type of technical argument which a court will subordinate to the primary consideration of ascertaining whether the amendments sought are necessary for the purpose of determining the real questions of controversy. Apart from that, O. 28, r. 1 speaks of allowing a party "to alter or amend" a pleading. The last passage from the judgment of Geoghegan J. in *Croke v. Waterford Crystal Limited* which I have quoted above, clearly indicates that the rule comprehends an alteration which introduces a new cause of action, even one which would be statute barred if brought by separate action. Accordingly, in my view, this ground is not made out.

23. Secondly, the plaintiff questioned whether these defendants had shown good reason for having to amend. It was suggested that the impression they had given that they were effectively lay litigants until their current legal team commenced acting for them was not a correct impression, particularly, in the case of the second defendant. Reference was made to the following other proceedings concerning the plaintiff's proposal to construct the onshore gas terminal and pipeline with which these defendants were associated:

> (1) A plenary action in this Court in which the second defendant (by the name Brendan Philbin) and the fifth defendant and others were plaintiffs and the State parties and the plaintiff, by its former name, Enterprise Energy Ireland Limited, were defendants (Record No. 2002 No. 4347 P), which did not proceed beyond plenary summons stage. These defendants say that those proceedings have become moot because of a legislative change in 2002.
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> (2) Proceedings in this Court between Mary Philbin (the mother of the second defendant) and the plaintiff (Record No. 2002/65 MCA), in which the applicant did not prosecute an appeal to the Supreme Court against the refusal to grant her an interlocutory injunction to restrain the plaintiff from constructing an access road to the pipeline route. The second defendant has averred on this application that he was not the originator or motivating agent of those proceedings and his involvement therein was merely one of general approval to the initiation of the proceedings, but nothing further.
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> (3) Judicial review proceedings between Martin Harrington, as applicant, and An Bord Pleanála, Ireland and the Attorney General, as respondents, and the plaintiff, Mayo County Council and others, as notice parties, in which, in a judgment delivered on 26th July, 2005, Macken J. dismissed the applicant's application for leave to commence proceedings by way of judicial review in relation to the planning permission dated 22nd October, 2004. Although he was named as a notice party in those proceedings, the second defendant says that he did not participate in them.

24. Although these defendants did have the benefit of legal advice prior to these proceedings from in or around 2002 in relation to issues concerning the plaintiff's proposal to build the onshore terminal and pipeline, the reality is that the defences they delivered personally in these proceedings on 27th May, 2005 were such that they provoked objections in point of law in the replies delivered by the plaintiff on 3rd June, 2005. Just four months later, through the solicitor on record for them, they intimated to the court that, with the benefit of legal advice, they wished to deliver amended defences and counterclaims. In the overall scheme of things, in my view, there was no undue delay on the part of these defendants in seeking leave to amend. It seems to me that the current state of the pleading of their respective cases is, of itself, sufficient reason why they should be allowed amend.

25. Thirdly, the plaintiff contends that it would be prejudiced if leave to amend is granted. These proceedings are prohibiting progress on a major infrastructural project and any delay in the prosecution of the proceedings is detrimental. It is true that the court has been anxious to facilitate the parties by managing the proceedings with a view to an early hearing. The evidence adduced on this application, in my view, does not suggest that these defendants are trying to frustrate that objective. However, these defendants point to the fact that, as matters lie between the plaintiff and the Minister, the project cannot continue without the consent of the Minister and there is nothing before the court to indicate when such consent will be forthcoming. The plaintiff has raised the following matters as the probable sources of delay in bringing the matter to conclusion:

> (1) The inclusion in the proposed draft defences and counterclaims of matters which the plaintiff contends are not related in any way to the cause of action pleaded by the plaintiff in these proceedings and which could not be conveniently tried with it. By way of example, the plaintiff referred to paras. 21 and 22 of the counterclaim, in which it is alleged that the plaintiff and the State defendants, other than the Attorney General, have acted in a mode and manner calculated to defeat the defendants' rights to access to environmental information, that the Environmental Impact Statement submitted by the plaintiff was inadequate and failed to comply with the requirements of the Directive and that the Directive was not properly transposed into Irish law. The reliefs claimed on foot of those allegations are declarations and damages for breach of these defendants' entitlements under the Directive (paras. S,T and DD of the prayer for relief in the

counterclaim). In relation to the issues raised in connection with the Directive, I am not prepared to hold at this stage, on an application for leave to amend, that these are issues which should not be litigated in these proceedings. The plaintiffs also referred to paras. 24 and 25 of the counterclaim in which these defendants allege that the Construction Compound constitutes a nuisance. These allegations give rise to a counterclaim by these defendants for damages for nuisance (para. EE of the prayer in the counterclaim). The plaintiff has claimed damages for nuisance against these defendants and it is not clear to me on the basis of what principle the court could hold that it is not open to these defendants to counterclaim in these proceedings for damages for nuisance, which, if awarded, would in due course be set off against any award made to the plaintiff.

(2) The plaintiff pointed to the possibility of the other defendants seeking to be allowed to amend their respective defences and counterclaims, if these defendants are given liberty, resulting in further delay. Even if this were a possibility, and given that this application and the plaintiff's application were heard together and the legal teams for the other defendants were present throughout, I did not get any sense that it was, I cannot see that it would be a justification for refusing this application.

(3) Similarly, the fact that the issues raised on the proposed amended defences and counterclaims at issue here may give rise to more expansive discovery than the defences delivered by these defendants in person, would not justify refusing this application.

26. Fourthly, and this is the point on which counsel for the plaintiff laid most emphasis, the proposed amended defences and counterclaims raise issues of public law which, it was submitted, should have been raised by way of judicial review within the time limited in Order 84 of the Rules and issues which are not justiciable in these proceedings. The arguments on this point overlap with the submissions made on the plaintiff's motion. Matters which may be raised by the plaintiff in answer to these defendants' proposed amended defences and counterclaims that issues raised by these defendants are not justiciable in these proceedings or are time-barred, or there is no *locus standi* to pursue them, are matters to be raised on the plaintiff's reply and defence to counterclaim. I think the appropriate approach on this application is to regard them as matters which do not inhibit the exercise of the court's discretion in favour of allowing amendment, but rather as matters to be addressed on the plaintiff's application.

27. The joinder of the State parties gives rise to two distinct questions.

28. The first is whether the State parties may be joined as defendants to the counterclaims. This is governed by O. 21, r. 10 which provides as follows:

> "Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in the statement of claim setting forth the names of all persons who, if such counterclaim were to be enforced by the cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff."

29. Counsel for the State parties, in reliance on an old authority, *O'Connor v. Anderson* [1880] 14 I.L.T.R. 14, submitted that this can only be done where there is a connection between the third person sought to be made a defendant and the original cause of action and the relief sought against the third person and that sought against the plaintiff. The connection between the State parties and the original cause of action is that the plaintiff's case, as pleaded, is that its entitlement to construct the pipeline derives from the consent granted by the Minister on 15th April, 2002 on foot of the statutory authority granted by the Act of 1976, as amended, and that its entitlement to enter on the plots the subject of the compulsory acquisition orders derives from those orders made by the Minister in May and June, 2002 on foot of the authority conferred by the Act of 1976, as amended. Insofar as the plaintiff impugns the consent dated 15th April, 2002 and the compulsory acquisition orders and the statutes on foot of which they were made, in my view, the necessary connection is established. Similarly, insofar as these defendants plead that the exercise of statutory rights in the construction and use of the pipeline would infringe their constitutional rights, the connection is established. The connection is less clear cut in relation to the impugning of the Act of 2000 and the Regulations made thereunder. Although the plaintiff has pleaded the existence of the planning permission for the onshore gas terminal, thereby implying that it is material to its cause of action, the connection between the State parties, in particular, the Minister, and the issue whether planning permission is necessary for the pipeline and whether the environmental protection afforded by EU law has been upheld seems to me to be tenuous, as these are matters which are "within the bailiwick" of other public authorities. However, it seems to that that is a matter which may be raised by the State parties on the defences to the counterclaims.

30. The second question is whether these defendants should be allowed to amend their defences and counterclaims under O. 28, r. 1 by joining the State parties as defendants to the counterclaim and pleading against them. In this connection, counsel for the State parties referred to the analysis of the existing pleadings against the second respondent in *Croke v. Waterford Crystal Limited* set out in the judgment of Geoghegan J. at p. 328 and his decision in relation to the second respondent set out at p. 338. In that case the Supreme Court refused leave to amend the statement of claim as against the second respondent, but it did so on the basis that the plaintiff had not put forward any factual basis whatsoever to support fraud or any kind of deliberate misconduct claim against the second respondent. I do not see how that decision assists the State parties.

31. Counsel for the State parties took a similar line to counsel for the plaintiff in relation to the nature of the claims proposed to be pursued against the State parties. In relation to the challenges to the validity of public law decisions, he submitted that these matters should be pursued by way of judicial review, where these defendants would have to apply for leave and go through the filtering process provided for in Order 84 and explain and justify why they did not pursue their challenges within the time constraints provided for in Order 84. As regards the challenges to the constitutionality of certain statutes, he submitted that these defendants must demonstrate that they have *locus standi*. Finally, he referred to the so called principle of "self restraint" which is explained at p. 833 in Kelly on the *Irish Constitution* (4th Edition, Lexis Butterworths). In other words, he was submitting that the plaintiff's common law claim in tort should be pursued separately and first. All of these points, it seems to me, are matters which it is open to the State parties to take in their defences to the counterclaims.

32. As was held by the Supreme Court in *Croke v. Waterford Crystal Limited*, the primary consideration for the court must be whether the amendments are necessary for the purposes of determining the real questions of controversy in the litigation. While not disagreeing with the submission made by the plaintiff in its written submission, that at the core of these proceedings is the concern of these defendants that the safety of the pipeline has not been adequately assessed, I have come to the conclusion that they are, because it is open to the defendants to seek to redress those concerns in such manner as the law permits. That is not to say that there is no substance in the points made on behalf of the plaintiff in relation to the public law nature of the issues raised and the reliefs claimed, the issue of *locus standi* and the order in which the issues raised should be litigated. However, those are matters

which should be raised by way of reply or defence to these defendants' counterclaim. I think it would be premature and not a proper exercise of the court's discretion to refuse leave on the basis of those considerations.

Decision on application of second and fifth defendants
33. Accordingly, there will be an order under O. 28, r. 1, allowing these defendants to deliver defences and counterclaims in the proposed form.

The plaintiff's application
34. As I have outlined earlier, the plaintiff sought a number of alternative remedies on its notice of motion of 30th January, 2006: orders striking out so much of each defendant's defence and counterclaim as seeks to raise public law issues; or an order directing a separate trial of the counterclaims; or an order giving directions as to the justiciability of the public law issues; or an order directing the trial of a preliminary issue as to whether the defendants can raise public law issues in these proceedings. The application was grounded on the affidavit of the solicitor acting for the plaintiff. The affidavit does not contain any factual material which has not already been alluded to. The points made in it are that the public law issues are not sufficiently connected, and cannot be conveniently tried, with the claims advanced by the plaintiff. If the defendants are permitted to pursue the public law issues, this will prejudice the plaintiff. The court has endeavoured to facilitate the parties in relation to an early hearing of the substantive proceedings, and the public law issues would considerably delay the trial. It was also averred that the public law issues raised are frivolous and vexatious and bound to fail in circumstances where the defendants failed to raise the issues in judicial review proceedings in time.

35. Of the defendants, only the second and fifth defendants filed affidavits in response. Two affidavits sworn on 6th February, 2006 and 7th February, 2006 by the solicitor for the second and fifth named defendants were filed, the thrust of which is that these proceedings spring from, and are rooted in, issues of public law and that issues of private law are secondary thereto.

36. The events leading up to the hearing of the plaintiff's application are of some significance. By letter dated 19th January, 2006, the plaintiff's solicitors informed the solicitors for the second and fifth defendants that I had been assigned to hear and determine all preliminary issues arising in these proceedings and that the plaintiff intended to apply on 25th January, 2006 for an early hearing of the application of the second and fifth defendants, with which I have just dealt. The plaintiff's solicitors also informed the solicitors for the first and third defendants that, as had been indicated in court on 12th January, 2006, and with the consent of the second and fifth defendants, the plaintiff would apply for liberty to issue against all defendants a motion seeking, *inter alia*, an order for the trial of a preliminary issue of law as to what public law issues, if any, are justiciable in these proceedings. As I stated earlier, the plaintiff's application issued on 30th January, 2006. I assume a letter in similar terms was sent to the solicitors for the fourth and sixth defendants.

37. The final position of counsel for the plaintiff on the hearing of the plaintiff's application on 8th and 9th February was that what the plaintiff was seeking was an order striking out such parts of the defence and counterclaims as seek to raise public law issues, primarily, issues concerning the validity of the consent under s. 40 of the Act of 1976 and the compulsory acquisition orders. The plaintiff was not seeking a separate trial of the counterclaims. Neither directions as to the justiciability of the public law issues nor an order directing the trial of a preliminary issue as to whether the defendants can raise public law issues were necessary, presumably on the basis that the public law issues should be struck out at this juncture.

38. The basis on which the plaintiff contended that it was entitled to have the public law issues removed from the proceedings was that they should have been litigated within the time limits prescribed in O. 84, r. 21 of the Rules, in 2002 and 2003, and that they are not now justiciable. The authority primarily relied on by the plaintiff was the decision of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 3001. That decision is undoubtedly authority for the proposition that a litigant may litigate a public law issue which could be the subject of an application for judicial review by way of plenary action but the principles enshrined in O. 84, r. 21 relating to delay in applications for judicial review should be adopted, so that if the plenary action is not brought within three months from the date on which the cause of action arose, the court would normally refuse relief unless satisfied that, had the claim been brought under Order 84, time would have been extended. Order 84, rule 21 gives the court power to extend the period within which an application for judicial review may be brought, where it considers that there is "good reason" for doing so. The plaintiff submitted, again in reliance of the decision of Costello J. in the *O'Donnell* case, that the onus was on the defendants to establish "good reasons" – to show that there are reasons which both explain the delay and afford a justifiable excuse for the delay. The defendants had not advanced any reasons why they should be granted an extension of time in this case. Therefore, it was submitted by the plaintiff, the defendants cannot succeed on the public law issues and they should be struck out.

39. In answering the plaintiff's application, counsel for the first and third defendants addressed the relevance of the approach adopted in the *O'Donnell* case, argued against characterising the stance of the first and third defendants as raising public law issues of the type under consideration in the *O'Donnell* case, and identified English authorities in which the position of a defendant raising a public law defence in an action by a public authority (*Wandsworth L.B.C. v. Winder* [1985] 1 A.C. 461; and *Pawlowski (Collector of Taxes) v. Dunnington* [1999] S.T.C. 550) has been distinguished from the position of an applicant pursuing a public law remedy. He submitted that it was not open to the court on the plaintiff's application to decide that the public law issues should be struck out. Further, he submitted that the court was not dealing with the trial of a preliminary issue. The notice of motion did not raise on its terms, or by implication, the question of delay, and there was no evidence of delay before the court. While it is true that the notice of motion did not highlight delay as an issue, in the plaintiff's grounding affidavit, the plaintiff's solicitor averred that the public law issues sought to be raised "in relation to the validity of the consents" were bound to fail because they should have been raised by judicial review and are now out of time. The reference to "consents", however, in my view, is confusing in a context in which the meaning of "public law issues" was not defined or expanded on in the notice of motion. Does it mean a consent under s. 40 of the Act of 1976, or is it intended also to include the compulsory acquisition orders?

40. In answering the plaintiff's application, counsel for the fourth and sixth defendants pointed out that the fourth and sixth defendants are not challenging the validity of the compulsory acquisition orders. There is no public body involved in the issues involving these defendants; it is litigation between two private parties, in which the validity of the consent under s. 40 can be tried. He submitted that the public law element here is collateral and he referred the court to the commentary on such situations in Hogan and Morgan on *Administrative Law in Ireland* (3rd Edition, Round Hall Sweet & Maxwell) at pp. 797 and 798. Counsel for the fourth and sixth defendants submitted that, not only should the court not decide to remove the public law issues from the proceedings, but asserted that there was little point in directing that a preliminary issue be tried. He submitted that the contention that issues are out of time should have been pleaded in the plaintiff's reply and defence to the counterclaims of these defendants.

41. As I have stated, the second and fifth defendants filed two affidavits in response to the plaintiff's application. Counsel for the second and fifth defendants made submissions on the relevance of Order 84 and also on the relevance of the decision in the *O'Donnell* case, indicating that these defendants were reserving their position on whether, in assimilating declaratory actions and judicial review

applications, that decision was correct. These submissions were relevant to these defendants' application to amend, as well as to the plaintiff's application. It was also submitted that there are no statutory limits in Order 84, merely guidelines as to time; Order 84 cannot impose time limits in relation to litigating constitutional rights; and issues of EU law and rights under the Convention are usually litigated in *inter partes* litigation. Apart from that, it was submitted that the second and fifth defendants would have been able to satisfy the "good reasons" test under O. 84, r. 21 for a number of reasons. One was that, if there was no onshore gas terminal, there would be no pipeline. The plaintiff did not obtain planning permission for the terminal until 22nd October, 2004. Another reason advanced was that it was not until the plaintiff brought an interlocutory application in these proceedings in the Spring of 2005, that these defendants first had sight of the letter of consent dated 15th April, 2002.

42. In setting out the stance adopted by the plaintiff and the defendants in the preceding paragraphs, I have not dealt exhaustively with the arguments advanced on behalf of the parties, and, in particular, I have not set out the response of counsel for the plaintiff to the arguments advanced on behalf of the defendants, but I have had regard to all of the submissions made in reaching a conclusion on the plaintiff's application.

43. Order 19, r. 27 provides as follows:

> "The court may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client."

44. That rule, in my view, is not designed to deal with a situation in which a litigant pleads a cause of action and his opponent pleads that the cause of action is either statute barred or time barred by some procedural rule. The mechanism provided in the Rules, and usually deployed, to deal with such an issue is O. 25, r. 1 which empowers the court to direct that a preliminary issue be tried on a point of law. I have no doubt that all of the defendants acted properly and *bona fide* in raising issues in their defences in relation to the consent under s. 40 of the Act of 1976 and the compulsory acquisition orders. Accordingly, I refuse the plaintiff's application for an order under O. 19, r. 27.

45. However, I am disposed to direct the trial of a preliminary issue as to whether the defendants can raise public law issues. Counsel for the plaintiff clearly stated what the position of the plaintiff would be at the trial of the action: the plaintiff is going to produce the consent dated 15th April, 2002 granted by the Minister, and the compulsory acquisition orders made by the Minister and is going to rely on the *maxim omnia praesumuntur rite esse acta*. When any defendant challenges the validity of those documents, the plaintiff is going to invoke O. 84, r. 21. Therefore, realistically, the question as to whether the issues raised by the defendants can be litigated in these proceedings will have to be addressed at some time. It seems to me that to deal with that question by way of a trial of a preliminary issue would be likely to involve substantial savings of time and cost.

46. I do not propose to direct the trial of the preliminary issue until such time as the plaintiff and the Minister have delivered their replies and defences to the defences and counterclaims of the second and fifth defendants and all of the issues between the parties have been clearly identified. At that stage, the plaintiff will be required to define by reference to the pleadings as between the plaintiff and each defendant what is meant by "public law issues" in the context of an application for the trial of a preliminary issue. Similarly, the State parties will be required to define the public law issues which arise as between the State parties and the second and fifth defendants. If, as between the plaintiff and each defendant, and the Minister and the second and fifth defendants, there is not agreement as to the relevant facts, I will hear submissions as to how the preliminary issue should be heard.

Decision on the plaintiff's application

47. Accordingly, my decision on the plaintiff's application is to dismiss paras. 1, 2 and 3 of the notice of motion and to adjourn para. 4 to a date to be agreed.

General observations

48. Once the pleadings as between the plaintiff, the second and fifth defendants, and the State parties are closed, in my view, the parties should agree the issues to be tried as between the plaintiff (and, in the case of the second and fifth defendants, the State parties) and each defendant. In the absence of agreement, the plaintiff's solicitor and the Chief State Solicitor should prepare lists of issues for consideration by the court. In my view, this is essential, because of the different approaches adopted by the various defendants and the different interests of the defendants, some only of whom are landowners affected by the compulsory acquisition orders. Consideration should be given to whether, apart from the question whether public law issues can be litigated now, any other issues should be dealt with by way of the trial of a preliminary issue, for instance, the issue of *locus standi* or the justiciability of any other issue. The order in which the issues are to be tried should be agreed or, alternatively, the plaintiff should put the matter before the court for decision. In this connection, I would expect that there would be agreement that the issues to which the principle of "self restraint" apply should be deferred until the other issues have been dealt with.