High Court

Murphy v The County Council of the County of Wicklow

1998/25 JR

19 March 1999

KEARNS J:

The Glen of the Downs is an area of outstanding natural beauty and ecological diversity. Its trees and woodlands comprise the majority of the habitat and ecological areas of importance within the Glen. They comprise oak, ash hazel, beech and oak-beech woodlands. There is also some rowan, sycamore and holly.

A stream of pure water runs from North to South through the Glen along the Eastern side of the existing roadway. Adjacent to it are wet woodlands which constitute the habitat for some rare invertebrates.

It contains 21 different species of breeding birds, including species which are largely restricted to mature native woodland such as Blackcap and Jay. Sika deer, badger and red squirrel are all common species in the Glen.

In the County Development Plan for Wicklow the Glen is designated as being of outstanding natural beauty. It is further a listed Area of Scientific Interest rated of National Importance (An Foras Forbartha 1981). It is also a designated national Nature Reserve (designated 13 June 1980) and is protected under the Wildlife Act 1976. The site is also listed in the CORINE data base on sites of scientific importance held by the EC Commission.

The Environmental Impact Statement (EIS) which was prepared in this case in 1990/91 recognised the area as a major amenity, not only for the people of County Wicklow but also for Dublin and the country as a whole. It recognised that the Glen must be treated in a very special way, and, as far as possible, preserved unspoiled.

The public have always enjoyed access to the Glen of the Downs for recreational purposes, largely facilitated in the last century by the La Touche family. In 1766 David La Touche commissioned the leading landscape gardener Peter Shanley, to fashion the Glen in the style of the early picturesque landscape movement. The Octagon House was constructed on

the Eastern side of the Glen and apparently served as a tea room. A programme of planting was undertaken, the benefits of which are still to be seen to-day. The course of the stream was altered and made more amenable to those walking through the Glen. This area of land between the stream and public road is covered with ash, hazel woodland and contains a rich ground flora which has a restricted distribution elsewhere in Ireland.

In the early part of this century all the lands comprised in the Glen were sold and responsibility for their management passed to the Forestry Department in the 1930's. All of the land was then and is now registered in the name of the Minister for Agriculture.

There are conflicting views as to the user of the Glen between 1933-1970. On one version of the evidence, the public were not encouraged during those years to access the woodlands, although a suggestion to the contrary has been made by witnesses called in this case by the Applicant.

What is not in dispute is that in 1970 and the years that followed the Forestry Service of the Department of Lands laid out certain nature trails for use by the public. This was on foot of a policy decision made as part of European Conservation Year to encourage greater access to the woodlands by the public. In 1972 the present car park was constructed on the Eastern side of the roadway.

There is evidence of a roadway passing through the Glen as far back as the 17th century. In 1814 the current road through the Glen was constructed to facilitate the passage of mail coaches. An earlier road had bypassed the Glen but was abandoned because it was narrow and steep. The road through the Glen was declared a main road in 1926 and the road as it currently exists was constructed in the period 1968-70.

The road scheme which is the subject matter of these proceedings, involves a proposal to upgrade a section of the N11 National Primary Route by constructing a dual carriageway linking the existing dual carriageway at Glencormack (near Kilmacanogue) to the existing dual carriageway at the Southern end of the Glen of the Downs, a length of road of approximately five kilometres.

This is a significant project, costing some £18.5m and which will take approximately two and a half years to complete. When completed, it will provide continuity of standard with the adjacent sections of dual carriageway. In terms of further work, it appears there are plans in being to continue the improvement to dual carriageway standard as far as Enniscorthy under the Government's Programme for Peripherahity for Transport.

Quite apart from those considerations, the Respondent took the view that present traffic volumes are twice those which would normally necessitate the provision of a dual carriageway. Average daily traffic on the road is 25,600 vehicles and this is expected to double within fifteen years. Wicklow County Council also maintain there are safety

considerations which suggest that road improvement is required. Between 1988 and 1996, five people died and eighty four accidents were reported on the stretch of the N11 from Kilmacanogue through the Glen of the Downs.

Against this background, it is not difficult to see how the road widening scheme was regarded both as urgent and necessary by Wicklow County Council on the one hand and equally on the other hand how many people, and not merely those living locally, feared the impact such a development would have on the eco system and wildlife in the Glen of the Downs.

The Applicant in these proceedings contends that the works and the development if allowed to proceed will irrevocably destroy the woodland aspect of the Glen. Hundreds, if not thousands, of trees will require to be removed. Substantial excavation into the slope on the Western side of the Glen will be necessary. The ground water flow may be interrupted so as to adversely affect the wet woodlands between the roadway and the stream. Natural habitat may be lost to breeding birds and animals, causing overall an unacceptable level of interference with lands designated as a nature reserve. The Applicant further claims that the respondent has failed to comply with significant statutory pre-conditions before commencing tree felling operations which began in January 1998 as part of the initial works connected with the scheme.

The Respondent, while accepting the development will obviously have some impact on the Glen, at least during the course of the construction works, claims that the supposed adverse affects have been grossly exaggerated. Approximately 87% of the road construction will be along the line of the existing road and the adjoining disused section of roadway on the Western side. The scheme as approved affects approximately 1% of the woodland in and around this location. In other words, 99% of the woodlands, or approximately 80,000 trees, will not be affected. In addition, substantial remedial and ameliorative steps will be taken which will include replanting a substantially greater number of trees than the number removed. The area of State land affected amounts to 0.68 hectares, comprising slivers of land on either side of the existing roadway. The Respondent proposes to return to the State a plot containing .74 hectares of council land superfluous to the road scheme as part of the development proposal.

The Respondent's design for the scheme was finalised early in 1990. The Council at that time wrote to the Department of the Environment stating that they considered an environmental impact assessment was required as the route passed through the Glen of the Downs.

On the 5 February 1990 approval was obtained from the Department of the Environment to carry out an EIS and the consulting engineering firm of Ove Arup was appointed to prepare the report. On the 24 April 1990, the Department made it a requirement pursuant to Statute to prepare the EIS. All statutory requirements were complied with and a full public meeting

took place in December 1990. Detailed representations and submissions were received prior to publication of the EIS in January 1991. Under the initial proposal prepared by the Respondent the proposed route was to lie somewhat to the East of the existing road. Its most serious effects would have included loss of approximately 40% of the ash hazel woodland and diversion of 40% of the length of the stream running through the Glen. A number of rare invertebrate species were placed at risk and two bird species were recognised as likely to suffer serious loss of habitat. As a result some of the County Council proposals were changed or modified in the EIS including adjustment of the horizontal alignment in the Glen of the Downs to avoid intrusion into the woodlands as far as possible. It also proposed to reduce the median gap in the middle of the road from the normal 8m to 4m.

In July 1991 the Department of the Environment requested further information in respect of the EIS, following which a response document (The Response Document) was furnished to the Minister in March 1992. This document took on board the problems which arose from routing the widened roadway on the Eastern side of the Glen and proposed instead a route which lay more to the Western side. The Response Document addressed itself to the feasibility of construction on this side of the Glen. It addressed the visual impact and impact on the natural environment of such an adaptation. It concluded essentially that the proposed route on the Eastern side of the valley would impinge significantly and have an adverse affect on the habitats in the vicinity of the stream. It would necessitate the realignment of approximately 400-450m of the stream thus disturbing the woodlands and ground flora in this area. In addition, an earth retaining structure of approximately 140m would be required.

On the other hand, the Western route addressed in the Response Document would result in the construction of a 60m length of retaining wall varying in height from 2m to 8m. This would constitute a significant and permanent visual impact. A loss of 2.6 acres of mature trees was envisaged under this second proposal (option 2).

The Office of Public Works, who by then were managing the Nature Reserve, were unhappy with both proposals and suggested that a much tighter cross section of road be utilised.

Thereafter further consultations were carried out and all statutory procedures were fully complied with, prior to the production of a report by two Inspectors from the Department of the Environment in May 1993.

Having considered the EIS and Response Document, the Inspectors recommended a modified proposal (option 3) which essentially allowed the road to pass along via media between the initial proposal and the proposal contained in the Response Document. (See Appendix 1). Under this proposal, the overall width of the combined dual carriageways was reduced to 25m. This carriageway would consist of 2 x 7.5m carriageways, 1 no, 3m median, 2 no, 2m hard shoulders and 2 no. Grassed areas on either side 1.5m wide.

Under this modified proposal, the stream was left untouched and far less encroachment was necessary on the Western side. The Inspectors felt this represented a reasonable balance between the competing environmental requirements of amenity and ecology. They did not feel that any sort of clear case had been made out that the habitat of the invertebrates was threatened. They also noted that the valley was already subject to a high level of noise, vibration and fumes and felt these were not going to increase radically. Indeed with the increasing use of lead-free petrol, air pollution was likely to decrease.

Essentially what emerged therefore from this process was a recommendation that the "Western alignment be accepted as the basic alignment with the exception of the Northern end where the widening was to take place on the Eastern side.

A further public meeting occurred in June 1992 and at the end of this lengthy process of consultation, the Minister for the Environment finally certified the EIS on the 23 December 1993.

The Applicant attended neither of the public meetings, put in no submissions, and brought no challenge to the adequacy of the EIS until these judicial review proceedings were commenced in January 1998.

By Compulsory Purchase (Kilmacanogue/Glen of the Downs Dual Carriageway) No 1 Order 1995, Wicklow County Council moved by way of compulsory purchase to take in the lands required for the road scheme. In addition to the State lands in Glen of the Downs, there were approximately 90 property owners between the Northern end of the Glen and Kilmacanogue who were affected by the CPO. The Court will later have to consider whether Wicklow County Council adopted proper procedures in applying CPO to State lands but it is not in dispute in this case that all the procedures applicable to compulsory purchase were properly followed in this instance.

A lengthy public hearing relating to the scheme took place at the Glenview Hotel between the 28 November 1995 and the 1 December 1995. By the conclusion of those proceedings, there were no objections to the proposed scheme from the various groups and individuals who had opposed initially the route through the Glen of the Downs.

The Minister for the Environment confirmed the CPO on the 23 January 1997. Thereafter one local resident brought proceedings in accordance with Section 78 of the Housing Act, 1966, but these proceedings were compromised in July 1997, following which the CPO, if it was valid, became operative 21 days thereafter.

Notice to treat was served in respect of the lands, including the State lands, on the 7 October 1997.

Notices to enter were served on the 25 November 1997.

Again, at no stage did the Applicant participate in these statutory procedures or take part in the public meeting, prior to the coming into operation of the CPO on the 21 August 1997.

Believing the way was now clear to proceed with the scheme, Wicklow County Council commenced tree felling operations in January 1998. However, having felled 124 trees, their activities were brought to a halt as a result of the protest of the Applicant and his associates who, by their occupation of the trees, rendered it impossible for the Respondent to proceed any further.

The Applicant is an "eco warrior" who, with his associates, have occupied the Glen since late 1997 at a point in time when it was obvious that works of tree felling were about to commence. Thereafter ejectment proceedings were brought by Wicklow County Council and the present judicial review proceedings were brought by the Applicant.

Since that time, Wicklow County Council in October 1998 executed an agreement with the Minister for Arts, Gaeltacht, Heritage and the Islands for the purchase of the lands the subject matter of the CPO.

This took place against a background that Wicklow County Council were not entirely happy that CPO procedures were the proper route to have followed for the purpose of taking in the State lands. As will be immediately apparent, the vendor in this agreement is a Minister other than the Minister in whose name the lands are registered (ie the Minister for Agriculture) and this is an issue of some importance in this case having regard to the contentions advanced by the Applicant on the one hand and having regard to the ejectment proceedings being brought by Wicklow County Council against the Applicant and his associates on the other.

During the twelve days of the hearing, I received evidence from the Applicant and two of his associates, all of whom are, or were at some stage eco warriors.

They presently occupy approximately 15 tree houses in the Glen of the Downs on both sides of the roadway.

Despite their title, I found all three witnesses to be genuine and bona fide persons who have a passionate commitment to the eco system and to the protection of the Glen of the Downs. Mr Gavin Harte, being one of the group, gave evidence that eco warriors are a loosely knit group whose membership and numbers change and vary from time to time. They were committed to what he described as a "vigil" in Glen of the Downs and pointed out that their continued occupation of the tree houses at that location involved considerable hardship, particularly during winter months for those involved. He further stressed that his group pursue only peaceful means and at all time operate, and will continue to operate within the

law.

I will return to this aspect of the case in the context of locus standi, but I think it important to state at this early stage that idealism and commitment to our nature heritage underpin the actions of the Applicant and his associates and I have no reason in this case to think otherwise. Specifically, no case has been made out against them that they are either damaging the trees in Glen of the Downs or engaging in threatening or other behaviour which could in any way be described as illegal.

Before addressing the topic of locus standi, let me set out the main arguments advanced by the Applicant in this judicial review.

Firstly, it is contended that the EIS prepared on behalf of the Respondent is totally inadequate for the road scheme as finally determined. This is so because the Respondent now proposes to carry out works which have been modified in a material way from that originally submitted for certification and it is claimed the extent of the variation from the Respondent's original scheme is such as to require that a completely new EIS be prepared on foot of a revised environmental impact assessment.

Secondly, it is contended that the Respondent cannot acquire these lands or go in upon them to carry out development works for the road scheme, without having the prior consent of the Minister for Finance and the Minister for Agriculture pursuant to the State Property Act, 1954. It is claimed they do not have such consents, that they failed to comply with the requirements of that Act, and a declaration to that effect is accordingly sought.

Thirdly, the Applicant contends that, as the lands in question are part of a nature reserve designated as such by Statutory Instrument 178 of 1980, the Respondent has no jurisdiction to carry out works consisting of the cutting down or removal of trees, flora or fauna unless or until Statutory Instrument 178 of 1980 has been appropriately modified.

Fourthly, the Applicant contends that the CPO procedures were inappropriate to the acquisition of State lands and that such a procedure cannot be applied to such lands, having regard to the concept of State sovereignty, the provisions of the Constitution and the State Property Act, 1954.

Fifthly, the Applicant maintains that there are a number of public rights of way in Glen of the Downs

which require to be extinguished by appropriate statutory procedures before the Respondent can carry out the proposed road scheme. It is further contended that the public enjoy a ius spatiendi or right to wander in the woodlands which has not been extinguished; finally, it is claimed the public may enjoy these lands under implied charitable trust.

LOCUS STANDI

Order 84, R 20, (4) of the Rules of the Superior Courts provides the following threshold requirement for granting Judicial Review:-

"the Court shall not grant leave unless it considers that the Applicant has a sufficient interest in the matter to which the application relates."

This requirement is in conformity with the judgment of Walsh J in State (Lynch) v Cooney [1982] IR 337, in which he stated at p 369:-

"The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the fact, because it is only by an examination of the facts that the Court can come to a decision as to whether there is a sufficient interest in the matter to which the Application relates."

The Respondent contends that the Applicant does not have locus standi in these proceedings to argue the various points raised in the Judicial Review on grounds which include absence of merits, lack of interest in any legal sense in the subject matter of the proceedings and delay. Significantly, the bona fides of the Applicant and his commitment, and that of his associates, to the preservation of the eco-system is not in dispute. Further, it is accepted by the Respondent that the Court is entitled to have regard, as a factor in determining this issue, to the fact that the Attorney General legally aided the Applicant under the Attorney General Scheme in these proceedings.

While Messrs Hogan and Morgan (Administrative Law in Ireland -- 3rd edition, pp 739-764) address the significant evolution in case law on this whole topic since the decision in Cahill v Sutton [1980] 1 IR 269, the Supreme Court decision in Lancefort Limited v An Bord Pleanala [1998] 2 ILRM 401 represents the most updated pronouncement on locus standi and contains within it a detailed review of the relevant legal principles.

As both sides rely on different aspects of the Supreme Court judgment, it is important to analyse precisely what was decided in Lancefort and what general principles in that decision are of relevance or application to the instant case.

The case involved a challenge to a permission from An Bord Pleanala to develop a site for the construction of a hotel in the centre of Dublin. In reaching a decision the Board did not require an environmental impact assessment to be carried out. Subsequent to the oral hearings a number of individuals formed a limited company, namely, Lancefort, which sought liberty to apply for Judicial Review. Some of the individuals involved in the

formation of Lancefort had attended a hearing, prior to the granting of permission but had not put forward any objection that an EIS had not been sought by the planning authority or An Bord Pleanala.

Although two High Court judges separately found that Lancefort did have locus standi, the Supreme Court in a majority judgment found the Applicant company did not have the requisite locus standi to challenge the decision.

At first glance, this decision appears to favour the Respondent because there are certain similarities between that case and the present one. In both cases, the Applicant came to Court seeking relief at a time when the statutory procedures had been exhausted and had not participated in them. The lack of an EIS, or in this case the alleged lack of any adequate EIS (which the Applicant says is the same thing) is again a feature common to both cases. Also, in neither case, could the Applicant be said to have any proprietary interest in the matter before the Court.

While these are the similarities, there are important differences. In Lancefort, there were statutory requirements to bring the Judicial Review application within two months, and to establish "substantial grounds" and a further restriction lay in the fact that an appeal to the Supreme Court could only be taken on a point of law of exceptional public importance.

Secondly, in looking at what Lancefort did decide, it is clear that Keane J regarded two questions as being of paramount importance in the majority judgment in the matter when he stated as follows at p 436:-

"Two questions arise, however, in determining whether a person has a 'sufficient interest in the matter to which the application relates' which were the subject of discussion in this case. The first is as to whether the issue of locus standi should be determined as a threshold issue on the application for leave to issue the Judicial Review proceedings or whether, assuming leave to be granted, it should be determined on the hearing of the substantive application for relief. The second is as to the extent to which the Court, in determining the issue outstanding, should consider the merits of the case the Applicant seeks to make."

Immediately some clear distinctions can be seen to emerge between Lancefort and the present case. Firstly, the application of the Applicant did not require to be made on notice to the authority concerned unlike in Lancefort where application seeking Judicial Review of decisions by planning authorities or the Board must be made on notice to the authority concerned. Accordingly, the pronouncement of Keane J that, as a general rule, there should be sufficient evidence before the Court at that stage to enable the judge to determine the question of standing has no particular relevance in the instant case.

Secondly, the appeal "on the merits" in Lancefort was confined to a single issue, namely, the absence of an EIS which, in the particular circumstances of Lancefort, the Court could

not regard as a particularly serious matter. Keane J stated at p 440-441:-

"An examination of the merits of the case, accordingly, leads me to the conclusion that, if there has been any irregularity in the manner in which the Board discharged its functions, it could not possibly be regarded as constituting an abuse of power or a default in procedure sufficiently grave as justify affording locus standi to a body such as the appellant. Not only was it not in existence at the relevant time and hence is in serious difficulties in contending that it had an interest in the subject matter: the procedural irregularity, if such it was, was of so little weight that neither Mr Smith, the person who took the leading part in the formation of the Appellant, nor Counsel appearing on behalf of An Taisce nor any of the experts who participated in the procedure leading to the decision considered it worthy even of mention."

It is difficult to see therefore, how the majority decision of the Supreme Court in Lancefort can be of particular assistance in the present case where some five different points are raised in the Judicial Review, some of which I may say at this stage certainly have merit. In a multi-point case such as the instant one, I cannot believe that the decision in Lancefort is to be interpreted as requiring the Court to explore the merits of each individual point before arriving at any conclusion as to whether or not an Applicant has locus standi. If that were the case, how could time and expense be avoided in the case of a crank or meddlesome litigant if the merits of his case on perhaps a dozen different points had first to be dissected before arriving at any conclusion as to whether or not he had locus standi? Accordingly, it seems to me that the thrust of the decision in Lancefort goes to a case where a single point only is raised and where considerations of locus standi and the merits of that one point are inextricably woven together.

What the judgment of Keane J does emphasise however, is the weakness of any Applicant coming to Court seeking relief in respect of a ground of Judicial Review which he could have argued but failed to do so at the appropriate time. As Keane J stated at p 440:-

"It is clear, as was held by this Court in Chambers v An Bord Pleanala [1992] 1 IR 134; [1992] IRLM 296, that the fact that a person affected by a proposed development did not participate in the appeals procedure is not of itself a reason for refusing locus standi. It may even be that a company which came into being after the decision which it is sought to challenge may, in particular circumstances, be in a position to assert locus standi, as held by Comyn J in the case to which I have already referred. But it would, in my opinion, be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the application was made for leave to bring the proceedings."

That finding seems to me to have certain inescapable consequences for the Applicant in the instant case insofar as any attack on the EIS is concerned and I will turn to that topic presently.

Nothing in the judgment of Keane J seems to this Court to invalidate the recitation of the general and relevant principles as enunciated by Denham J in the course of her dissenting judgment in Lancefort, and in particular where she dealt with environmental issues.

She stated as follows at p 418-9:-

"In certain public law cases and in actions reviewing the constitutionality of laws, principles of locus standi have been developing to include persons acting in the public interest. Whilst this is not a case where the constitutionality of an Act is in issue the nature of the litigation (claiming to protect the environment) is analogous in that it is a public interest case. It is not similar to an action by an individual seeking to protect an individual right. In this case a legal person is seeking to protect the environment -- for the public benefit. Consequently, principles which have enabled public interest litigants to litigate for the protection of the Constitution are relevant also to litigation to protect other public interests such as the environment. Indeed, a progress from a principle of a "victim" locus standi to one where the public interest is an important factor may be seen in some cases relating to the environment'.

In Environmental and Planning Law in Ireland by Yvonne Scannell it is stated at p 219:-

'Locus standi to challenge the validity of decisions by the Board is more readily available to those who were parties to the appeal. In all cases to date where locus standi was granted to non parties, they were able to demonstrate that they had either actively participated in some of the procedures for objecting to the proposed development Law v Minister for Local Government Unreported, High Court, 7 May 1974; Haverty v An Bord Pleanala [1987] IR 485), or that special considerations justified granting them standing, State (CIE) v An Bord Pleanala Supreme Court, 12 December 1984; Brady v Donegal County Council [1989] ILRM 282 (Applicants denied opportunity to appeal by alleged failure to public notice of the application in a newspaper circulating in the area) and that they had a special interest in the outcome of the appeal Chambers v An Bord Pleanala [1992] IR 134; [1992] ILRM 296).'

The public aspect of environmental law in relation to locus standi was described at p 108 as:-

'It is submitted that because planning legislation envisages the involvement by members of the public in all stages of the planning process and because many judicial decisions have, in varying ways, stressed that in all planning matters there are three parties: the developer, the planning authority (or An Bord Pleanala, in the case of an appeal) and the members of the public (see for example, Stafford and Bates v Roadstone [1980] ILRM 1; Robinson v Chariot Inns Limited [1986] ILRM 621; Morris v Garvey [1982] ILRM 177). Locus standi to challenge what McCarthy J described in the Supreme Court as 'an environmental contract

between planning authority . . . and the community.' McGarry v Sligo County Council [1989] ILRM 768 at p 772) is very wide indeed and is certainly not confined to persons whose proprietary interests are affected. It probably extends to all members of the public liable to be affected by the provisions of a development plan unless there are countervailing factors. Thus, for example, if the nature and gravity of the allegations made are serious, a very wide range of persons will be accorded standing whereas if they are trivial, it may well be denied. The nature of the remedy sought may also influence the Court's discretion; it may be easier for an ordinary member of the public to obtain a declaration than an enforceable order of mandamus. The locus standi rules are therefore essentially a matter for the Court's discretion but all indications in environmental cases to date support the view that standing for Judicial Review in these cases will rarely be denied.'

Whilst this view might be somewhat optimistic on the common law of public interest parties, it is rooted in precedent. A recent decision is consistent with that opinion. In Chambers v An Bord Pleanala [1992] 1 IR 134; [1992] ILRM 296, the Supreme Court rejected a submission, inter alia, that as the Plaintiffs had failed to be involved in the statutory planning appeal they had lost locus standi by their conduct. On the facts Egan J held that the Plaintiffs were justified by reference to their involvement within an environmental association. He stated at pp 146/303:-

'The learned Trial Judge was correct in finding that the Plaintiffs were not named objectors in the application before Cork County Council but they were certainly involved with a body known as RICH ('Responsible Industry for Cork Harbour') who were objectors and who subsequently appealed to the Board. The Plaintiffs stated that they left it to RICH to deal with the appeal and their attitude in this regard can readily be understood particularly as there were 19 appellants in all'."

Again at p 420 Denham J stated as follows:-

"Environment issues by their very nature affect the community as a whole in a way a breach of an individual personal right does not. Thus the public interest element must carry some weight in considering the circumstances of environmental law cases and the locus standi of its parties."

In concluding at p 424 Denham J stated as follows:-

"The common law on locus standi has been developed to aid the administration of justice. The crank, vexatious litigant and stranger is excluded from the Courts. Lancefort does not belong to any of these categories.

The principles of locus standi have been extended by the Courts in some cases to situations where concerned citizens have sought to protect the public interest. The analogy of those cases, where the constitutionality of laws was queried, should be applied in this case. The

track laid by SPUC v Coogan; Crotty v An Taoiseach and McGimpsey v Ireland and environmental actions such as Chamber v An Bord Pleanala and R v Inspectorate of Pollution ex p Greenpeace (No 2) is firm and the cases provide appropriate precedents. This approach is just, aids the administration of justice, would not permit the crank, meddlesome or vexatious litigant thrive and yet enables the bona fide litigant for the public interest establish the necessary locus standi in the particular area of environmental law where the issue are often community rather than individual related. The administration of justice should not exclude such parties from the Courts. Whether or not they succeed in their action is quite another matter -- but they should not be excluded from the Courts to litigate the issue. I would affirm the Order of the High Court that Lancefort has locus standi and dismiss the cross appeal. As I am in a minority on this matter, it is unnecessary to express a view on the substantive issues of the case."

Both Denham J and Keane J considered the Greenpeace case in their judgments, albeit from slightly different perspectives. That case (R v The Inspectorate of Pollution Ex P Greenpeace Limited (No 2) [1994] 4 All ER 329) concerned the granting of authorisation to a company, BNFL, engaged in re-processing spent nuclear fuel, to discharge radioactive waste from its premises at Sellafield in Cumbria. The case on behalf of the Applicant for leave to challenge the granting of the authorisation was challenged on the basis that Greenpeace had no locus standi, but this objection was rejected by the Court. Denham J looked to the case in the context of locus standi and sufficiency of interest in quoting from Otton J at p 350:-

"It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before the Court. There would have to be an application either by an individual employee of BNFL or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well informed challenge might be mounted which would stretch unnecessarily the Court's resources and which would not afford the Court the assistance it requires in order to do justice between the parties."

Denham J felt that such considerations might well indicate the appropriate approach in certain cases.

In his judgment, Keane J, in underlining the stark contrast between the merits of the position in Greenpeace and that in Lancefort, stated as follows at p 441:-

"In that case, the Court, although it concluded that the objection of Greenpeace was not legally well founded, rejected the challenge to their locus standi, pointing out that they had a genuine interest in the matter raised and had 2,500 supporters in the area of the plant who might not otherwise have an effective means of bringing their concerns before the Court. The contrast between a concern based on a failure by the operator of such a plant to engage in a process of public consultation before beginning the discharge of radioactive waste with

the stated concern of the Appellant in the present case as to the absence of an EIS, in a case in which there has been an exhaustive and searching process of public consultation culminating in an oral hearing attended by the alter ego of the Appellants, hardly requires emphasis."

It seems to me a similar approach shows how the present case is clearly distinguishable from Lancefort. The present Applicant has genuine interest and is in a position to present expert evidence on a range of points, all of which are pertinent to the huge stake the public at large have in relation to the proper and lawful management of Glen of the Downs.

Both Irish and EU legislation recognise and give deference to the special position arising in relation to the eco-system and environment in Glen of the Downs. It is a Nature Reserve designated by Statute as such. It is quite unique.

The proposed development will have significant consequences for the Glen, at least in the short-term.

Although it may be regarded as a borderline case, I do feel these considerations suggest that the Court should exercise its discretion in granting locus standi. As indicated, I believe some of the points raised by the Applicant do have merit. In the absence of merits in relation to any point argued, the decision in Lancefort requires this Court to add absence of locus standi to its reasons for dismissing the particular point.

In relation to the question of delay, this again goes to discretion because the Court has a discretion under the Superior Court rules to extend the time for granting judicial review. Considerations of delay cannot arise, however, in relation to some of the points raised, namely those challenges to the Respondent based on the perceived or actual failure of a Respondent to obtain certain consents required by Statute before commencing the development works. Obviously, in relation to any such point, the clock cannot begin to run until the Respondent commences the actions complained of against a background of not having the requisite statutory authority to do so.

Mr Connolly on behalf of the Respondent asked the Court to consider whether or not the Applicant could bring proceedings at all because of the views expressed by O'Hanlon J in Parsons v Kavanagh [1990] ILRM 560. In that case, the Plaintiff operated a bus service between Clonmel and Dublin and sought an injunction and damages from a competitor who started up in business without an appropriate licence under the Road Transport Acts. If an Act on its true construction is intended to protect a particular class of persons, then, he argues, members of that class, and those only, are intended to have a right of action. An Act for the benefit of the general public confers no right on an individual member of the public to sue. Further, where a statutory remedy by way of criminal proceedings is provided for the breach of a statutory duty, there is a strong implication that no civil action for breach of that duty lies.

I cannot see how this case is relevant to the present one. This is a different kind of action. No damages are sought. No criminal sanction exists under the Wildlife Act 1976, or is available to cover the situation where the proposed actions of the Respondent consist of entering upon the nature reserve and constructing a road over portion of it. The words locus standi do not appear at any stage in the judgment, nor is the report in any way considered by Messrs Hogan and Morgan when dealing with the topic of locus standi, although the case is mentioned in other contexts.

Finally, and for avoidance of doubt, I stress that I see this as an exceptional case for the reasons already set out. It would be quite wrong for the Applicant or his associates to interpret this ruling as giving a "green light" for similar protests at other locations which would almost certainly lack the unique environmental and statutory mantle which pertains to Glen of the Downs.

Arguments in Relation to Environmental Impact Statement

The relevant legal provisions governing an EIS are to be found in the European Communities (Environment Impact Assessment) Regulations 1989 (SI No 349 of 1989) (hereinafter referred to as 'the regulations') and Council Directive 85/337 EEC (hereinafter referred to as 'the Directive'). Mr Sreenan points out that regard must be had to the Directive when interpreting the regulations.

Before, however, coming to the requirements of the regulations and to the submissions made as to the inadequacy of the EIS in the instant case, I feel I should state in the plainest possible terms that I feel the Plaintiff cannot succeed in relation to this submission because of two insuperable obstacles.

The first of these is delay.

While the Superior Court Rules do provide a discretion to enlarge the time for bringing judicial review proceedings, quite obviously that discretion can only be exercised, when appropriate, to a very limited degree. Otherwise no executive decision of a body such as the Respondent, or, in the immediate context, the Minister for the Environment, could ever be safely relied upon for the purpose of carrying out activities thereby authorised.

The initial EIS in this case was produced in January 1991, following public consultation in December 1990. The Response Document, addressing the Western option was produced in March 1992 and a further process of public consultation took place in June of that year.

By the time the departmental inspectors reported in September 1993, there had been literally hundreds of submissions and the fullest possible consultation had taken place with local residents and objectors. The EIS was finally certified by the Minister for the Environment

on the 23 December 1993 subject to the conditions contained therein, one of which required a further study to be carried out to the design of the retaining structure on the Western side of the Glen of the Downs.

The Applicant did not participate at any stage in this process of consultation and public meetings. Indeed, as already mentioned, he did not participate in the lengthy public meeting which took place in relation to the compulsory purchase procedures either. His challenge brought in January 1998, is therefore brought over 4 years after the EIS was certified. No other challenge to the adequacy of the EIS has been brought by any other party in the interim.

Mr Sreenan on behalf of the Applicant has put up as a consideration in this regard the fact that part of his client's concerns relate to possible interference with ground water flows which only took concrete form when the more detailed design drawings recently became available. He also contends on the delay issue that the full implications of the design report in relation to the retaining structures on the Western side of the roadway have only recently been clarified in detailed design form. Accordingly, he could not be expected to have mounted a challenge until he had all the relevant information in his possession.

This strikes me as an entirely unrealistic contention. I have evidence from Mr John Stowell, a Consultant Hydrologist retained on behalf of the Respondent, who has many years experience dealing with the requirements of EIS reports. He told the Court that in some instances the report submitted for certification is extremely detailed, in other cases, less so. In his view, the latter was the better option because it enabled potential problems to be identified at an earlier stage and rectified and he had no criticism of the EIS and the Response Document as submitted for certification on the basis that it failed to incorporate finalised design drawings.

If Mr Sreenan's contention is correct, it would mean that information which was not available to an Applicant at the time leave was given to bring judicial review, could rely on new information -- as distinct from existing material which was not at the time yet discovered -- to graft on new and additional claims for the substantive hearing of the judicial review application. I do not believe this is a legitimate procedure under judicial review and a similar conclusion was reached by Kelly J in Ni Eili v EPA in a judgment delivered on the 6 May 1997; [1997] 2 ILRM 458.

The second insuperable obstacle to any attack on the EIS in this case lies in the fact that any such challenge would require to be directed against the Minister for the Environment, who certified the EIS and not the Respondent herein.

In an effort to get around this difficulty, Mr Sreenan points to Article 5(2) of the Directive which provides:

"The information to be provided by the developer in accordance with paragraph 1 shall include at least:

-- a description of the project comprising information on the site, design and size of the project;

-- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and

-- the data required to identify and assess the main effects which the project is likely to have on the environment;

-- a non-technical summary of the information mentioned in indents 1, 2, 3."

In other words, the Applicant contends there is a quite separate obligation on the developer to supply an adequacy of information so as to enable the Minister discharge his statutory functions properly. If there is a total lack of appropriate information, then the Applicant can direct his attack either to the developer or to the Minister. In effect in the instant case, Mr Sreenan contends there was no EIS at all in respect of the modified route (option 3) which was certified by the Minister in December 1993. Because the regulations purported to implement the Directive, they must be interpreted in the context of what the Directive requires.

It seems to me that once a developer purports to comply with the regulations, the sole arbiter for determining the adequacy of compliance is the Minister who has the power to either grant or refuse a certificate. Otherwise, his functions in this regard are meaningless. As we have seen, the Minister does not simply rubber stamp reports of this nature. Two inspectors from the Department were actively involved in assessing the proposals in 1993 and were instrumental in giving the final shape to the proposal in the form of the modified route (option 3) which was finally certified in December of that year. Accordingly, it is for the Minister, and the Minister alone, to determine the sufficiency of the information furnished for the purpose of granting a certificate.

The case of Browne and Others v An Bord Pleanala [1989] ILRM 865 further supports that view.

This was a planning case where a number of issues arose, including the adequacy of an environmental impact statement. At p 875 Barron J stated as follows:

"An environmental impact study where it is required is just as much part of the application as the plans or other description of the development which must be considered by the relevant planning authority. When considering an application for permission, such authority is given powers inter alia under Regulations 26 and 28 to require further information to be

furnished. This is a power independent of its power to grant or refuse permission. If it exercises such power, it is not until its requirements have been met that it has power to grant a permission pursuant to the provisions of Section 26 of the Act. The exercise of this power is solely a matter for a planning authority. The relevant provisions are mandatory in the sense that the developer must provide the information sought. However, it is solely for the authority to determine whether or not they have done so. In other words, within the framework of the present regulations, it is solely for a planning authority to determine upon the sufficiency of an environmental impact study. Having done so, and being otherwise satisfied it then has power to grant the permission sought."

At a later passage at page 876:

"In my view, once it is shown that the planning authority and therefore the Respondent had jurisdiction to deal with the application before them, then the question of the rights and wrongs of the application was a matter for them. Any other approach would be to turn an application for judicial review into a further appeal. I have no jurisdiction to do that. So my failure to refer to the evidence adduced by the applicants or to its importance as indeed my failure to refer to the Eolas Reports or their importance or to any other matter of fact dealt with by the Respondent is not to be interpreted as disinterest or lack of concern for the position of the Applicant, but is dictated solely by the nature of the proceedings before me."

It seems to me that the reasoning thus expressed is entirely applicable to the facts of the present case insofar as the identification of the appropriate Respondent is concerned. The last quoted remarks of Barron J are, of course, relevant in the context of considering the attack made upon the EIS, to which I will now turn.

In the light of the views I have expressed already in relation to this issue and to those which will now follow, I have not regarded it as necessary to set out at this point all of the evidence which I received over a period of three days from different witnesses and experts pertaining to the adequacy of the EIS documentation. Instead I have annexed a summary of that evidence at Appendix 2 to this judgment.

At the request of the parties I did agree to receive evidence and allow cross-examination of witnesses on this topic purely to provide for the situation that I may be found to have wrongly decided the EIS point for the two reasons mentioned above, namely delay and the failure to bring any challenge against the appropriate Respondent.

Accordingly, I can confine myself to the principal submissions made by both sides in the light of the evidence received.

The regulations require the following specified information to be contained in any EIS:

"(a) a description of the development proposed, comprising information about the site and

the design and size and scale of the development;

(b) the data necessary to identify and assess the main effects which that development is likely to have on the environment;

(c) a description of the likely significant affects, direct and indirect, on the environment of the development explained by reference to its possible impact on --

human beings;

flora;

fauna;

soil;

water;

air;

climate;

the landscape;

the interaction between any of the foregoing:

Material assets;

the cultural heritage;

(d) where significant adverse effects are identified with respect to any of the foregoing, a description of the measures envisaged in order to avoid, reduce or remedy those effects; and

(e) a summary in non-technical language of the information specified above."

The Applicant's main criticisms may be summarised as follows:

(a) Once the Minister decided on the modified route (option 3) a fresh EIS was required, as the original EIS addressed the eastern option and the Response Document addressed the western option.

(b) The EIS was inadequate in that it did not have a description of the development to such

a level of detail as would enable a complete analysis of its effects to be assessed.

(c) it did not adequately address the questions of ground water flow, the impact of the development on the trees to be retained in the Glen and the methodology of constructing the excavation of the Western side of the roadway.

The Applicant further contends that the more detailed design drawings now available indicate that the provision of French drains on the Eastern side of the roadway could well impede the flow of ground water under the road surface and restrict the flow of that ground water to the wet woodlands between the roadway and the stream.

Secondly, the detailed designs for the soil-nailing procedures on the Western embankment over a stretch of 210 metres indicate that extensive bore holes will require to be driven into the slope and filled with cement and retaining pins. These excavation works and the remedial measures proposed in building up the embankment at certain points to a height of five or six metres have not adequately taken into account the likely impact or effect on the adjoining woodlands, environment and habitat.

In considering these submissions, I must keep in mind that my function is not to re-visit these issues by way of appeal, as Barron J emphasised in Brown. To interfere, the Court would require to be satisfied that there was virtually no material upon which the Minister could reasonably exercise his discretion to grant a certificate. It is not the function of the Court to "second-guess" the Minister or to apply standards of exactitude of an extreme nature, particularly when any review is taking place almost ten years after the EIS was first prepared.

In O'Keeffe v An Bord Pleanala [1993] 1 IR 39, the Court, in applying the considerations of the Supreme Court in State (Keegan) v Stardust Compensation Tribunal [1986] IR 642 on the question of what level of irrationality was required before intervention by judicial review was justified stated at p 71:

"The Court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that:

(a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or,

(b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."

At p 72, Finlay CJ established the high threshold which is required to be passed by an Applicant when making a judicial review on the grounds of unreasonableness:-

I am satisfied that in order for an Applicant for judicial review to satisfy a Court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the Court can intervene and quash its decision, it is necessary that the Applicant should establish to the satisfaction of the Court that the decision-making authority had before it no relevant material which would support its decision."

In Berkeley V Secretary of State for the Environment and Fulham Football Club [1998] PLCR (Part 2) 97 the English Court of Appeal at p 112 stated:

"The Court must be satisfied that the objectives of the directive are met. However, the Court retains a discretion notwithstanding the absence (which I assume without deciding) of a schedule 3 statement properly so-called, to decline to quash the decision that the objectives are in substance achieved by the procedure followed. These objectives include the provision of appropriate information in a comprehensible form, making the public aware of the environmental implications of a project giving an opportunity to the public to express opinions about it, and the decision maker taking account of opinions expressed and making an overall assessment when reaching a conclusion."

The EIS as submitted on the 22 March 1991 comprised 103 pages of report, 80 pages of appendices and many maps. Thereafter the Minister requested further information and the Response Document dated March 1992 was supplied to the Minister on the 22 June 1992. I see no good reason to exclude the Response Document from forming part of the EIS as clearly it formed part of the basis for the Minister's decision to certify in December, 1993.

I am satisfied that the ETS provided adequate material upon which the Minister could reasonably decide to certify. It did address water conditions in the Glen. Mr Stowell has pointed out that more detailed expert investigation of ground water movement was not necessary in the light of the available information at that time. This included information derived from bore holes already present in the Glen and indeed from the existing vegetation and obvious health of the wet woodlands on the East side of the existing roadway.

It must at all times be borne in mind that we are not here talking about virgin woodland through which a roadway is for the first time being introduced. We are talking about the widening of an existing roadway which will expand to a degree, but not to a huge degree, beyond its present confines. Of course some trees will require to be felled, some 386 altogether and perhaps more, but a huge stock of trees and woodlands will remain.

The advent of lead free petrol and the construction of a road surface with a low noise texture must also be placed in the balance against so many negative criticisms.

In relation to works on the Western side of the roadway, I feel the implications of these works were addressed to a reasonable degree in the Response Document. The Minister was clearly cognisant of those implications as is reflected in the conditions attaching to his

certification on the 23 December 1993.

Finally, on the point that an entirely new EIS was required, this also seems to me to be an unreasonable requirement or expectation. If one looks at the drawing in Appendix 1 prepared by Messrs Ove Arup which sets out in a very simple form the three alternative routes, one can see that the third option is in effect a corridor through the Eastern and Western options. An EIS which considered the implications of a route which lay to a greater degree to either the East or West of the modified route must surely be regarded as being comprehensive of a route passing between route 1 and route 3. In other words, the wider envelope of assessment of both sides must be deemed sufficient to enclose the smaller envelope of the third option.

I have already indicated that the absence of a detailed design specification does not in any way invalidate or take from the EIS. No precedent or authority of any sort has been cited to suggest that an EIS must be prepared to the level of final design drawings.

Indeed even as the evidence unfolded, it became clear that Wicklow County Council were reconsidering the provision of a french drain on the Eastern side of the roadway and replacing same with a layer of permeable gravel. It is only to be expected at detail design stage that modifications and improvements will emerge and it would be absurd to find fault either with engineers or the Respondent for improving detail design options as the project approached completion.

Accordingly, the Applicant's case with regard to the EIS fails on all fronts, including locus standi.

CONSIDERATION OF PROCEDURES UNDER STATE PROPERTY ACT, 1954.

The lands which the Respondent proposes to acquire for the purpose of road widening belong to the Minister for Agriculture and are State lands as defined by 5.2 of the State Property Act, 1954.

As shall be seen when the question of the application of the compulsory purchase procedures to State lands is considered, the 1922 Constitution of Saorstat Eireann did not permit alienation of State lands at all. Bunreacht na hEireann relaxed that position under and by virtue of Article 10, but it is important to approach the State Property Act, 1954 with this constitutional back drop in mind. Strict controls on the disposal for any purpose of State lands is the leit-motif of the constitutional provisions, and this is mirrored in the State Property Act, 1954, which requires that virtually every transaction to do with State lands requires the consent, both of the Minister for Finance and the Minister in whose name State lands are vested.

Chapter II of part II of the State Property Act, 1954 sets out the relevant provisions.

Section 9 provides:-

"The powers conferred by this chapter on a State Authority shall, where that State Authority is not the Minister, be exercised only with the consent (which may be general or particular) of the Minister."

In this context, the Minister for Finance is intended.

Section 10(2) provides that a State Authority may, with the consent of the Minister do all or any of the following things in respect of the State land vested in it:

"(a) sell such State land or any part thereof;

(b) exchange on such terms (including payment or receipt of money for equality of exchange) as such State Authority may determine, such State land or any part thereof for any other land,

(c) make a grant gratuitously of such State land or any part thereof for any specified purpose,

(d) make a lease of such State land or any part thereof for any term."

The relevant portions of Section 11 provide:-

The State Authority may, in respect of the State land for the time being vested in that State Authority do all or any of the following things --

(a) grant to any person on such terms and conditions as such State Authority shall determine a tenancy from year to year or for any lesser period;

(b) grant to any person, on such terms and conditions and for such as such State Authority shall determine, a licence to occupy or to use to occupy and use, either generally or in a particular manner or for a particular purpose such State land;

(c) grant, by way of licence or otherwise, to any person, on such terms and conditions and for such period as such State Authority shall determine, any easement, profit-a-prendre or other right, privilege or liberty over, or in respect of such State land or any part thereof."

As previously mentioned, these lands are not owned by the Minister for Finance, but by the Minister for Agriculture. They are managed by DUCHAS, formerly the Forestry and Wildlife Service and forming part of the Office of Public Works, being a body which since 1995 is answerable of the Minister for the Arts, Heritage, Gaeltacht and the Islands

(hereinafter referred to as MoAHGI) for its heritage functions.

In short, the position under the 1954 Act is that a department in whom State lands are vested cannot sell same without the consent of the Minister for Finance, nor can a licence be granted to any person to go in on State land without the involvement of the State Authority in whom the lands are vested.

The Applicant claims that the Respondent did not have the appropriate licence in January 1998 when it went in on these lands to commence the development works. Insofar as consent to sale and transfer is concerned there was no consent to this either, but both sides agree that this is a matter with which the Court is not presently concerned as such consent can be obtained prior to the completion of a transfer and it is not necessary for the Respondent to own these lands prior to carrying out the proposed development works per se.

The Respondent first submitted that the consent was not required from the Minister for Finance under either Sections 10 or 11, as the lands qualified for exclusion from the application of the sections by virtue of 85(1) of each section which provides that the powers under Section 10 and 11 should not be exercisable in respect of lands contained in the first schedule to the 1954 Act.

Section 64 of the Wildlife Act 1976 amended the first schedule to the State Property Act 1954, by adding to the first schedule land acquired under the Wildlife Act, 1976.

This submission is clearly wrong, because these are not lands "acquired" under the Wildlife Act 1976. They were already in State ownership. Furthermore, even if they were to be regarded as lands to which the first schedule of the 1954 Act applied, the exclusionary provisions of both Sections 10 and 11 relate to "powers" to dispose with the lands, and not to the lands themselves. Accordingly, the provision has precisely the opposite meaning than that contended for by the Respondent.

The Respondent then contended that if consent was required it had been furnished by the OPW in August 1995 and that the OPW were authorized to give such consents as the OPW formed part of the Department of Finance under and by virtue of the first schedule to the Minister's and Secretaries Act, 1924.

This submission in turn was superceded by a further submission on the 9th day of the hearing to the effect that the Minister for Finance had in 1969 issued a general consent to the sale and disposal of State lands for purposes which included road widening. Again, however, this submission was not properly founded because an examination of the so-called consent, contained in a letter dated 28 January 1969, revealed that the letter did no more than convey a general sanction for dispensing with "unrestricted competition" in the disposal of some State lands vested in the OPW.

This confusion and uncertainty led the Court to require the attendance in Court of the relevant departmental official to produce the appropriate file in relation to the consents, general or specific, furnished by the Minister for Finance under the State Property Act 1954.

Mr Tony McCullough attended Court and produced the relevant file. It transpired that all the general consents, including the letter dated 28 January 1969, related only to lands vested in the OPW and not to lands vested in other departments. There were separate sections of the file in relation to other departments, including a section for the Department of Agriculture, which in the instant case is the relevant department as the lands are vested in the Minister for Agriculture. No consent of a general or specific nature was to be found in this section.

Mr McCullough did produce a handwritten memo which recorded the agreement of the Minister that there would be a road widening scheme through the Glen of the Downs, and I have included this document at Appendix 3.

The document contains a reference to Commissioner Scully who at the time was responsible for the heritage services function of the Office of Public Works and the document is initialled by the then Chairman of the Commissioners of Public Works, John F Mahoney.

The document is dated 17 November 1993. The text of the document appears to have been written by Mr Casey who was Director of the National Wildlife Park. The document is ticked "agreed by Minister" as of the 1 December 1993.

As pointed out by Mr Sreenan, this document, which is the only evidence of any kind of consent under the State Property Act, 1954, only goes so far as to indicate the agreement of the Minister to the proposed development as a development but does not address any detail, either in relation to any sale or to any incursion into the nature reserve and the cutting down of trees. It is not on its face a consent for the purposes of either S 10 or S 11 of the Act.

Mr McCullough further accepted that had due consideration been given to the fact that the lands were owned by the Department of Agriculture, rather than the OPW, at the relevant time, then the Department of Agriculture would have become involved in the execution of any licence or sale.

Accordingly, even if the handwritten document can be construed as a specific consent by the Minister, the further requirement under Section 11 of the State Property Act, 1954, was clearly not complied with in that the Minister for Agriculture did not grant the licence which was necessary in the circumstances of such major development, nor indeed was that Department ever consulted at all.

On balance, I am very doubtful that the handwritten memo could constitute a consent of the sort which would be expected if same was being furnished for the purposes of the State Property Act 1954, particularly having regard to the versions of general consent which Mr McCullough produced to the Court.

It seems to me that this whole question of consent under the State Property Act 1954, was not properly or adequately addressed at all in this case.

As this hearing went into its ninth day, consent documents were furnished to the Court from both the Minister for Finance and the Minister for the Marine and the Department of Agriculture in respect of future works and the transfer of the lands.

The fact that this was done, and the manner in which these consents were formulated simply serves to highlight the absence of proper written consents at the time when they were required.

Accordingly, I find that (a) there was no consent from the Minister for Finance as is required both by S 10 and by S 11 of the State Property Act 1954 and (b) no licence for the proposed use for development of the lands was ever furnished by the State Authority in whom the lands were at the relevant time vested, nor has it been consulted or involved in or about the transfer of such lands to the Respondent.

MUST SI 178 OF THE 1980 BE AMENDED PRIOR TO THE DEVELOPMENT WORKS?

The Applicant contends that the lands earmarked for construction work as a public roadway form part of lands within the ownership of the State which have been designated for use as a nature reserve pursuant to SI 178 of 1980, the Establishment Order for which was made pursuant to Section 15 of the Wildlife Act 1976 on the 13 June 1980.

The Applicant contends that the Respondent has no jurisdiction to carry out works consisting of the felling of trees, removal of flora and fauna or other works in connection with the construction of a roadway unless or until the area designated as a nature reserve by SI 178 of 1980 has been modified by appropriate amendment as such user is clearly in conflict with the designated statutory user.

The Respondent, through Mr Michael Looby, state that the Council has at all material times been aware of the existence of Statutory Instrument 178 of 1980 (entitled Nature Reserve (Glen of the Downs) Establishment Order 1980) but claims that the lands which are established as a nature reserve expressly exclude "any part thereof which forms part of a public road." On that basis, he says that the road scheme, when completed, will form part of a public road and as such is excluded from the Statutory Instrument. He further states

that the Respondent has at all material times complied with the provisions of the Wildlife Act 1976, including Section 12 thereof which sets out certain relevant obligations and rights of an authority such as the Respondent in relation to entry upon nature reserves for the doing of certain things. Mr Looby further claims that the Respondent carried out the necessary consultation with the relevant Minister in compliance with its obligations under Section 12 of the Wildlife Act 1976, and thereafter the Respondent was entitled to carry out all necessary works on foot of the powers available to the respondent under SS (2) thereof. He further contends that, insofar as any contention is made by the Applicant that Statutory Instrument 178 of 1980 requires modification to take account of the road scheme, such modification can only be made on completion of the road scheme.

Section 15(2) of the Wildlife Act 1976 gave power to the Minister to make an Establishment Order declaring that certain lands should constitute a nature reserve where he was satisfied that --

"(A) Land to which this Section applies --

(i) includes the habitat or forms the habitat or part of the habitat of one or more species or community of flora and fauna being a species or

community which is of scientific interest, or

(ii) includes or forms an eco-system which is of scientific interest, and that the habitat or eco-system is likely to benefit if measures are taken for its protection,

(B) It is desirable to establish the land as a nature reserve . . ."

The Section also provided that an Establishment Order should specify the reason why, and indicate the objectives for which a nature reserve was being established. It further provided that the Minister should manage the land to which the Order relates so as to secure, as best as may be, the objectives dictated in the Order having regard to and in accordance with the general protection of the natural environment.

Powers of amendment and revocation of such Establishment Orders were also contained in the same section as follows:-

"(5) The Minister shall not amend an Establishment Order unless he considers that the objectives, as regards which the relevant nature reserve was established, require revision because of changes in the features or characteristics of the reserve or in any other circumstance which affects the reserve.

(6) The Minister shall not revoke an Establishment Order unless he considers that it is no longer practicable or is no longer desirable to maintain the nature reserve established by the

Order."

As stated, the nature reserve (Glen of the Downs) Establishment Order was made on the 13 June 1980. In it, the then Minister recited the statutory considerations outlined above and ordered as follows:-

2.(1) It is hereby declared that the land specified in paragraph (2) of this Article shall constitute and there is hereby established a nature reserve.

(2) The lands referred to in paragraph (1) of this Article are all that part of the lands known as the Glen of the Downs situate in the townlands of Bellevue Demense and Woodlands and County of Wicklow, other than any part thereof which forms part of a public road, and which is referred to in the map contained in the schedule to this order and thereon delineated in red."

The map attached to the statutory instrument is an ordinance survey map contained at Appendix 4 to this judgment and which contains the following legend at the bottom right-hand corner:

"All public roads bounding or intersecting the lands shown outlined in red are excluded".

The Applicant argues that the words "any part thereof which forms part of a public road" can only mean the public road or roads which existed at the time SI 178 was enacted. Otherwise, and if it was intended that the exclusion should include any public road to be built at a later time, the words would have been "any part thereof which forms part of a public road or which may form part of a public road".

Accordingly, before the Respondent can enter upon the nature reserve to carry out works, the Minister must amend or alternatively revoke the Statutory Instrument to enable the Respondent to do so as the proposed user is inconsistent with a nature reserve. It is, of course, accepted by the Respondent that the works comprised in building a road are per se inconsistent with the objectives of 5.1.178. In addition, the proposal contemplates an acquisition of portion of the nature reserve, so that post- acquisition the public road and nature reserve will be occupying different lands from those shown on the map contained in the schedule to the Order.

The Applicant claims that the construction, or attempted construction of a roadway through a nature reserve in the circumstances envisaged amounts to an attempt to amend the Statutory Instrument and the Applicant says that the only person who can do this is the Minister in exercise of his powers under Section 15 of the 1976 Act. It is accepted by the Applicant that, if an amendment of the Act is required in this case, then Section 15(5) does cover the particular requirements of this case where it provides that the Minister may amend an Order "in any other circumstances which affects the reserve".

In reply, the Respondents have argued that the words of the Statutory Instrument must be construed as meaning a public road which may at any time be built through the reserve, including any future road, or any widening of an existing road. In other words, SI 178 is not to be construed as a "snapshot" static definition of where the public road ends and the nature reserve begins, but rather as a definition which is capable of an updated construction in the light of any subsequent roadworks through the Glen.

Alternatively, the definitions of "public road" and "road" contained in the 1993 Roads Act must now be understood as lending a much more comprehensive meaning to our understanding of "road" than the old common law description of a public highway or the public road definition contained in Section 1 of the Local Government Act 1925.

Public road is now defined in the Roads Act 1993 as:

"A road over which a public right-of-way exists and the responsibility for the maintenance of which lies on a road authority".

Considerable reliance was placed on the very extensive definition now given to the word "road" under the Act which now includes:

"(A) any street, lane, footpath, square, court, alley or passage,

(b) any bridge, viaduct, underpass, subway, tunnel, overpass, over-bridge, flyover, carriageway (whether single or multiple), pavement or footway,

(c) any weigh-bridge or other facility for the weighing or inspection of vehicles, toll plaza or other facility for the collection of tolls, service area, emergency telephone, first aid post, culvert, arch, gully, railing, fence, wall barrier, guardrail, margin, curb, lay-by, hard shoulder, island, pedestrian refuge, median, central reserve, channeliser, roundabout, gantry, pole, ramp, bollard, pipe, wire, cable, sign, signal or lighting forming part of the road, and

(d) any other structure or thing forming part of the road and (i) necessary for the safety, convenience or amenity of road-users or for the construction, maintenance, operation or management of the road or for the protection of the environment, or

(ii) prescribed by the Minister".

By contrast, the word "road" under the 1925 Act meant:

"Any public road and includes any bridge, pipe, arch, gully, footway, pavement, fence, railing or wall (where such fence, railing or wall was erected by or was liable to be

maintained by the County Council or Grand Jury) forming part thereof."

Mr Connolly argues that the widened definition, and in particular that contained at paragraph (d) above, covers works to a public road which would include road widening (Day 3 p 69). Therefore, if I understand his argument correctly, not only does this definition state and expressly give an updated construction to the words "public road" but, somewhat alarmingly, he says this definition in the Roads Act is now sufficiently wide to comprise many consequential or ancillary works of a major nature, such as the road widening in the instant case, and no amendment to the Statutory Instrument would be required for this reason alone.

His third submission is that the Respondent was entitled under Section 12 of the Wildlife Act 1976 to enter upon these lands for the purpose of carrying out certain works while taking all practicable steps to avoid or minimise interference with the nature reserve. Having complied with the requirements of 5.12 there can be no question of an amendment of SI 178 arising as a precondition for the carrying out of works permitted in the particular circumstances by the Act.

I will therefore turn to the various points raised, the first two of which can be dealt with together.

I was referred to the Supreme Court decision in Keane v An Bord Pleanala [1997] 1 IR 184 in support of the proposition that an updated construction of the Statutory Instrument is possible.

The essential issue in that case was whether or not a "beacon" as defined by Section 742 of the Merchant Shipping Act 1894, could be interpreted as encompassing a new navigational aid system which was based on the transmission of electromagnetic waves or pulses, which had not been invented or known in 1894.

The Chief Justice in his judgment (p 215) invoked in aid Bennion on Statutory Interpretation and the following passage at p 618:

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any changes which have occurred, since the Acts passing in law, social conditions, technology, the meaning of words, and other matters."

He then went on to state:

"Bennion also states at p 627 that if, however, the changed technology produces something which is altogether beyond the scope of the original enactment, the Court will not treat it as

covered."

At p 231 Mrs Justice Denham dealt with the topic of "updating construction" and stated:

"Whereas an Act is drafted in accordance with the time of its enactment, except in rare circumstances, it is presumed to be an ongoing Act. As stated in Statutory Interpretation, A Code (Second Edition) FAR Bennion at s 288:

(2) it is presumed that Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

(3) a Fixed Time Act is intended to be applied in the same way whatever changes might occur after its passing. Updating construction is not therefore applied to it.'

Fixed Time Acts are rare, and there is no evidence that the Section in this Act is one such. Rather, the draftsman's relevant words would appear to seek to encompass "all other signs of the sea" in a manner unlimited by the restriction as to type of signal and to be a catchall phrase. It is general and wide terminology upon which it is appropriate to have an updating construction."

While the Chief Justice and Ms Justice Denham decided the particular issue in different ways, the principles are nonetheless clear. The question is whether or not these principles have any application to the facts of the present case.

In my view, they do not. There are no words in SI 178 which require an updated construction because of changes in social conditions, technology or the meaning of words. The key words are "which forms" and not "public road" in this context, and though the 1993 Act may have widened the definition of what a road may comprise, that, it seems to me, is quite beside the point.

I do not at all accept that this new definition of a road carries with it the construction for which Mr Connolly argues. As Mr Sreenan points out, paragraph (d) of the "road" definition in the Roads Act 1993 relates to the road already existing. It says nothing which could be interpreted as meaning that two additional carriageways and all necessary construction and ancillary works for the creation of such could be taken in under this definition without further ado. I cannot see this definition -- which does of course up date in explicit terms the meaning of the word "road" -- as having anything like the implications contended for by Mr Connolly. One has only to ask where a "road" would ever begin or end if this submission is valid.

On the general submission, namely, that any future road is covered by the wording of SI 178, it seems to me to fly in the face of the literal meaning of the words, particularly when those words are couched in the present tense and include an express reference to a map which is annexed. What we see in this Statutory Instrument are words of territorial definition, akin to a title document which marks out boundaries and which utilises a map for the purpose of avoiding any doubt or uncertainty. Article 2(2) does nothing more than define territorial boundaries at a given point in time.

If the Respondent's submission is correct, there could be a creeping process of attrition into the nature reserve by the construction of a number of roads which could subvert the entire objectives of the Statutory Instrument. How much of the nature reserve would require to be taken out by public road construction before the essential requirement to use these lands as a nature reserve would begin to bite?

I have no doubt that the Statutory Instrument or at least its annexed map does require an amendment to address the new situation in Glen of the Downs and I will presently turn to the question of when that amendment should properly occur.

Firstly, I wish to deal with the arguments raised in relation to Section 12 of the Wildlife Act 1976. The Respondent relies on ss 2 of this Section to go in upon the nature reserve for the purpose of carrying out the construction works. He further claims, and this is not in dispute, that it has had consultation with Duchas on behalf of the appropriate Minister who has furnished consent, subject to certain conditions, to the carrying out of the proposed works. This, of course, is distinct from and not part of the consent arrangements under the State Property Act 1954.

The question, however, is whether or not the particular statutory provision is appropriate to the facts of the present case. Quite apart from any consent requirements, can the Respondent avail of Section 12 to escape the requirement to amend SI 178 in advance?

5.5. (2) provides as follows:

"Subject to sub-Section (3) of this section, a Minister of State other than the Minister and every authority or body to which this section applies shall --

(a) before determining any matter or doing anything which is, in his or their opinion, or is represented by the Minister to the other Minister of State, or the authority or body to be likely or liability to affect, or to interfere with, the suitability for a nature reserve or a refuge, as may be appropriate, of land to which an Establishment Order, a Recognition Order or a Designation Order applies, or the management of land pursuant to and in accordance with an agreement under Section 18 of this Act, consult the Minister as regards the avoidance or minimising of such effect or interference, and

(b) take all practicable steps to avoid or minimise such effect or interference".

This provision, which is available to the Respondent as a local authority, creates both obligations and rights in the given circumstances.

The Applicant contends that these powers are only available to the Respondent where it wishes to do something which would interfere with the overall suitability for a nature reserve of these lands. In other words, the act contemplated would require to be one which would have as a probable or likely consequence the rendering of the lands unsuitable for a nature reserve.

On this basis, Mr Sreenan argues that the construction of a roadway, whilst having a significant and deleterious effect on the nature reserve, is not such as would render the lands totally unsuitable as a nature reserve. Therefore, the Respondent cannot rely on SS 2 and must seek instead to amend the Statutory Instrument.

There seem to me to be obvious flaws in this submission. Firstly, it is in the teeth of the case being made by the Applicant and other witnesses on whom the Applicant relies, who claim that the whole ecology of the woodland will be significantly altered if the proposed works go ahead.

Dr O'Callaghan goes so far as to say in his report that the effects of the proposed construction will, in his opinion, "irrevocably destroy" the woodland aspect of the Glen of the Downs. It can hardly be said that such far-reaching claims do not go to the suitability of the lands for a nature reserve.

However, taking the Applicant's point as argued, namely, that the development would affect, but not render unsuitable, the lands for use as a reserve, a further difficulty immediately presents itself. It is this: If certain works which affect the suitability of the lands for use as a nature reserve, can, following consultation with the Minister, be carried out without amending SI 178, why would a heavier statutory onus lie on a Respondent in respect of a development which fell short of that particular effect or interference? It seems to me therefore that the words "doing anything to affect" must be given a very wide interpretation.

Having taken time to consider this provision as a whole, it seems to me that significant works of road construction, as intended in this instance, must be regarded as affecting and interfering with the suitability of land for a nature reserve, at least in the short-term. It could hardly be contested that the construction works while they are ongoing will not have a significant impact on wildlife in the Glen. This is an inevitable consequence of such works.

That is why in Section 12 there is very clear emphasis on the requirement to take all

practicable steps to avoid or minimise the effect or interference. It also seems to me that these words contained in ss 2 of Section 12 are particularly apt for application to major works of a short to medium term variety. They would have no meaning or application in the kind of example mentioned by Mr Sreenan whereby an airport or airstrip was constructed either in or beside the reserve because the interference or effect would be permanent and in no circumstances could be avoided or minimised.

For all these reasons, I think Section 12 was available to the Respondent in the context of the proposed construction works.

Given that the two Statutory users in respect of the lands required (ie public road and nature reserve) are clearly irreconcilable, the question must now be addressed as to the point in time when an amendment of SI 178 should take place and whether such amendment is a precondition for any of the steps which the Respondent proposes to take, either with regard to the construction works or the dedication of the completed road as a public road.

It seems clear to me that the Statutory Instrument cannot be amended until after the steps outlined above have been taken. The definition of "public road" per se compels one to that conclusion. There will not be a four-carriageway new public road in existence in Glen of the Downs until same is constructed, taken in charge and dedicated as such. The Statutory Instrument could not, even as amended, address the new state of affairs by reference to the words "public road" until everything had been done, unless the words "public road" are abandoned in any amending text.

Accordingly, the question to be asked is whether or not I am compelled to take the view that the Statutory Instrument must be amended twice; once, to redefine the area now being excluded from the nature reserve -- perhaps by reference to a strip contained between lines intersecting the reserve -- and, thereafter, on a subsequent occasion, to reintroduce the definition "public road" when the works have been completed.

This seems to me an approach as unreasonable as the updated construction submission made by the Respondent in relation to the existing Statutory Instrument. For example, in the course of construction, engineering considerations may dictate some minor deviation of the route of the proposed road. It would be absurd if the relevant Statutory Instrument had to be amended every time such a situation presented itself.

It seems to me therefore that the appropriate time for an amendment is when the road scheme is completed, so that the dedication of the road as a "public road" can coincide with the amendment of the Statutory Instrument. If it is dealt with in that way, only the map, as distinct from the text, of the Statutory Instrument will require to be amended. Clearly an enlarged version of the existing map will be required. The Statutory Instrument thus amended will constitute the new "snapshot" of the territorial limits of the nature reserve which will remain inviolate unless or until amended by the Minister for some other reason

at some other time. Under these arrangements no conflicting statutory user of the 0.68 hectares can occur.

Finally, it is appropriate to consider once again the issue of locus standi in relation both to the issue raised under SI 178 and the issue raised in relation to the procedures obtaining under the State Property Act 1954.

It seems to me that delay cannot be relied upon in either case to oust the finding of locus standi already made. A simple illustration shows why that must be so. Supposing, for example, the Applicant had presented himself at the offices of the Respondent arguing that the necessary consents were not in place or that SI 178 had not been amended, he could have been readily met with the reply that these matters would be attended to prior to the commencement of the development works. The Applicant's right to apply for a judicial review could only arise therefore when the Respondent went ahead against a background of not having the necessary consents, or, if it had been appropriate, without the modifications of SI 178.

ARE COMPULSORY PURCHASE PROCEDURES APPLICABLE TO STATE LANDS?

A clue to the answer to the question posed above may perhaps be gleaned from the references in both Irish Constitutions to the topic of State lands. Article 11 of the Constitution of the Irish Free State (Saorstat Eireann), Act 1922 provided as follows:-

"All the lands and waters, mines and minerals, within the territory of the Irish Free State (Saorstat Eireann) hitherto vested in the State, or any department thereof, or held for the public use or benefit, and also all the natural resources of the same territory (including the air and all forms of potential energy), and also all the royalties and franchises within that territory shall, from and after the date of the coming into operation of this Constitution, belong to the Irish Free State (Saorstat Eireann), subject to any trusts, grants, leases or concessions then existing in respect thereof, or any valid private interest therein, and shall be controlled and administered by the Oireachtas, in accordance with such regulations and provisions as shall be from time to time approved by legislation, but the same shall not, nor shall any part thereof, be alienated, but may in the public interest be from time to time granted by way of lease or licence to be worked or enjoyed under the authority and subject to the control of the Oireachtas; provided that no such lease or licence may be made for a term exceeding 99 years, beginning from the date thereof, and no such lease or licence may be renewable by the terms thereof."

Article 10 of the Constitution of 1937 provides as follows:-

"1. All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all

royalties and franchises within that jurisdiction belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body.

2. All land and all mines, minerals and waters which belonged to Saorstat Eireann immediately before the coming into operation of this Constitution belong to the State to the same extent as they then belonged to Saorstat Eireann.

3. Provision may be made by law for the management of the property which belongs to the State by virtue of this Article and for the control of the alienation, whether temporary or permanent of that property."

Article 5 of the 1937 Constitution provides:-

"Ireland is a sovereign, independent, democratic State."

As previously indicated, these provisions suggest that State lands enjoy a special position under our Constitution. This is hardly surprising as various State authorities do, in effect, ultimately hold these lands on behalf of the people of Ireland.

When one turns to the State Property Act, 1954, one finds therein an elaborate and detailed procedure for the disposal or user of State lands.

What one does not find in the State Property Act is any reference whatsoever to the compulsory acquisition of State lands. It is submitted by Mr Sreenan on behalf of the Respondent that it is inconceivable against the Constitutional framework and the historical background of compulsory purchase in Ireland (where no such application to State lands has ever been shown to have been made) that the State Property Act could be altogether silent on such a topic if it were the case that compulsory purchase procedures applied to State lands.

There do exist procedures for the alienation of State land in the Crown Lands (Ireland) Act 1822. Section 15 of that Act provides that any person or corporation who wishes to purchase any lands in Ireland being the property of the Crown shall deliver an account of the lands and the price offered to the treasury in Ireland whereupon he is issued with a certificate. The actual conveyance must be by deed of bargain and sale which must be enrolled by the auditor of the Exchequer and only on enrolment does the land vest in its purchaser and such enrolled deed of sale and bargain is thereafter evidence of title to the land. The Court has been informed that this Act has never been repealed and remains extant.

Mr Sreenan further argued that if compulsory purchase procedures were to apply to State lands, what then becomes of the consent of the Minister for Finance under Chapter 2 of the 1954 Act?

Mr Connolly conceded that in respect of 60 or 70 separate Acts of the Oireachtas under which compulsory purchase was permissible, he could only identify one which contained a specific reference to the compulsory purchase of State lands and that was the Fishery Harbour Centres Act, 1968.

Section 3 of that Act provides that the Minister may, whenever he thinks proper, acquire by agreement or compulsorily, any lands situate in a fishery harbour centre or right over or in respect of land or water so situate.

Sub-section 8 of Section 3 of the same Act provides:-

"The powers of compulsory acquisition conferred on the Minister by this Section shall not extend to land or rights over or in respect of land or water vested in the State, a Minister of State, the Irish Land Commission, a Local Authority for the purposes of the Local Government Act 1941, the Electricity Supply Board or a Gas Undertaker (within the meaning of the Gas Regulation Act 1920, as amended)".

Mr Connolly argues that, because State lands were exempted in this instance, it should be presumed as a result that State lands are amenable to compulsory purchase in every other case in the absence of an exemption.

He instanced two other examples, being the Roads Act 1993 and the Transport Act 1944 as having similar import or effect, although I cannot agree that this is so.

Section 53 of the Roads Act 1993 provides that the powers conferred on any State Authority or local Authority to carry out works on land shall not be exercised by the Authority in relation to any land comprised in a motorway, busway, or protected road. This exemption seems to me to have nothing to do with compulsory purchase.

The other instance cited is Section 130 of the Transport Act 1944 which provides:-

"Notwithstanding anything contained in any enactment, no person shall, without the previous consent of the Minister acquire compulsorily any land or premises held or occupied by a body corporate for the purposes of any railway, tramway, harbour, dock, inland navigation or air navigation undertaking or acquire terminate, restrict or otherwise interfere with compulsorily any easement, way leave, or other right whatsoever over or in respect of any such land."

Again, this section is anything but specific in terms of addressing the issue of State lands -- the bodies affected can just as well be private undertakings.

This then is the extent of the authority cited in support of the proposition that compulsory

purchase can apply to State lands.

It is clear from perusing the papers in this case that Wicklow County Council themselves had serious reservations about the appropriateness of compulsory purchase for the State lands in Glen of the Downs. On the 22 August 1995, the County Engineer, Mr Michael Looby, in writing to the National Parks and Wildlife Service of the OPW wrote as follows:-

"We can also confirm that the Council have no authority to acquire lands by compulsory purchase from a State authority. The lands in question have been included in the Compulsory Purchase Order to ensure that, should any other party claim ownership to these lands, implementation of the project will not be delayed on technicalities."

This letter was written in reply to a letter from OPW dated 9 August 1995, addressed to the Secretary of Wicklow Council, which contained the following passage:-

"While they are willing to hand over these lands to the Council, we feel that the compulsory purchase order procedures may not be an appropriate way in which to give effect to this. Indeed we feel that it may not be legally possible for a local authority to acquire land compulsorily from a State Authority. This is a legal technicality however and it is not our intention to delay the project in anyway by raising it at this stage."

Undeterred by these considerations, Wicklow County Council nonetheless opted to go down the route of compulsory purchase in respect of the State lands and took the step which I have outlined in the opening background statement. One right of way was addressed by the CPO, namely, the break in the median at the Southern end of the Glen. It was obviously anticipated that the compulsory purchase would, if valid, extinguish this right of way. There may have been other considerations, but if so, the Court has not been appraised of them.

In this regard, it is important to keep reminding oneself that the CPO procedures were entirely proper and appropriate for the ninety private land owners whose property lay between the north end of the Glen and Kilmacanogue village.

Subsequently, long after these proceedings commenced, Wicklow County Council saw fit to execute an agreement for the purchase of the .68 hectares making an agreement in writing for no specified financial consideration with the Minister For Arts, Gaeltacht, Heritage and the Islands. Two things may be said about that agreement. Firstly, it is clearly made with the inappropriate party as vendor, because the lands are owned by the Department of Agriculture. Secondly, special condition number 4 in the agreement undertakes to deliver the consent of the Minister for Finance to the transfer of the lands, so it is even more difficult to understand how it could have been argued before this Court that such consent was not required in the first place. However, the question must arise as to why any

agreement was necessary if the CPO was valid.

It is urged upon the Court by Mr Sreenan that compulsory purchase powers are very draconian and the State cannot be presumed to have been willing to have such powers deployed against itself in the absence of specific statutory provision to the effect. Such a view would be entirely in conflict with the Constitutional and Statutory framework.

It also, he says, offends the notion of Ireland as a sovereign State that a subordinate body such as a local authority can be deemed to have the right to usurp the State's position under the Constitution and under the State Property Act, 1954 in such a fashion.

He relied on the Supreme court decision in Webb v Ireland [1988] IR 353 in support of his argument. The Constitutional issue in that case was whether the royal prerogative of treasure trove had survived the enactment of the Constitution so as to be covered by the terms of Article 49.1 of the Constitution and thus available to the State as a defence to a claim by the finders for the return of extremely valuable historical artefacts, known collectively as the "Derrynaflan Hoard".

In holding that no royal prerogative had vested in the Irish Free State, the Chief Justice, speaking for the majority, cited Articles 5 and 10 of the Constitution and said:

"I am satisfied that the phrase "all royalties" contained in Article 10.1 of the Constitution, construed in the light of Article 5, must be widely construed and must include one of the definitions of royalty to be found in the shorter Oxford English Dictionary, namely the sovereignty or sovereign rule of a State. It would, I think, now be universally accepted, certainly by the people of Ireland, and by the people of most modern States, that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history.

If this be so, then it would appear to me to follow that a necessary ingredient of sovereignty in a modern State, and certainly in this State, having regard to the terms of the constitution, with an emphasis on its historical origins and constant concern for the common good is and should be an ownership by the State of objects which constitute antiquities of importance which are discovered and which have no known owner. It would appear to me to be inconsistent with the framework of the society sought to be protected by the Constitution that such objects should become the exclusive property of those who by chance may find them.

The existence of such a general ingredient of the sovereignty of the State does, however, seem to me to lead to the conclusion that much more limited right of the prerogative of treasure trove known to the common law should be upheld not as a right derived from the Crown but rather as an inherent attribute of the sovereignty of the State which was recognised and declared by Article 11 of the 1922 Constitution."

It hardly needs to be emphasised that if artefacts and the right or prerogative of treasure trove in relation thereto, should be an inherent attribute of the sovereignty of the State, how much greater an aspect of the self same sovereignty must be the ownership of State lands.

On behalf of the Respondent, Mr Connolly points out that the compulsory purchase powers in this case were exercised under the Housing Act, 1966. No challenge has been made from any quarter to the propriety of the procedures adopted by the County Council in giving effect to the CPO. The only issue is whether or not State lands are amenable to such a process. The 1966 Act does not except or exempt State Lands from the application of compulsory purchase. He submits there is no reason why State Lands should not be amenable to compulsory purchase. While the consent for the Minister for Finance is a necessary ingredient for the sale or user of State Lands, it does not follow that the Minister for Finance can veto a compulsory purchase to which some other Minister has consented. The fact that ministerial consent is still required, albeit from a different Minister, means there is in reality no attack upon the sovereignty of the State.

He cited the case of Howard v The Commissioner for Public Works and Ireland [1993] ILIM 665 as support for the proposition that statutes apply equally to the State and relied in particular on the following quotation of Finlay CJ at pp 674-5 as follows:

"Obviously, it is necessary first of all to reach a conclusion as to the appropriate principle of interpretation to be applied to the Statute before seeking to reach any conclusion as to whether the statute does or does not apply to the work being carried out by the Commissioners in these two cases.

Having carefully considered the submissions which are made to the Court I have come to the conclusion that there is not any principle deriving from the provisions of the Constitution or from the common law applicable in Ireland which presumes that a general statute does not apply to the State or State agencies unless it is either expressly so applied or must apply by necessary implication. I am also satisfied that there is no such principle which presumes that a general statute applies to the State and to State authorities unless they are expressly exempted from its application or an exemption of them from its application must necessarily be implied from the statute."

The enabling words or relevant words in the context of compulsory purchase are to be found at Section 10(1) of the Local Government (Ireland) Act 1898 which provides as follows:

"A County Council, for the purpose of any of their powers and duties, may acquire, purchase, take on lease or exchange, any land or any easements or rights over or in land, whether within or without their county, including rights to water, and may acquire, hire, erect and furnish such halls, buildings, and offices as they require . . ."

Both sides agree that these words are neutral in terms of interpretation as to possible application to State Lands. They do not rule them either in or out.

Finlay CJ continued as follows at p 675:

". . . The principle which in my view is applicable to the question of the interpretation of the Act of 1963 in this case, so as to ascertain whether it applies to the work carried out by the Commissioners in Luggala and Mullaghmore, is that the Court should, in accordance with the ordinary rules applicable to the interpretation of statutory provisions and without any presumption in either direction, seek to ascertain whether the legislature intended to apply the necessity to apply for planning permission under S 24 to the Commissioners in carrying out these works."

Blayney J addressed the question of statutory interpretation against the background that there is no presumption either way in regard whether the State is or is not bound, quoting Maxwell (Interpretation of Statutes) the 12th ed 1976 (at p 28) . . .

"The Rule of construction is 'to intend the legislature to have meant what they have actually expressed' (per Parke J.)

In R v Banbury (inhabitants) (1834) 1A & E 136 at p 142). The object of all interpretation is to discover the intention of Parliament, 'but the intention of Parliament must be deduced from the language used' (per Lord Parker CJ in Capper v Baldwin [1965] 2 QB 53 at p 61 for 'It is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law' (per Lord Morris in Davies Jenkins & Co Ltd v Davies [1967] 2 WLR 1139 at p 1156)"

Given that the enabling words of Section 10 of the 1898 Act did not point one way or the other, it seems to me that this question can only be resolved on fundamental and basic principles which in this case means considering whether the terminology of the State Property Act, 1954 lends itself to a particular interpretation of the enabling words in Section 10 of the 1898 Act. In my view the only possible interpretation which sits comfortably with the 1954 Act is one which excludes compulsory purchase from State Lands. Further, any concept of state sovereignty in Ireland is inconsistent with the compulsory acquisition of its assets by a subordinate authority.

This is not a situation where the issue is immunity from suit for wrong, which was found not to be a necessary ingredient of State Sovereignty in Byrne v Ireland [1972] IR 241.

The State is a juristic person and is not above the law as Howard demonstrates. It seems to me, however, that the issue under consideration gives rise to quite different considerations which, if the concept of State sovereignty is to mean anything, leads to the conclusion

which this Court must make, which is that, in the absence of specific enabling statutory provision, compulsory purchase powers do not extend to State lands.

If I am correct it follows that the CPO was made without jurisdiction and was a nullity from its inception. It would also seem to follow that the usual 21 day period for challenging the validity of the CPO could not be said to apply in such circumstances. If a time limit could be said to exist under the Rules, I would extend time on this issue.

It seems to me, to adopt Mr Sreenan's colourful phrase, that the "breath of legal life" could never be given to such a procedure at a later stage so as to in any way confer retrospective validity.

If I am mistaken in holding as I have done in relation to the validity of the CPO, both sides agree that the Applicant would have absolutely no entitlement to challenge a valid CPO, the said period of 21 days having elapsed well in advance of the commencement of the judicial review proceedings.

Insofar as it may be necessary to take into account Section 10 of the Local Government (No 2) Act, 1960 as substituted by Section 86 of the Housing Act, 1966, nothing in that Section could be construed as widening the powers contained in Section 10 of the 1898 Act so as to extend compulsory purchase to State lands.

Finally, the exercise of the power to compulsorily purchase in s 10(1) of the 1960 Act is subject to the following proviso: The local authority must exercise this power for "purposes for which they are capable of being authorised by law to acquire land compulsorily."

When considering whether the authority is capable of being authorised to acquire land compulsorily, it is important to have regard to the nature of its powers. The Local government Act, 1991, s 7(1) requires that:

". . . a local authority in performing the functions conferred on it by or under this or any other enactment, shall have regard to . . .

(e) policies and objectives of the Government or any Minister of the Government in so far as they may affect or relate to its functions."

This provision was considered in the case of Glencar Explorations plc v Mayo County Council [1993] 2 IR 237. Blayney J stated at page 248, that:

"Without attempting to define precisely the meaning of the phrase 'shall have regard to', I am satisfied that a local authority could not be said to have had regard to the policy of the Government in regard to mining when it adopted as part of its development plan a policy which was totally opposed to that policy."

In this instance, SI 178 of 1980 illustrates the policy of the Government to establish and protect the Glen of the Downs as a Nature Reserve. The local authority is bound to have regard to this policy. As a matter of statutory interpretation, then, the powers of the local authority to compulsorily acquire land, is not unlimited, but must be exercised in accordance with other matters, such as Government policies. Here, the attempt by the local authority to compulsorily acquire the State-owned land, could not be lawfully authorised, as it was entirely inconsistent with the Government policy of establishing the Glen of the Downs as a Nature Reserve in 1980.

Even if I am wrong and CPO powers could in a general way apply to State lands, how could such powers be applied to State lands having a designated statutory user as a nature reserve?

While I have found S 12 of the Wildlife Act does allow a local authority go in and do things on nature reserves, the compulsory acquisition of a chunk of such lands could only occur in the context of an amendment of SI 178 and of necessity such an amendment in this context would have to precede the making of the CPO. For that reason also therefore, the exercise of such powers was improper in the present case.

PUBLIC RIGHTS OF WAY, IUS SPATIENDI AND PRESUMED CHARITABLE TRUST

The Applicant contends that there are in the Glen of the Downs certain public rights of way which have not been extinguished and which the proposed road scheme development will either render inaccessible or interfere with to some degree.

He further contends that the public have, going back to the time of the La Touche estate, enjoyed a ius spa tiendi (a right to wander) through the woodlands comprised in Glen of the Downs. Finally, it is urged that the history of public access and user of the Glen and woodlands is consistent with the presumed creation of a charitable trust.

It is of assistance in considering the issue of public rights of way to have regard to the three maps prepared by Mr Bergin, Engineer, who gave evidence on behalf of the Applicant. The first is numbered N11/KIL/H020-6 and shows a dotted line overmarked in red which moves upwards in a zig-zag line from the western side of the roadway to the boundary of the nature reserve on the western side and which runs thereafter in a southerly direction before petering out towards the southern end of the Glen. The second map (GD-PW-07) shows a section of the roadway at the northern end of the Glen, including the carpark entrance and the commencement of the zig-zag path (track 4). It also shows a number of other short paths marked in red, all of which are cul-de-sacs and some of which lead to tree-houses occupied by the Applicant's associates. The third map (GD-PW-08) shows a number of paths (E, F, 3, G, H & J) all of which are on the western side of the roadway

and all of which lie within the 210 metres which will be affected by the embankment which will be constructed by the Respondent on this side of the roadway. These maps are to be found at Appendix 5.

Again, all of these paths, marked in red upon the map, peter out some short distance into the woodlands, many of them terminating at a tree in which a tree-house may presently be found.

To the right of these openings and paths may be seen the old road which has been abandoned and which is inaccessible to vehicular traffic. Further to the south and not visible on this particular map is the median right of way through the grass divide in the centre of the roadway.

It is not in dispute that the old road is a public right of way, nor is it in dispute that the median gap at the commencement of the dual-carriageway to the south of the Glen is also a public right of way which was designated as such when the new dual carriageway was constructed there in 1970.

Because of the importance of this issue to all parties concerned, I went to inspect the different openings and paths on Friday 12 March, 1999 with representatives from both sides.

I am satisfied that all openings and paths marked in red, other than the zig-zag path (track 4) and track 3, are of recent origin, that is to say within the last two years, and are almost certainly associated with the presence in significant numbers in the Glen of the Applicant's associates and their tree-houses to which a number of these paths lead. I completely accept the evidence of Mr O'Donnell and Mr Casey to this effect, which conforms with my own observations on inspection.

Accordingly, I am principally concerned with the entrance to the carpark on the eastern side of the roadway and then the two aforementioned tracks on the western side, all of which will require to be set back by some small margin in the context of the proposed road scheme.

The Applicant contends, and this is not really in dispute, that a public right of way, once created, lasts indefinitely unless or until extinguished by appropriate procedures. For example, the Roads Act 1993, contains a mechanism for the extinguishment of public rights of way, which can include a public hearing for that purpose. The route of a public right of way cannot be altered, nor can it be obstructed. The fact that it is not used for many years is quite immaterial. It cannot be abandoned. The fact that a path or track is a cul-de-sac does not dislodge the notion of a public right of way, although an inference of dedication is more difficult to draw in the case of a cul-de-sac. Equally, a public right of way may more readily be inferred when it leads to a place of public interest than when it simply peters out. User of

a public right of way must be open and unconcealed. User is less cogent evidence if the owner is not resident. Finally, user which is referable to a permission given to individuals does not justify an inference of dedication.

HOW IS A PUBLIC RIGHT OF WAY CREATED? This topic is dealt with in Bland's Law of Easements and Profits a Prendre (1997) at p 64 as follows:-

"A public right of way can be enjoyed by any member of the public. It is established by showing use from time immemorial, by relying on creation by statute or by proving express or implied dedication to the public of the way by the owners of the underlying soil and an acceptance of such use by the public. A public right of way is not acquired by prescription, but the same evidence of user may prove sufficient evidence to support a presumption of dedication. The user need not be for any particular length of time, but as dedication is a matter of intention the user must be such as to imply the assertion of the right with the knowledge and acquiescence of the owner of the fee."

These requirements received recent confirmation in Smeltzer v Fingal County Council [1998] 1 IR 279, where Costello P stated at 287:-

"The law relating to highways and the creation of public rights of way is a very ancient one and the relevant principles are well established. A distinction is made between a permission granted by an owner of land to members of the public to walk on pathways on his land, and the dedication to the public of those pathways. To establish a public right of way what has to be proved is an intent on the part of the owner to dedicate his land to the public, an actual dedication, and acceptance by the public of the dedication."

In the instant case, I should point out that I received evidence from the law agent of the Respondents to the effect that the entrance to the carpark and the carpark itself have never been taken in charge by Wicklow County Council. The surface of the entrance to the carpark is not tarmacadem and is in very poor condition. The nature trail or trails on the eastern side of the roadway are not in any way affected by the dispute in the sense that there is no allegation that they are being interfered with, so essentially I have three alleged rights left to consider, being the entrance to the carpark, track 4 and track 3.

Going back in time, I have been furnished with extracts from a number of publications, including Arthur Doran's "Bray & Environs" (1905) which, in referring to Glen of the Downs at p 97 states:-

"The southerly side is unfenced, and its path quite open. The other side, instituting portion of the detnesne of Bellevue, is, through the courtesy of the owner, Major La Touche, open to visitors on Mondays; on other days, special permission must be obtained. Visitors generally walk up the path to the octagon house, etc and regain their car at the demesne entrance on the Delgany Road."

I also received an extract from Carson's Illustrated Guide to the County of Wicklow [1882], which in referring to the La Touche estate contains the following passage at p 47:-

"The house and grounds are thrown open to tourists every Monday; on other days an order is necessary, but that may be readily obtained on application to Mr La Touche. The house itself contains little to interest the traveller; but the demesne is extensive and beautifully laid out. Its higher grounds command an extensive landscape, embracing quite a panorama of mountain peaks.

These extracts are useful in showing that 100 years ago the public were permitted to access paths in the demesne woodlands. However, the extracts which I have quoted do seem to indicate that that access was exercised with the permission of the La Touche family, rather than by way of public right.

After the La Touche period, I have evidence that the lands passed to one David Frame before they were acquired by the Minister for Agriculture in September 1933. Statutory Instrument 158 of 1933 vested the lands in the Minister of Lands and this was the relevant authority in 1970 when, against a background of the European Conservation Year, a decision was made to open a nature trail through the woodlands.

In the intervening years between the La Touche presence and 1970, I have no clear evidence as to the existence of any particular paths at any particular location or route in Glen of the Downs. In fact, I have evidence that the public were not encouraged to access the woodlands at all during that time and that the lands on the eastern side of the roadway were fenced. There is evidence the other way also, because Mr Brendan Scally has told the Court that he used a path on the west side of the Glen to reach the summit on that side. This track was about halfway down the Glen, while it was not exactly a zig-zag, it did curve before eventually leading to the summit and the rock, which, as a matter of probability, was the rock referred to as Hangman's Rock on Mr Bergin's first drawing. Mr Scally stated that there were also some rough paths on the eastern side.

This was the history until 1970 when the then Minister for Lands came to Glen of the Downs for the purpose of opening the nature trail on the eastern side of the Glen. A photograph of that occasion is enclosed at Appendix 6 which shows that the trail in question was the established path for forestry vehicles and workers in the Glen.

Dr Jack Durand was present on that occasion as an Assistant Inspector with the Forestry Department and, as such, responsible for Glen of the Downs. He confirmed that the public was discouraged from coming into the Glen prior to 1970.

At the time the nature trail was opened, this particular trail was the only one constructed. Thereafter the existing loop-trail on the eastern side of the roadway was constructed by Mr

Harding who also gave evidence. Again, Mr Harding was attached to the Forestry Service and was based in Glen of the Downs from 1969 onwards. He also told me there was very little use of the Glen by the public prior to 1970. It was fenced on the eastern side. He never saw anyone on the western side of the Glen. He informed the Court that he constructed track 4, the zig-zag path, in 1972, acting on his own initiative and without permission from his superiors. When they found out about it, they required the abandonment of this track because it was too dangerous for pedestrians to cross the roadway. His recollection was that this track was not signposted in any way, unlike Mr Cotter, who gave evidence on behalf of the Applicant, who had a clear recollection from his childhood that this trail was in fact marked by a post at its commencement on the opposite side of the roadway from the carpark entrance.

The Court also heard evidence from Mr Casey in relation to track number 3 that this was used for the purpose of extracting wood by the Forestry and Wildlife Service from the western side of the Glen. A horse-drawn trap could access the woodlands via that path. It had no other purpose as far as Mr Casey was concerned.

This is the background against which the Court must decide if public rights of way exist or not at the three specified locations. It has been submitted on behalf of the Applicant that the test is an objective one, not a subjective test. In other words, the Court is not concerned with the intention of the Minister for Lands in 1970, but more with public thinking as to their rights of access and their rights to use certain pathways in the ensuing period.

In this regard I was referred to a passage from the recent House of Lords judgment in DPP v Jones and Anor, delivered on 4 March 1999 and reliance was placed on the judgment of Lord Irvine where he stated:-

"A highway may be created either by way of the common law doctrine of dedication and acceptance or by some statutory provision. Dedication presupposes an intention by the owner of the soil to dedicate the right of passage to the public. While the intention may be expressed, it is more often to be inferred; but the requirement of an inference of an intention to dedicate does not, in my judgment, advance the question of the extent of the public's right of use of the highway. The dedication is for the public's use of the land as a highway and the question remains: what is the proper extent of the public's use of the highway? Given that intention to dedicate is usually inferred, it would be a legal fiction to assert that actual intention was confined to the right to pass and repass and activities incidental or ancillary to that right. There is no room in the judgment of Collins J in Hickman, at pp 757-758 for the fiction of an immutable, subjective original intention. Neither highway users nor the Court are in any position to ascertain what the land owner's original intentions may have been, years or even centuries after the event. In many cases, where the intention to dedicate is merely inferred from the fact of user as of right, there will not even have been a subjective intention. Nor would it be sensible to hold that the extent of the public's right of user should differ from highway to highway, as necessarily it would if actual subjective intention were

the test. It is time to recognise that the so-called intention of the land owner is no more than a legal fiction imputed to the landowner by the Court."

Later at the same page he stated:

"I doubt whether, when a highway was first dedicated in, say, the early 19th Century, a land owner would have contemplated the traversal at very high speed of the land dedicated by vehicles powered by internal combustion engines. The fact is that the common law permits vehicles to be driven at high speed on the highway because that is a reasonable user in modern conditions; it would be a fiction to attribute that to an actual intention at the time of dedication."

Lord Irvine then went on to conclude that a public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass.

This particular judgment seems however to me to relate entirely to the extent and nature of a public right of way, rather than to any threshold definition of what is required to create a public right of way. In the instant case, there is no conflict between the parties as to the scope of any public right of way which may be found to exist at any of the three locations which I have identified.

The State Property Act, 1954 must again be considered, and in particular the following provisions of Section 11(2) which provides that:-

"A State authority may, in respect of State land for the time being vested in that State authority, do all or any of the things:

. . . (i) Dedicate such State lands or any part thereof for use by the public;

(j) Permit the public generally or any particular class or section of the public or the members of any particular association, club or organisation to have access to and to use such State land, either generally or for a particular purpose, on such terms and conditions as such State authority shall determine."

Mr Connolly argues that what is "sauce for the goose is sauce for the gander". The Applicant to make out any case must establish both consent by the Minister for Finance on the one hand and an express grant or act of dedication by the Minister for Lands on the other before such State lands or any part thereof may be assumed to have become a right-of-way or a location where ius spatiendi arises. Equally, a license or permission to the public to use lands either generally or for a particular purpose, such as a right-or-way, is subject to the same requirements.

I think it must be accepted from the evidence on this point that the Minister for Lands did, in July 1970, obviously consent to the user by the public of the nature trail at least by way of licence. This is accepted by the Respondents who contend, however, that the Minister did nothing more than that.

It seems to me that the entire history of user of the nature trails from that time up to the present is consistent only with consent at least by way of license having been furnished in accordance with the requirements of the State Property Act 1954.

Of course, the material question is: Consent for what purpose? In this regard, the evidence of Dr Jack Durand conveys clearly to me that the public were licenced to use these nature trails and the woodlands, but the Forestry Department always retained the right to control that access and did in fact have instances where people were asked to leave, either because they were riding horses along nature trails or lighting fires or engaging in other conduct which forestry employees regarded as inappropriate. Dr Durand was quite adamant that the Forestry Department reserved the right to alter the route of any nature trial if circumstances so warranted and indeed retained the right to close a particular trail in appropriate circumstances.

This state of affairs seems to me quite different from that which is Costello P had to consider in Smeltzer v Fingal County Council.

In Smeltzer, the Defendant decided to develop a derelict site as a public park which had an official opening in 1986. In September 1995 it was decided that the Defendant's new administrative officers should be located on the land. It was common case that the construction of the building would deprive residents of the use of the park and pathways within which had been used by residents since the park's opening in 1986. The Plaintiff submitted there was a public right of access to the lands as a public park which arose from a trust created when the land was acquired and that there was a public right-of-way over the paths created in the town park when the Defendant in 1986 dedicated public rights-of-way over the land.

The Plaintiff sought an injunction to prohibit the Defendant from carrying out any development until necessary statutory conditions had been complied with, and an injunction requiring the Defendant to comply with statutory procedures concerning the extinguishment of public rights relating to the land. Against that backdrop, Costello P decided that there was an intention on the part of the Council to dedicate public rights-of-way over the land in the park on the pathways laid out and there had been an actual dedication and acceptance of the rights dedicated by the use of the park.

That can be contrasted with the present case where there certainly was no express dedication of the woodlands as a public park. A nature trail was opened along the route of

an existing path. The particular trail in respect of which a public right-of-way is claimed in the instant case did not even exist in 1970. In this regard, I accept Mr Harding's evidence that the path or trail on the western side was not constructed until 1972 and I cannot infer from Mr Scally's evidence that the route of this zig-zag path is the identical route as the one he claims to have accessed many years previously. In Smeltzer, lands in question had been specifically developed as a public park. A brochure has been produced showing the pathways in the park and the entrances to the park. In the passage quoted by the judge, the brochure concluded:-

"What was a derelict site six months ago, has now been transformed into the town park which will mature with time to become a very special amenity in the heart of Swords."

Against this backdrop, the learned judge felt that the evidence in the case established that the Defendant was doing a lot more than giving the public a mere licence to enter their land. He felt that Dublin County Council intended that the pathways would be dedicated to the public in the sense that the public (and not the Local Authority) would enjoy their use indefinitely into the future.

Given the implications of creating a public right of way over lands, and given that I have evidence of the actual intention of the relevant Minister in 1970, I am satisfied on balance that the relevant intention was to licence access to these woodlands rather than to dedicate same in any formal way. Given that these are State lands to which the State Property Act, 1954 applies, the Court should be slow to infer that the State would or could readily or lightly acquiesce in the creation of such rights.

Certainly there is no evidence of any written formal dedication and indeed the later dedication of the Glen as a nature reserve with the preservation of wildlife as its priority is in potential if not actual conflict with the sort of interpretation contended for by the Applicant. It would, to say the least, have been highly imprudent for the State to dedicate or create rights-of-way over these lands and I do not believe any such intention was ever formed. Nor do I think it reasonable to infer any such intention given the available evidence as to actual intention in this case.

Any relevance Lord Irvine's remarks may have in relation to an objective test should only, in my view, apply in a situation where no such evidence is available. It would be ridiculous to apply an objective test in one direction if evidence from those who actually had the animus dedicandi was available to point towards some other intention. I therefore conclude that no public rights-of-way exist in Glen of the Downs, other than the existing roadway, the old road and the median break at the commencement of the dual carriageway to the south. Specifically, the three points or paths identified at an earlier stage are all accessed by the public on foot of a licence for that purpose.

Finally, if I am mistaken and these are three public rights-of-way with terminus a quo at the

public roadway, the road scheme will do no more than set back access by a few yards in each case. The paths and routes will be preserved. Indeed, access may be improved by ramping measures. Having regard to the maxim "de minimus non curat lex" it would not appear appropriate to me that the Court should restrain or injunct the road widening or make any other finding because of the minute nature of any interference with such rights.

Still less do I believe that any ius spatiendi arises. As stated by Halsbury (4th Ed) par 500:-

"There can be no common law right in the public or customary right in the inhabitants of a particular place to stray over an open space or to remain on that space for such purposes as they may think proper, that is to say, no ius spa tiendi vel manendi, as distinct from the proper customary use of village or town greens.

The only common law right of the kind which can be claimed by the public is to pass and repass from one point to another across an open space and the only customary right of the kind which can be claimed by the inhabitants of a particular place is to use a green for exercise and recreation, including the playing of lawful games."

I have been asked to hold that there is ius spatiendi in Ireland under and by virtue of the decision in Abercrouaby v Town Commissioners of Fermoy [1900] 1 IR p 302.

That was a case where an owner in fee brought an action for a declaration of title to a strip of land on the bank of the river Blackwater adjoining the town of Fermoy, called "The Barnane Walk" subject to a right-of-way on foot possessed by the public over the premises. The evidence adduced regarding the character and user of the premises showed that so long as memory went back it had been devoted to the recreation of the inhabitants of the town, by whom it was used as a promenade.

It was held that the Town Commissioners of the town had no right to erect a barrier across the entrance to the walk and that the owner in fee of the land subject to said right of the inhabitants of Fermoy could not encroach on the walk (a) by granting to his tenants of other lands abutting thereon a right to pass over the walk in carriages, unless such grant were subject to the condition that the use of the inhabitants should not be thereby interfered with or (b) by converting the walk into a public road to be traversed by all kinds of vehicles.

However, as Mr Connolly points out, this case addressed a unique situation where the inhabitants of Fermoy assembled at this location as a place of recreation -- "to walk, to saunter, to lounge, to chat, to meet their friends". Whether it be a customary right or ius spatiendi, it seems to be beside the point, the limitation on the case is that it requires a local dimension to underpin the right contended for. No such consideration arises in the instant case.

Again, bearing in mind the constant backdrop of the State Property Act 1954, the Court it

seems to me, should be even more circumspect about making findings for such rights without the clearest evidence. Further, given that Costello P in such a recent case as Smeltzer held there was no such common law right means that this Court would require very strong reasons for reaching different conclusions, such as an express grant of such a right.

At p 286 of his judgment, the learned Judge stated:-

"It was also urged on behalf of the Plaintiff that public rights arose under common law in the park (as distinct from rights-of-way over the pathway in the park). But it is well established that there can be no common law right in the public or customary right in the inhabitants of a particular place to stray over an open space, ie, that there is no ius spatiendi."

To revert to DPP v Jones, all three Law Lords who considered the question of ius spatiendi as a public right found against the notion.

The view of the Court on this topic were expressed most trenchantly by Lord Hope who stated as follows:-

"This point that the right is to pass or repass, not to remain, is perhaps best illustrated by using the language which Farwell J adopted in Attorney-General v Antrobus [1905] 2 Ch 188 when he was asking himself whether the public could acquire by user the right to visit a public monument.

In that case also, as it happens, Stonehenge was the subject of the controversy -- although in rather different circumstances, as the monument was then fenced in on private ownership. The owner of the land had enclosed the monument by fencing on the view that this was necessary for its protection. The Attorney-General wished to remove the fencing in order to keep the place open so that the public could visit it. The action failed, because there could be no public right of way to the monument acquired by mere user or by the fact that the public had been in the habit of visiting it. At p 198 Farwell J said that the jus spatiandi -- the right to walk about or to promenade -- was not known to our law as a possible subject matter of prescription. At p 206 he said that the public had no jus spatiandi or manendi -- -- the right to stay or remain -- within the circle. In re Elleziborough Park [1956] Ch 131, in which it was held that the jus spatiandi, in regard to a right to use a pleasure park, could be acquired by grant as an easement, Lord Evershed MR observed at p 163 that Farwell J's rejection of it may have been derived in part from its similar rejection by the law of Rome, and that there was no other judicial authority for adopting the Roman view in this respect into English law. But as to the matter of public right he went on at p 184 to say this:

"There is no doubt in our judgment, but that Attorney-General v Antrobus was rightly

decided; for no such right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription.

Although the use of these Latin words may seem out of date in present circumstances, they serve nevertheless as a valuable reminder of the place which the right to assemble must occupy in the context of the law relating to real property. Easements and public rights to land which are acquired by user or by dedication are limited rights, as against the occupier or owner of the land which is affected by them. They are granted or acquired for a particular purpose only, and they are not to be confused with the use of the land for other purposes. Thus a right of way or passage is entirely different from a right to walk about or a right to remain in one place. The law recognises that a right of way or passage may be acquired by user or by dedication. But it takes a different view of the right to walk about or to remain in one place. These are not rights which the public can acquire by user or by dedication. If rights of this kind can be acquired at all they can be acquired only by express grant. So they cannot be included among the rights of access which the public can enjoy as of right without the consent of the landowner."

Lord Slynn in his judgment stated:

"These cases, in limiting or linking rights of users by the public of the highway to passage or repassage, in themselves exclude a right to stay on the highway other than for purposes connected with such passage, but they are to be read with cases of wider application which reject the possibility of a right of staying or wandering over land being acquired by users or prescription. See, for example, Attorney-General v Antrobus [1905] 2 Ch 188, where a claim of a right for the public to visit Stonehenge acquired by user was rejected, and in In re Elleuborough Park [1956] Ch 131 where a claim that the public had acquired a right to wander in a pleasure park was asserted. In the latter case, Lord Evershed MR said, at p 184:

'There is no doubt, in our judgment, but that Attorney-General v Antrobus was rightly decided; for no such right can be granted (otherwise than by Statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription.'"

Finally, Lord Clyde stated:-

"But it must immediately be noticed that the public's right is fenced with limitations affecting both the extent and the nature of the user. So far as the extent is concerned the user may not extend beyond the physical limits of the highway. That may often include the verges. It may also include a lay-by. Moreover, the law does not recognise any jus spatiendi which would entitle a member of the public simply to wander about the road, far less beyond its limits, at will. Further, the public have no jus manendi on a highway, so that

any stopping and standing must be reasonably limited in time. While the right may extend to a picnic on the verge, it would not extend to camping there."

Against this background of recent case law, it seems ius spatiendi can no longer be regarded as a right recognised by law in the absence of express grant.

For precisely the same reasons, I would find it quite impossible to hold that any presumed charitable trust existed. Section 11 of the State Property Act, 1954 contained an express provision whereby such a dedication could take place if same was intended. There is no evidence of an express grant of the type contended for.

CONCLUSION

While this decision clears the way for Wicklow County Council to proceed with the scheme, there are two areas where the Council failed to observe proper statutory procedures.

The Applicant is entitled to declaratory relief in respect of two points argued in this judicial review. He is entitled to a declaration that the Respondents require a consent from the Minister for Finance to the proposed sale or transfer of these lands by the Minister for Agriculture to Wicklow County Council, and that the Respondent did require, (but did not obtain) the consent of the Minister for Finance to execute major development works on State lands and for that purpose also required a licence from the Minister for Agriculture. Secondly, the Applicant is entitled to a declaration that the procedures of compulsory purchase under the Local Government Act 1898 and 1960 are not available, for the acquisition of State lands, or if so, were improperly applied in this case.

The Applicant is not entitled to succeed on the other points raised. At the very conclusion of the hearing I was advised by the law agent of Wicklow County Council that an error had been made in entering a contract for the purchase of these lands with the Minister of Arts and the Gaeltacht in October 1998. The contract should, of course, have been made with the Minister for Agriculture.

It is clear that the mistakes on the part of the Respondent which have occurred in this case will not be the source of further delay in the proposed road scheme as these mistakes can readily be rectified by getting the appropriate consents and by executing a fresh agreement for the transfer of the lands with the Minister for Agriculture.

However, the fact that these errors did occur may have certain implications for the trespass proceedings brought by the Respondent against the Applicant and his associates in Glen of the Downs and I will hear the submissions of counsel on both sides in relation to any Order which I should make in relation to those separate proceedings.

In conclusion, and this can only be a request, I would ask that some consideration be given to the idea of placing signs at either end of the Glen to advise motorists they are entering an important nature reserve and to slow down. A reduced speed limit number in a circle on its own is not very effective. Hopefully such a measure might address the Respondent's stated concerns about accidents along that stretch of roadway. It might even persuade some motorists to pull into the car park and enjoy the unique amenities which Glen of the Downs has to offer.

SUMMARY OF CONTENTIONS, EVIDENCE AND CONCLUSIONS ON ENVIRONMENTAL IMPACT STATEMENT

One of the main criticisms of the EIS is that it does not address in any detailed manner ground water conditions in Glen of the Downs which is a matter of some importance, particularly having regard to the fact that there is no ground water table chart available for the Glen. The report does not address the significance of any proposed drainage system to be constructed alongside the road and the impact such drainage system may have on the ground water flow.

It is further suggested that the EIS contain no worthwhile analysis of the impact of the development on the surrounding woodland. In particular on the western side, a far greater number of trees may require to be removed following significant earth removal on that side over a distance of 210 metres and because of a continuing danger that remaining trees could constitute a hazard to road users. The removal of trees close to the road will have an extremely deleterious effect on the remaining colony in a "domino effect" exacerbated in part by climate and wind and also by increased risks of infection. Any interference with the ground water movement would have severe effects on the trees in drought conditions, and in particular on beech.

Finally, the insertion of soil nailed walls to shore up the remaining hill-side or provide an embankment on the western side will involve the insertion of an unspecified number of steel rods into bore holes in the remaining embankment over a 210 metre stretch. It is contended that this measure in particular will cause damage to the adjacent trees both while that work is in progress through vibrations and soil disturbance and also thereafter by possible interference with the free percolation of water in the area due to the fact that the bore holes are filled with poured cement.

Mr David Ball, Consultant Hydrogeologist, gave evidence that a failure by the Respondent to retain a hydrogeologist to investigate and properly assess the ground water in the Glen led to significant flaws in understanding the relationship between ground water and the overall ecology of the Glen. Insofar as the topic of water in the Glen was addressed, a fundamental mistake appears to have been made by assuming that the stream is the basis of the eco-system, whereas it is in fact merely the surface drain for the eco-system. The EIS did not seem to take on board the fact that the ground water flow is the system which

maintains the flow in the springs and the stream in the Glen. Accordingly, while 90% or more of the actual water in the Glen may come from sources outside the Glen, the critical water is that within the Glen, generated by precipitation and ground water movement. This is the water which provides a small but important part of the essential moisture for trees, plants and vegetation, particularly in the wet woodlands east of the roadway.

This brought Mr Ball to his main criticism of the EIS, namely, that it failed to address the probability that the drains to be provided along the east side of the road would intercept the ground water flow from the western valley side into the stream.

The intended provision of french drains below water table level adjacent to the roadway would deprive both the stream and the lands intervening between the stream and the roadway of essential supply. In effect the drains would constitute a barrier running at right angles to the natural flow of ground water. Mr Ball referred to several drawings showing different points along the length of the Glen where the height above datum of the proposed french drains on the eastern side of the roadway was below that either of the stream bed or the natural water level on the western side of the roadway, although he did accept that different readings in the opposite direction were evident at other points further down in a southerly direction from the car-park entrance. The french drain, which has the effect of regulating the movement of ground water below road surface, also constitutes in respect of collected ground water a preferential flow path which, if below water table level, would carry ground water away in a southerly direction from the adjacent lands and stream.

He did accept, however, that if the french drains were constructed and maintained above the level of the water table, then there should not be a problem of impeded movement of ground water, but he was uncertain as to whether or not french drains could be constructed in such a fashion.

Dr Dealga O'Callaghan, an Agricultural Consultant also gave evidence as per his report of February, 1999.

On one aspect of his evidence, he frankly concedes that his concerns and criticisms are premised entirely on Mr Ball's evidence that certain lands will be deprived of ground water supply, or may be so deprived.

In drought conditions, ground water becomes extremely important and particularly for trees such as beech and ash hazel who rooting system is close to the surface. Oak, on the other hand, can extend its rooting system downwards to retrieve moisture to a far greater degree. The soil in the Glen is free draining soil which causes deposited water to run off faster whereby the trees, and in particular the beech and woodlands, could become drought stressed following the works and put at risk. He did, however, accept that precipitation provided the primary source of moisture for trees and further accepted that roadworks per se in his opinion had a minimal effect on ground water movement. He was not in a position

to say what the minimum requirement by way of rainfall for beech or oak might be and said there was no scientific research to indicate what a minimum level might be.

He also stressed the colonial nature of trees, one of the features of which is the presence of a linked or common root system. The root zone of trees is called the rhizosphere and a large component of this is the Mycorrhizal association. This is the association between fungus growth and the tree roots. It is a symbiotic relationship whereby the tree gains nutrient uptake, specifically nitrogen and the fungus gains its sugars and carbohydrates from the trees. Any interference with this relationship or micro-climate would have a deleterious effect upon tree health. Alteration in the hydraulic continuity of the soil is an effective way to alter the micro-climate.

Equally, major tree losses have a knock-on domino effect on surrounding mature trees. The remaining trees are exposed to additional loss through wind throw, infection or decline because of altered environmental conditions. Following excavations on the western side of the roadway, additional trees will be required to be removed because of their hazard potential.

While the authority had limited the proposed number of trees to be felled to 386, he felt the probability would be that a far greater number would be lost for these reasons. The EIS, in his view, was signally lacking in analysis of the impact of the development on the viability of the woodland generally. He expected a marked decline in the woodland if the road scheme went ahead. He expected the beech woodlands to show significant signs of distress within five years. It was a well known fact, according to Dr O'Callaghan, that one of the secondary effects of construction development generally, was a most adverse effect on tree life. He felt that up to 50% of the hill-side would be affected.

Both Dr O'Callaghan and Mr Ball gave evidence that the driving of nails into the embankment on the west side would create problems for the trees in the immediate vicinity, both from vibrations and from the adverse affects of pouring liquid concrete into the bore holes.

It was further claimed that the EIS failed to address the possible location of perched water levels, being levels at which water may be intercepted and retained above the true water table level. Finally, the EIS did not address the dimensions of the embankment cutting on the western side of the roadway in the follow-up investigations and report which followed the initial EIS, nor did the EIS properly address the implication for the woodland and environment on this aspect of the road scheme.

John Stowell, consultant Hydrologist, was employed by Ove Arup between 1990-1995. He prepared the hydrological report referred to in Appendix 2 of the Response to Queries" dated March 1992.

He told the Court that ground water conditions in the Glen were considered in order to assess the effects which the road might have on water. While the expertise of hydrogeologists is sometimes sought in the context of a proposed development, this would normally only be necessary where some particular problem presented itself which would demand it.

He carried out a hydrological survey over a period of three days and concluded that the proposed road would have a very small impact on a small proportion of the water flowing through the Glen, as a result of which it was his opinion that it was not necessary to carry out any specialised study.

He said that 97% of the overall water, both surface and ground water, in the Glen of the Downs originates from areas not effected by the proposed road scheme, primarily coming from streams in the hills to the north of the Glen of the Downs and which flows in a north/ south direction. This water includes the water which forms the stream. Approximately 3% of water in the Glen of the Downs comes from the western side of the Glen and has to pass the line of the road in order to reach the stream. This figure includes road surface water which would amount to approximately 1% and which is of no significance, as Mr Ball agreed, in this particular context.

He had made a recommendation that this surface water drainage from the new road should be culverted so as to reduce the risk of pollution from a spillage on the road. The proposed new road side Aco-drain and carrier-drain beneath it would carry away any such pollutants under the most up-to-date design proposals, so any loss to the immediately adjacent vegetation was more than outweighed by the removal of possible pollutants.

He did not believe that the subsurface of ground water would be impeded by the road. The new road can be designed in such a way as to allow such flow to continue.

He also had regard to the approximate depth of the water table measured in holes drilled for the purpose of site investigation in or about March or April, 1988 and his investigations revealed that the road could be designed and built in such a way, as to allow ground water to flow beneath it unimpeded.

He accepted that the first EIS did not appear to have contained a hydrological report. However, this was rectified in March 1992. He did not drill new bore-holes as the existing ones gave adequate indications of the water table. The water table is well below the road surface level.

He gave no consideration to the matter of french drains as there were no detailed engineering design plans on this aspect of the proposal at the time he reported.

Over many years, he had seen plans at environmental impact stage and some of these were

very detailed, others less so. On balance he preferred a less detailed design at an early stage, so that any problems likely to arise could be identified at that stage and dealt with in the subsequent designs. He thought that was a better approach than doing it the other way around, which could result in multiple changes to the design plans with consequent extra cost and delay.

It was of course important to bear in mind that this was not virgin woodlands through which a road was passing for the first time. He had due regard to the existing environmental situation as he found it at the time of his report which indicated an uninterrupted ground water flow beneath the present road surface.

Mr John Higgins, Engineer and Director of Civil Engineering in the firm of Ove Arup & Partners Ireland, gave evidence that the modified route is within the corridors considered in the EIS and Response Document. He says that because both the eastern and western route were considered, and all of the effects of each route were considered, all other possible routes which might lie between the extremities of those routes was by obvious implication also considered.

A large team of experts had been assembled for the purpose of carrying out the EIS, including a hydrologist, a geotechnician, an environment consultant, an expert on arbori culture and another expert on landscape matters.

He believes that the section on hydrology contained in the Response Document adequately covers the subject of ground water flow in Glen of the Downs insofar as the proposed road scheme is concerned.

The last road improvements of a major nature were carried out in Glen of the Downs in 1968 at a time when there was little if any use of french drains in Ireland. Road surface water, and any potential pollution from road vehicles or spillages, presently flows along the road edge until it is conveyed by open cuts along the road edge into the wet woodlands and eventually into the stream. This unsatisfactory situation will be rectified under the new road scheme whereby these pollutants would be carried away from the Glen.

While he accepted that no water flow charts were plotted, examination of ground water levels in the Glen carried out in 1991 and 1992 indicated that the ground water in the area where the new drain will lie is in general not less than 3.5 metres below existing road levels at any point on the west side of the Glen. The further bore-hole tests later carried out confirmed these findings.

The purpose of a french drain, which is located beneath the carrier drain, is to prevent the water table from rising above a depth of 1 metre or more below the final road surface, thus preventing the foundation of the entire road from becoming saturated.

In normal circumstances the level of the bottom of the french drains on the western side of the Glen will be above the level at which the water table will lie. The water table in the area of the Glen between chainage 4600 and chainage 5300 has been shown in site investigation bore-holes in 1992 to lie in general between 3.5 metres and 9.5 metres below ground level. This means that any french drains which would lie between 1.9 metres and 2.2 metres below ground level would not generally intercept the water table and cannot affect it in any way.

Alternatively, instead of using french drains, the County Council might consider placing a permeable layer of material on the bottom of the road construction on the eastern side which would allow free passage of ground water through and under the road. These are matters which will be addressed in the final design and before any construction contracts are entered into by the County Council. On the assumption that proper consideration yields the optimum design outcome, the drainage arrangements on the widened road will have a neutral effect on the ground water flows in the Glen and the present flow regime will be maintained.

He accepted that no detailed report on the additional works necessary following on cutting into the slope on the western side had been obtained prior to certification of the EIS. Such a report was commissioned in liaison with Messrs Brady, Shipman and Martin, Landscape Architects, in May 1995, in compliance with the condition attaching to the Minister's Certificate.

In that report it was recognised that some retaining structures were required for both slope stabilisation and supporting proposed road margins on both the eastern and western side of the Glen.

Soil-nailing was identified as a top-down construction which would reduce the land-take requirements on the section of cut slope essentially the steepened slopes will be stabilised using soil-nailing retention methods. Thereafter a soil panel vegetation system would be used to face the pre-stabilised slopes, ensuring minimum intrusion on the existing landscapes. Certain controls would require to be implemented to minimise any damage during construction.

He accepted that about 180,000 cubic feet of rock and screed would require to be removed on the western side of the road, amounting to approximately 11,000 tonnes.

Industrial explosives should not be employed for the purpose of this work. In road building terms, this amount of soil and rock to be removed over the stretch of roadway where it would happen, would not be regarded as extensive, although he did accept it could be seen as such in terms of the impact on a nature reserve.

The soil-nailing would be carried out from above, and some trees above the cutting would

require to be felled to provide a margin for these operations to be safely carried out. The question of vibrations was not addressed in the EIS or Response Document, but it was his opinion that a person standing six paces away from where the drilling work was in process would not feel any vibrations.

The impact of the excavation and route on the western side was addressed in a general way in the EIS and more so in the Response Paper. The report obtained in May 1995 was commissioned on foot of a condition attaching to the certificate as provided by the Minister in December 1993. It addressed the measures necessary to the completion of the embankment, including soil-nailing.

Another condition attaching to the Minister's certificate was the requirement that Wicklow County Council would consult with the Office of Public Works with regard to all details of construction and design. It was his understanding that this process of consultation had been carried out.

Mr Joseph Tracey, forestry consultant, gave evidence of inspecting up to 3,000 trees. These had already been tagged and numbered in the period 1995-1996 as trees which had some exposure risk or were liable to be affected by the road scheme. His instructions were to identify trees that required to be felled.

He found the total number of trees required to be removed during the construction of the proposed dual carriageway was 386 trees and scrub. Of this number, 124 trees on both the eastern and western side of the roadway were felled in January 1998.

He also identified an additional 119 trees which may require to be removed from various points, including a band ten metres in width extending into the woodland from the top of the proposed cutting on the western side. The purpose of this band is to provide a safety margin between the embankment and the tree line which would protect against falling trees and allow the diggers to operate freely and safely.

In addition, he identified a further 172 trees which, regardless of any roadworks which might take place, were in his opinion, a hazard to the public. Of that 172, 57 require branches only to be removed and 115 require to be felled.

Of the 386 trees required to be removed, 21% are of non-native species and of low nature conservation value. Of the 119 individual trees which may become unsafe, 43% are of non-native species and of low nature conservation value.

He disagreed strongly with the views expressed by Dr O'Callaghan. He pointed out that trees rely on precipitation and not ground water for their nourishment and in his view ground water was not relevant to the welfare and/or condition of trees.

Insofar as precipitation levels in the Glen were concerned, some of these range between 991mm-1400mm per annum, well in excess of the minimum levels which in his opinion were necessary for the welfare of the trees to be found in the Glen.

He referred the Court to the 1998 text "Growing Broad Leaves" by Professor PM Joyce, who has over 40 years experience in forest practice, research and education, specialising in growth and yield studies. At p 82 of the text Professor Joyce states in relation to beech:-

"It prefers a maritime climate with high humidity and precipitation exceeding 750mm -- annum.

On the same page Professor Joyce deals with wind-blow in relation to beech in the following sentence:-

"Under favourable growth conditions beech is windfirm."

He did not for one moment accept either the domino theory contended for by Dr O'Callaghan or the wind-blow theory whereby if trees of the perimeter were removed, those remaining in the colony would suffer significantly adverse consequences. In his opinion, the only trees likely to be affected by wind-blow are to be found amongst the 119 which may require removal or become unstable during the course of construction works.

In relation to the role of the mycorrhiza, the level of this function goes up or down depending on the fertility of the soil at root system level. It is particularly important where the soil is infertile. However, where bacteria could work on humus on the ground and where the soil was fertile, as in the Glen, this association was far less important. The main nutrients which mycorrhiza absorb are minerals such as phosphate and potash rather than nitrogen. In any event, mycorrhiza was in his opinion more important for conifers.

In further elaboration of the concept of the wind-blow and colony effect, Mr Tracey referred to the slip-road on the southern part of the western side of the Glen where five years ago between 300-350 trees were taken out at a right angle cut to the wind. Of the remaining oak, beech and eucalyptus, not one had been affected and the only tree losses he found on the site were two spanish chestnuts which were blown over because they did not have the windfirmness of the other varieties. Accordingly, if a domino effect had not taken place at the most vulnerable point in the Glen, there would be far less vulnerability along the edge of the side of the road.

He further pointed out that where a stump is cut off, adventitious buds on the side of the stump will sprout and will actually produce trees eventually through a process known as coppicing. Furthermore, the extended roots of these stumps serve as an additional purpose in binding and holding the soil firmly.

Finally he pointed out that Coillte are planting some 6,000 acorns in the area in the Glen of the Downs which are being presently grown at local nurseries. They are also propagating a considerable number of indigenous species such as hawthorns and hazel for planting.

He felt any risk of infection was absolutely minimal for the simple reason that trees are so resilient. Accordingly, at the end of the day there will be more trees in the Glen than at present, in addition to the coppices which will come up on the surface and will retain the substrate.

It is important to bear in mind that there are 80,000 trees in the Glen completely unaffected by the road scheme.

Mr Richard Nairn is an environmental consultant specialising in ecology, flora and fauna.

He carried out the field studies for the EIS with particular regard to the fact of the proposed development on rare invertebrates and on bird life in the Glen.

One of the rare invertebrates identified in the Glen, mycetobia obscura is found in Ireland, but also in Denmark and Sweden.

He pointed out the Glen of the Downs is not a designated site for the application of the Habitats Directive, although the presence of acid oaks in the Glen would warrant inclusion for that reason alone. He addressed the issue of potential habitat loss in the Response Paper and the effects of the cutting on the western side are addressed in the Response Paper also insofar as they might affect bird life.

He did accept that the excavation works would impact significantly on bird life and felt it would be necessary to cut into the slope in the period September-February which would be the optimum period in terms of minimising interference to birds.

Somewhat surprisingly, he stated that traffic per se does not greatly disturb birds. There is a great amount of noise from passing traffic in Glen of the Downs at present. Shooting does upset birds and he did accept that the use of drills in excavation work could undoubtedly have some adverse impact on bird life. However, the main problem for birds was the presence of humans passing through the woods -- of all the sources of disturbance to birds, this was the most serious.

Mr Kerry O'Sullivan, engineer, is Principal of the firm of O'Sullivans who succeeded Messrs Ove Arup.

In his opinion, the drainage system which was provided for on the latest design drawings was a Rolls Royce system which operated, or would operate, at three levels.

Firstly, adjacent to the road surface, would be an aco-drain, into which road surface water would discharge. This drain would in turn discharge into a carrier drain which would carry off this water, which might well include contaminants, away from the nature reserve. Below those drains was the french drain, the function of which is to deal with ground water.

He accepted that the french drain on the eastern side of the roadway might perhaps be a proposal better left to one side. There was no problem with the french drain on the western side of the road as the elevation there was significantly above water table level. He accepted that this reappraisal had taken place during the currency of the Court hearing of the case.

He now felt that the provision of 300mm of permeable material and gravel on the east side, extending under the embankment, was probably a better option. This would permit the flow of ground water to pass under the road and discharge through the permeable material, both in the direction of the stream and downhill in a southerly direction. It was difficult to be certain until the works were actually opened up. He pointed out that in many instances there might be porous ground conditions which would render it unnecessary to provide this material.

He felt that adequate consideration had been given to ground water levels in the Glen. His firm had excavated fourteen bore holes, ten trial pits and five slip trenches in the period March/April 1997. While this was primarily to test soil conditions, it was also an effective test to determine whether or not there were any problems in terms of water levels. There were no such problems.

In dealing with the soil-nailing procedures, he explained that approximately 400 nails would require to be inserted over a stretch of embankment on the western side measuring 210 metres in length.

These nails are 5 metres in length and are encased in a polyethylene sheath when inserted into the bore holes. They are then filled with a cement-like liquid under pressure.

He pointed out that they have a very low failure rate, less than 1%.

Mr Sean Casey is the Regional Manager of Duchas and a qualified forester. He pointed out that there had been full and detailed consultation between Duchas and Wicklow County Council. As a result of such consultations, the culverting of the river had been abandoned.

There had been four consultations since the EIS was certified by the Minister.

He himself received no information concerning the water table levels.

He also pointed out that consultation had taken place in relation to the implications of

cutting into the hill slopes on the western side.

This concludes the summary of the evidence given in relation to the environmental issues.

At the conclusion of this evidence, I am quite satisfied that no convincing case has been made out that the flow of ground water under the road will be interfered with. Any criticism of the french drain on the eastern side of the road can readily be addressed by a modification of that design proposal, or by the replacement of the drain in any final design by the insertion of the layer of permeable material.

I also accept Mr Stowell's evidence that there were no indicia in this case to warrant more detailed hydrogeological surveys and that the available information as to water table levels was adequate to enable an informed decision be made as to the likely ground water flows in the Glen. Virtually all of the experts who were called, including the Plaintiff's own experts, accepted that roadworks per se generally have little affect on ground water flows.

Further, even if I were to accept, which I do not, that there might be some partial interruption of the 2% ground water flow over the wet woodlands towards the stream, I am far from convinced it would have anything like the effect or effects contended for by Mr Ball and Dr O'Callaghan.

Dr O'Callaghan himself accepts that precipitation is the main source of water supply for trees and indeed Mr Treacy goes as far as to say that in effect it is the only important source.

With regard to the cutting into the hillside on the western side of the roadway, I am satisfied that this was addressed in a general way in the Response Document of March 1992. I regard this as forming part of the EIS, because it was certainly considered by the Minister and the Minister's inspectors had due regard to its contents when reporting in September 1993.

This document did address the problems associated with the excavation on that side of the road both from the point of view of habitat and bird life and generally on the environment.

It did not address any specific problems from the soil-nailing procedures which were only considered in detail in the report obtained in May, 1995. However, I do not see this as a shortcoming which could by any stretch, of the imagination be deemed to invalidate this EIS or to render it so meaningless that it could no longer be regarded as a document upon which the Minister could validly consider issuing a certificate.

Accordingly, I further hold that the EIS did consider all relevant matters as required by the regulations to a sufficient degree to enable the Minister grant the certificate in December 1993.

Further, the detailed evidence with which I have been supplied also satisfies me that, insofar as there was any shortfall of material before the Minister, the evidence which I have received to make good that shortfall also convinces me that the Minister would not have arrived at any different conclusion, nor could he reasonably have refused to certify the HIS. While the parties are not in agreement as to whether or not I can or should make such a finding, I am nonetheless indicating my view having listened to all the relevant expert testimony over a period of three days. While some of this evidence related to other issues which I have to consider, it was substantially to the effect that any shortcomings in the HIS were of a minor nature only and reinforce my view that the Minister could not, by any stretch of the imagination, be deemed to have acted unreasonably or that he issued a certificate which had no sustainable justification on the material before him.