Neutral Citation Number: [2007 IEHC 153]

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000

[2006 No. 477 J.R.]

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

CLARE COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Clarke delivered 26th April, 2007.

1. Introduction

1.1 In this case the applicant ("Mr. Sweetman") seeks to challenge a decision made by the first named respondent ("An Bord Pleanála") on 14th February, 2006 under s. 51 of the Roads Act 1993 (as amended) which had the effect of approving a road scheme designed to link the N18 Gort Road to the Ennis Information Age Park. The application for approval had been made by the notice party ("Clare Council"). Therefore the underlying challenge is to the validity of the approval by An Bord Pleanála of that road scheme.

1.2 However further significant issues arise in these proceedings by virtue of the

case made on behalf of Mr. Sweetman to the effect that Ireland has, in certain respects material to these proceedings, failed to comply with its obligations under Council Directive 2003/35/EC ("the Directive"). The Directive requires that a person, such as Mr. Sweetman, who wishes to challenge certain environmental decisions, have access to a judicial review of such decisions, at a cost that is not prohibitively expensive. Mr. Sweetman seeks declaratory orders in that context, including a declaration that the State has failed to properly implement the provisions of the Directive. In that context it was necessary that the second and third named respondents ("the State") be joined for the purposes of dealing with the question of whether Irish law adequately implements the requirements of those Directives.

1.3 It is common case that a challenge such as that brought by Mr. Sweetman to the road scheme in question comes within the ambit of s. 50(4)(b) of the Planning and Development Act, 2000 ("the 2000 Act") and that an application for leave to seek judicial review must, therefore, be brought on notice. It further follows that in order that leave to seek judicial review be given, Mr. Sweetman has to establish a substantial connection with the proceedings and to establish substantial grounds for his contention. The respondents and notice party have put in issue the question of whether Mr. Sweetman has established a substantial connection with the proceedings. Furthermore it is contended that there are not substantial grounds for the challenge. Both of these questions are, potentially, complicated by the issues which arise concerning the proper transposition of the Directive into Irish law. In addition certain procedural and pleading issues have been raised by the respondents and the notice party to which it will be necessary to refer in due course. However, in all the circumstances, it seems to me to be appropriate to start with a consideration of the factual basis for Mr. Sweetman's initial challenge to the road scheme in the first place.

2. The Challenge

2.1 Clare Council applied to An Bord Pleanála for approval of its scheme to link the N18 Gort Road to the Ennis Information Age Park. In its original application Clare Council enclosed an environmental impact statement ("EIS"). Certain procedural issues were raised by An Bord Pleanála which are not material to these proceedings. A new application was made on 29th August, 2005 which was followed by the publication of statutory notices in various newspapers.

2.2 The road scheme comprises approximately 450 metres of 7.5 metre single carriageway road together with footpaths and cycle paths. It would appear to have been accepted that, in the ordinary way, the scale of the road scheme proposed would not have required the preparation of an EIS. However because of the environmental sensitivity of the area concerned an EIS was, in fact, prepared. The proposed road development is immediately south of Lough Girroga which forms part of the Ballyallia Lake candidate Special Area of Conservation ("cSAC"). It is, therefore, the proximity of the road to that area and its consequent proximity to the Burren that makes the development a sensitive one.

2.3 Notwithstanding this, it would appear on the evidence currently available, that the only person who made observations in relation to the development was Mr. Sweetman.

This was done by letter dated 24th October 2005 and as it is in very brief terms I propose setting it out in full. It reads as follows:-

> "Ref: Ennis Inner Relief Rd. Phase I Environmental Impact Statement
>
> Dear Sir,
>
> I wish to make submission on this environmental impact statement.
>
> Information is required as to what long term monitoring and enforcement mechanism is proposed by applications (sic) to ensure that there is no adverse

impact on adjacent SAC."

2.4 In accordance with normal practice An Bord Pleanála appointed an inspector who considered the matter and reported to the Board. It is clear from the report of the inspector that he gave detailed consideration to the many matters dealt with in the EIS and came to the view that the road scheme should be approved. He had specific regard to the submission of Mr. Sweetman at para. 6.8 of his report in the following terms:-

> "Regarding the submission of Mr. Sweetman, it is considered that, as the road is largely on embankment and more importantly, the drainage system is split with one discharge to the east (EIAP system) and one to the west (N18 Gort Road) the proposed condition regarding ground water monitoring would be sufficient to ensure potential impact on the cSAC are dealt with. It is also of note that there are attenuation/interceptor arrangements proposed for the surface water system."

2.5 At an overall level the inspector went on, at para. 6.9, to conclude that:-

> "Overall the impacts or potential impacts are considered to be adequately assessed and addressed in the EIS and mitigation measures as proposed are considered satisfactory."

2.6 While recommending approval of the road scheme the inspector did, as the passage from his report referred to above (para. 6.8) imply, also recommend the imposition of a modification in the following terms:-

> "Prior to the commencement of the proposed development groundwater monitoring shall be carried out along the route of the proposed road to establish groundwater levels and quality in groundwater flow patterns. The monitoring shall continue for a period of three years following the post completion of the proposed road. The results of the monitoring shall be made available at the offices of Ennis Town Council on a monthly basis."

2.7 The stated reason for that modification was to ensure adequate monitoring of "potential impacts on Lough Girroga candidate Special Area of Conservation".

A central plank of Mr. Sweetman's challenge to the approval by An Bord Pleanála of the road scheme is that that requirement for monitoring is of little value in the absence of an additional provision providing for what is to occur in the event that the monitoring reveals an unexpected effect on the cSAC.

2.8 In that context Mr. Sweetman draws attention to a passage from para. 3.8 of the Inspector's report which, under the general title "water" makes the following comment:-

> "The EIS states that it is anticipated that there will not be any significant residual impacts of the surface water or ground water resulting from the development provided the mitigation measures are adopted. The recharge mechanism for Lough Girroga appears unclear. The EIS refers (p. 42) to a flood study and proposes that development works be prohibited in Karst areas where flooding or ecological sensitivities may be affected".

2.9 However reference should also be made to para. 6.6 which, having noted the proximity of the development to the cSAC and a small encroachment into same, states that:-

> "The drainage from the lake and its recharge are not fully detailed and there is reference to an overflow type drain to the River Fergus (p. 42, EIS). The approach therefore of having the road on embankment and the drainage system avoiding discharge to the lake are considered appropriate."

2.10 There followed para. 6.7 which is in the following terms:-

> "In relation to water it is noted from the Clare County Council Groundwater Protection Scheme maps that the area is shown as a regionally important aquifer (map 5c) but it is described as "Karst-development potential limited". Vulnerability is described as "High" in map 6c and in map 7c for Resource

Protection Zones. It is described as a regionally important aquifer with a vulnerability rating as "high". As the nature of the groundwater movement in Karst areas is complex and Lough Girroga is described as a Turlough in the EIS, the nature of the recharge mechanism should be monitored. As a Turlough could be affected by partially blocked Karstic features, the level and quality of groundwater should be monitored before, during and post construction and a condition is recommended in this regard.

The road is on embankment for most of its length and drainage is taken away from the lake and therefore impacts are considered unlikely to occur due to the absence of significant cuttings."

2.11 In the light of the above passages it is said on behalf of Mr. Sweetman that the modification requiring monitoring is demonstrably inadequate without some additional measure to provide for further mitigation in the event that the monitoring shows some unforeseen consequence. The question as to the proper approach to considering whether such a ground of challenge could meet the substantial grounds test for leave on the facts of this case is potentially affected by the proper interpretation of the directive as it is argued that the Directive has the potential to effect the type of review which the court should conduct.

2.12 Before going on to consider the challenge it seems to me, therefore, to be appropriate to turn first to the issues arising out of the Directive in that those issues have the potential to effect the proper approach which I should take to the question of whether leave should be given at this stage. I therefore turn to the provisions of the Directive.

3. The Directive

3.1 Directive 2003/35/EC provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment. It makes amendments

to Directives 85/337/EC and 96/61/EC ("the public participation Directive"). The material substantive portion of those Directives as amended is to be found in Article 10a of Directive 85/337/EEC as inserted by Article 7 of Directive 2003/35/EC.

3.2 It reads as follows:-

"member states shall ensure that, in accordance with the relevant national legal system, members of the public concerned;

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a member state requires this as a pre-condition,

have access to a review procedure before a court of law or other independent and impartial body established by law, to challenge the substantive or procedure legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged. What constitutes a sufficient interest and impairment of a right shall be determined by the member states, consistently with the objective of giving the public concerned wide access to justice. To this end, the interests of any non governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purposes of subpara. (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purposes of subpara. (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement or exhaustion of administrative review procedures prior to recourse

to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, member states shall ensure that practical information is made available to the public, on access to administrative and judicial review procedures."

3.3 It seems to be the case that no specific measures have been adopted by Ireland for the purposes of implementing the provisions of Article 10a. However it is contended in these proceedings, on behalf of the State, that the availability of judicial review in accordance with Irish law meets the requirements of Article 10a and that there is, therefore, no need for Ireland to adopt any additional measures so as to bring Irish law into conformity with the obligations contained in Article 10a.

3.4 The first real question which arises is, therefore, as to whether the process of judicial review available in the Irish courts is sufficient to meet the obligations on Ireland under Article 10a.

3.5 Certain aspects of this issue were touched upon by Kelly J. in *Friends of the Curragh Environment Limited v. An Bord Pleanála* (Unreported, High Court, Kelly J., 14th July, 2006). In that case the applicant sought a so called protective costs order ("PCO") as a preliminary to seeking to challenge a development by the Turf Club (who were a notice party to the proceedings) close to the Curragh. In seeking a PCO the applicant placed reliance on certain decisions of the United Kingdom courts which recognise a jurisdiction to make such orders. For the reasons set out in the course of his judgment, Kelly J. was not satisfied that it would be appropriate to make a PCO

under that jurisprudence.

3.6 However, at p. 31 of the judgment, Kelly J. went on to consider a contention on behalf of the applicant that, even if it was not entitled to a PCO as a result of the common law jurisdiction of the courts, it was, nonetheless, entitled to such an order by virtue of the provisions of Article 10a. Such a proposition could only be correct if the Directive had direct effect. Kelly J. noted that the Directive required member states to implement its measures by the 25th June, 2005 at the latest and went on, then, to consider whether the Directive had direct effect. Kelly J. noted the established jurisprudence, from, for example, *Becker's* case (1982) E.C.R. 53 and *Marshall's* case 152/84, which established that three conditions must be met in order for direct effect to occur. As noted by Kelly J. those conditions are the following:-

> "First the date for implementation must have passed and the member state must either have failed to implement or have inadequately implemented the Directive.
>
> Secondly the relevant provisions of the Directive sought to be relied upon must be identified and must be clear, precise and unconditional.
>
> Thirdly, direct effect has no horizontal effect. It may only be relied upon as against a member state or an emanation of the state (vertical effect)."

3.7 Having noted that the first requirement (the expiry of the implementation date) was met, Kelly J. went on to determine that the Directive did not have the sort of clarity which allowed it to have direct effect. In any event, on the facts of the case before him, Kelly J. was satisfied that the requirement that the Directive could only have direct effect against an emanation of the State was not met, in that the Turf Club was a private body. The substance of the decision was, therefore, that the Directive had not direct effect for those reasons and that therefore, it could not be called in aid to support an application for a PCO.

3.8 In reaching those conclusions Kelly J. made a number of comments concerning

the Directive and its interaction with the Irish judicial review process. At p. 25 of the judgment he said the following;-

> "Article 10(a) requires the public to have access to a review procedure before a court of law or other independent and impartial body to challenge the substantive or procedural legality of decisions. The Act allows an appeal from a decision of a planning authority to the Board. The Board is an independent and impartial body which is established by statute. It is empowered to hear challenges, both substantive and procedural. It conducts a *de novo* consideration of the application for planning permission. Whilst there is a right of redress on a limited basis to the courts by means of judicial review, it is not clear that it is covered by the Directive. It is just as arguable that the Directive covers an appeal to the Board."

Thereafter on p. 26 Kelly J. noted the following:-

> "Indeed it is also questionable as to whether the Article applies to court proceedings at all in the Irish context. It must be remembered that Irish court proceedings in questions of this type do not permit of a substantive review. The only form of review is a judicial review which does not address the merits of the case. Thus, it is doubtful if the directive applies at all.
>
> Even if the directive can be taken as applying to judicial review applications the question arises as to what the words "prohibitively expensive" refer to. It is not clear whether this refers to court fees which are chargeable by the State or to legal costs which are not. If it is court fees then access is available to any person on paying a modest court fee. It is particularly modest in the case of judicial review in planning matters where the originating document is a notice of motion carrying a fee which is a fraction of the fee payable for the issue of a plenary summons. If the directive is dealing only with fees then it has

no application whatsoever in the case of PCO."

3.9 It is clear from the above passages and, indeed, the remainder of the relevant portions of the judgment, that the principal issue with which Kelly J. was concerned when making those comments was as to whether the directive was directly applicable so as to enable the applicant in the case before him to place reliance on it in support of its application for a PCO. The question of direct effect also arises in this case. Mr. Sweetman argues that certain aspects of the directive have direct effect. It is, of course, necessary that he make that argument in order for him to be able to maintain his challenge to the decision to grant approval for the development. For even if Ireland had failed to implement the directive by the due date this would not enable Mr. Sweetman to challenge the road scheme on the basis of the directive unless the directive could be said to have direct effect. Therefore, insofar as Mr. Sweetman seeks to challenge the road scheme on the basis of the directive itself, (rather than merely challenging the failure of Ireland to implement the directive) he must establish that the directive has direct effect.

3.10 In that context it is important to note a number of differences between this case and *Friends of the Curragh Environment*. Part of the reason for the failure of Friends of the Curragh Environment to persuade Kelly J. that the directive had direct effect was the fact that the developer in that case was a private body. In this case the development is being conducted by a local authority in its capacity as a roads authority. The developer is, therefore, undoubtedly, an emanation of the State. Therefore that aspect of the test is met in this case. The question of whether the directive has direct effect in relation to this case turns, therefore, on the second test as to whether the relevant provisions sought to be relied upon are identified in a clear precise and unconditional manner.

3.11 Secondly it is true to state, as argued by counsel for Mr. Sweetman, that it is possible in principle that certain aspects of a directive may be capable of being given

direct effect even though other aspects of the same directive may not. It was not argued in this case that the determination of Kelly J. in *Friends of the Curragh Environment* was incorrect or that I should differ from it. However it was said that the aspect of the directive sought to be given direct effect is different in this case. As is clear from the passages referred to above Kelly J. was concerned with whether the applicant was entitled to a PCO. He concluded, for the reasons set out in the passages which I have quoted, that the directive was insufficiently clear to mandate the introduction of a PCO under the principle of direct effect. However in this case it is principally argued that the aspect of the directive which entitles a person to a review before a court or other independent body is sufficiently clear to be given direct effect and has not been properly transposed into Irish law.

3.12 Before going on to consider that argument it is important to note one further aspect of the distinctions that can properly be made between the circumstances with which Kelly J. was concerned in *Friends of the Curragh Environment* and the circumstances which exist in this case. It is also necessary to deal with the procedural issues raised, one of which arises out of that argument.

3.13 As is again clear from the passages quoted above, Kelly J. was concerned with the grant of a planning permission (under the 2000 Act). In those circumstances Irish law provides for the original decision to be taken by a local authority in its capacity as a planning authority. There follows an appeal, if brought, in the form of a *de novo* hearing before An Bord Pleanála. However in certain types of cases in which a permission for development is required (such as a road development as in this case) an original application is made to the An Bord Pleanála and there is no de novo hearing before any body. The only form of review available for the decision of the An Bord Pleanála in a case such as this is a judicial review by the courts. Therefore, in a case such as this, the only basis upon which it can be argued that the form of review which

the directive requires is met in Irish law, is if judicial review provides a remedy as required by the Directive.

3.14 There are, therefore, two issues. Firstly it is necessary to consider whether there is available in Ireland, on the law as it currently stands (or, perhaps, with any adaptations which the courts can impose in the absence of primary or secondary legislation) a sufficient form of review necessary to meet the obligations on Ireland under the directive; and secondly whether the aspect of the directive imposing an obligation to provide such review is directly effective.

4. <u>Is the case as now made pleaded?</u>

4.1 However, before going on to consider those issues, it is necessary to deal with the fact that, it is said, that the Statement of Grounds fails to make the case that the directive has not been transposed into Irish law on the basis of a complaint about the inadequacy of the type of review available in the courts. On the contrary, it is argued, the only aspect of the directive which is pleaded as having not been properly transposed is that aspect which concerns itself with prohibitive cost.

4.2 This issue is more than a mere technicality. As pointed out earlier, this application is governed by s. 50 of the 2000 Act. Amongst other things the application for leave must, therefore, be brought within eight weeks. Questions can then arise as to any attempt to change the basis of the challenge outside that period.

The jurisprudence in relation to such circumstances is clear. In *Ní Eilí v. EPA* [1997] 2 ILRM 458 Kelly J. had to consider an application to amend a statement of grounds after leave had been granted in judicial proceedings which were subject to the analogous procedural provisions of s. 85(8) of the Environmental Protection Agency Act, 1992 ("the 1992 Act"). Kelly J. held that the amendments sought by the applicant amounted to an additional and entirely new case. That being so, he concluded that the applicant in that case could not expand her challenge by seeking new relief on new grounds outside

the statutory time limit. He concluded that to allow such a course of action would run counter to the statute and in effect permit no time bar at all in respect of the additional reliefs sought. It is, of course, the case that s. 85(8) of the 1992 Act did not permit the commencement of proceedings outside the time limit at all. Section 50 of the 2000 Act permits such an application where this court considers that there is good and sufficient reason for extending the period within which the application is to be made.

4.3 This court had to address a similar situation in *Muresan v. Minister for Justice Equality and Law Reform & Others* (Unreported, High Court, Finlay Geoghegan J., 8th October, 2003) in respect of the procedurally analogous area of immigration law. Finlay Geoghegan J., having noted the decision of Kelly J. in *Ní Eilí,* applied the same reasoning to the procedurally identical section of the law governing challenges to immigration decisions and came to the view that:-

> "Where an applicant seeks leave to amend an application for leave to apply for judicial review by adding new reliefs which either seek to challenge a different decision to that already challenged or which may amount to a new cause of action in respect of a decision already challenged, that the applicant is in effect making a new application albeit by way of amendment to an existing application and therefore must satisfy the court that there is good and sufficient reason for extending the period within which the application shall be made in accordance with subs. (2)(a) of s. 5 of the Act of 2000".

4.4 The reference to the Act of 2000 is to the Illegal Immigrants (Trafficking) Act of that year which governs challenges to immigration decisions and is procedurally similar to s. 50 of the 2000 Act with which I am concerned.

4.5 The law is, therefore, clear. Where an amendment to grounds is sought which would amount to the pleading of a new case and where that amendment is sought outside the statutory time limit, then it can only be granted in circumstances where there

is "good and sufficient reason" for allowing the amendment outside time. In substance the court must be satisfied that there would have been good and sufficient reason for extending the time to bring an application for judicial review based on the new grounds. The situation in such cases is, therefore, wholly different from the situation which would apply in relation to what I might call an ordinary amendment in ordinary proceedings where the court will readily grant an amendment (if necessary on terms) provided that there is no significant prejudice. A case such as this is more analogous to an attempt to amend plenary proceedings to include a new cause of action in circumstances where that new cause of action, if commenced by separate proceedings, would be statute barred. In those circumstances wholly different considerations apply to an amendment.

4.6 In respect of the procedural issue, therefore, two questions arise:-

1. Is the claim now advanced pleaded; and
2. If not, is there good and sufficient reason for allowing an amendment to permit such a claim to be now pursued.

4.7 I deal with each of the points in turn. So far as the relief sought is concerned, the applicant claimed, at para. D4, "a declaration by way of application for judicial review that the second named respondent is obliged, pursuant to the provisions of Council Directive 2003/35/EC, to make provision for the applicant to challenge the within decision in the within proceedings at a cost that is not prohibitive". Similarly the declaration sought at para. 3 seeks a declaration of an entitlement under the directive "to bring the within proceedings at a cost that is not prohibitive". Finally at para. 5 a declaration is sought that the State has failed to properly implement the provisions of the directive.

4.8 Insofar as grounds are set out for seeking those reliefs Mr. Sweetman asserts, at para. E 24, that he is entitled under the terms of the directive "to access to judicial

review of decisions made in respect of an environmental impact assessment carried out under Council Directive 85/337/EEC at a cost that is not prohibitively expensive". There is then a reference to the fact that the costs of these proceedings would be beyond his means and having made reference to the fact that the implementation date for the directive has passed, the statement of grounds, at para. E 26, goes on to state the following:-

> "Notwithstanding the provisions of the directive, to date the second named respondent has failed to make any provision for the review of decisions such as that of the first named respondent herein, at a cost that is not prohibitively expensive".

4.9 It will be seen that each of the references in both the relief sought and the grounds relied upon makes reference to "at a cost that is not prohibitively expensive". It is asserted on behalf of Mr. Sweetman that relief five is expressed in general terms and that having regard to the comma immediately before the phrase "at a cost" in paragraph E 26, that paragraph should properly be interpreted as asserting a failure to make provision for an appropriate review of decisions generally, as well as asserting a failure to make provision for the review of such decisions at a non prohibitive cost. I am afraid I cannot agree. On any fair or reasonable reading, both of the individual clauses in the statement of grounds, or of the statement of grounds taken as a whole, same can only be interpreted as setting out a challenge based on a contended for failure to provide judicial review at a non prohibitive cost. There is nothing to suggest that there was a wider challenge based on a contention that the form of review itself is inadequate. I am, therefore, constrained to form the view that the statement of ground does not raise a challenge to the adequacy of the type of review provided in Ireland at all. It confines itself to challenging the exposure to costs. In those circumstances, having regard to the jurisprudence to which I have referred, it seems to me that such a challenge can only now be brought by amendment and that, again relying on that jurisprudence, an

amendment can only be allowed if there is "good and sufficient reason" for allowing it to be brought outside the time limit.

4.10 That raises the second question as to whether there are "good and sufficient" reasons. Unfortunately this issue only appears to have arisen in the last number of days prior to the hearing before me. In detail it appears only to have been fully explored by the parties in the course of oral argument. Counsel for Mr. Sweetman put up the best argument which he could to suggest that the claim that Ireland had failed to provide for an appropriate form of judicial review was within the pleadings. Because of adopting that position and the lateness of the time when the pleading issue became clear, there was no evidence before the court in respect of whether there might have been a good and sufficient reason for such a claim not having been included in the first place or some other good and sufficient reason to allow it now to be included. In those circumstances it would be impossible for me to conclude (in the absence of evidence directed to that end) that the "good and sufficient reason" test has been met.

4.11 However, in the circumstances, it also seems to me that it would be unjust to shut Mr. Sweetman out from a reasonable opportunity to satisfy me in that regard. I, therefore, propose dealing with this procedural issue on the basis that I will go on to consider whether there are substantial grounds sufficient to grant leave on the grounds not pleaded. If there are not substantial grounds under that heading in any event then the question of an extension of time does not arise in practice. If there would be substantial grounds, then I will afford Mr. Sweetman an opportunity to put before the court whatever evidence he can to satisfy me that there is good and sufficient reason for extending the time.

4.12 I should emphasise that I am adopting this procedure in the unusual circumstances of this case where the issue appears to have arisen late in the day and where, in my view, therefore, an injustice might be caused by not following that course

of action. In the ordinary way I would expect that, in the absence of special or unusual circumstances, a party who wishes to expand the relief claimed or the grounds upon which relief already claimed is advanced, should bring an application in advance (perhaps to be heard at the same time as the leave application) for an appropriate amendment and put before the court whatever evidence might be relied upon to justify the amendment outside time. While it will always be a matter for the judge having carriage of such applications to consider how best to deal with them, it seems to me that it would, ordinarily, be appropriate to deal with the application for an extension of time either before or at the latest along with, the application for leave.

5. Is the whole application out of time

5.1 Before passing on to consider the substance of the issues which arise under the claim as now made in respect of the transposition of the directive, and its possible direct effect, I should also deal with a further procedural issue which was raised only by Clare Council. The point concerned was not taken either by the State or by An Bord Pleanála. Clare Council argued that Mr. Sweetman had failed to bring even his initial claim within the original eight week period. The basis for so arguing was that a copy of the determination of An Bord Pleanála was sent to Mr. Sweetman in advance of the formal publication of the decision of the Board. There is no doubt that if time commenced to run as of the date when the decision was formally published, Mr. Sweetman is in time. If it could be said that time began to run when Mr. Sweetman received the letter confirming the result of the determination of An Bord Pleanála (and on the assumption that he received such a letter – an issue that is not entirely clear) then it would seem that he is out of time.

5.2 The question as to whether he received such a letter is open to doubt in the following circumstances. Clare Council did not originally place any reliance upon this point as it was unaware of the fact that such a letter may have been sent to Mr.

Sweetman. That fact emerged from the replying affidavit filed on behalf of An Bord Pleanála which was, apparently, filed after Clare Council had filed their replying affidavit. An Bord Pleanála, while making reference to the fact of the sending of a letter to Mr. Sweetman for completeness, did not and does not make any point arising from that fact, as to the time limit. Mr. Sweetman was not, therefore, on any real notice that this point was going to be taken until written submissions were filed by Clare Council in the days immediately prior to the hearing. In order to ensure an early hearing the case was listed for trial at Cork and in all the circumstances Mr. Sweetman did not have a reasonable opportunity of dealing with the factual question as to whether he received the letter. If, therefore, the question of him being in time turned on the receipt of the letter, I would be prepared to allow Mr. Sweetman a further opportunity to deal with that factual aspect of the case. However the point only arises in the event that time could be said to begin to run when Mr. Sweetman received the letter (if he did).

5.3 I am persuaded that time does not begin to run until the publication of a formal notice. Section 50(4)(a)(ii) of the 2000 Act as amended by s. 12(b) of the Planning and Development (Amendment) Act, 2002 provides as follows:-

> "Subject to subpara. (iii), applications for leave to apply for judicial review under the order in respect of a decision referred to in para. (a)(ii) or (iii) or (b)(ii) or (iii) subs. (2) shall be made within the period of eight weeks commencing on the date on which notice of the decision was first sent or published as appropriate".

5.4 Clare Council places reliance on the inclusion of the word "sent", which had been introduced into the section by the amendment referred to. However it is common case that there is no statutory obligation on An Bord Pleanála to send a copy of its decision in a case such as this to persons who make observations in relation to the application. In those circumstances, the sending of a copy of the decision to Mr.

Sweetman was a purely gratuitous act on the part of An Bord Pleanála and could not, in my view, affect the date on which the eight week period could be said to commence. I am therefore satisfied that, in this case, the eight week period commenced on the publication of the notice of the decision of An Bord Pleanála and on that basis it is clear that Mr. Sweetman is, at least so far as the claim as originally formulated in his statement of grounds, in time. In those circumstances is not necessary to go into the question of whether he received the relevant letter.

5.5 Having dealt with the procedural issues I therefore propose to go on to consider the substance of the arguments raised in relation to the transposition of the directive and its possible direct effect on the basis, as indicated above, that if I am persuaded that there are substantial grounds for giving leave in respect of grounds which are dependent upon the challenge not pleaded I will afford Mr. Sweetman an opportunity to persuade me that it would be appropriate to allow an amendment outside time.

6. The Substantive Requirement of the Directive

6.1 In general terms Mr. Sweetman argues that the current review available through judicial review in the Irish courts fails to meet the requirements of the directive in a number of respects.

Firstly it is said that the requirement now contained in s. 50 of the 2000 Act (as amended) that an applicant have to establish a substantial interest is in breach of the first paragraph of Article 10a.

Secondly it is said that Irish judicial review does not adequately give to persons, such as Mr. Sweetman, an ability "to challenge the substantial or procedural legality of decisions etc". A number of subsidiary points are made under this heading.

In addition it is said that the exposure of parties such as Mr. Sweetman, to the possibility of a costs order made in favour not only of respondents but also of notice parties amounts to a "prohibitive cost" and is also in breach of the directive.

I deal with each of the issues in turn.

6.2 The question of the proper interpretation of the term "substantial interest" as used in s. 50 has been the subject of a number of decisions in this court which I reviewed in *Harding v. Cork County Council* (Unreported, High Court, Clarke J., 31st January, 2007). The overall principles to be applied are now subject of an appeal to the Supreme Court arising from *Harding* on foot of a certificate which I gave in that case. The principles therefore await a definitive determination.

6.3 The question of whether, and if so to what extent, it may be necessary to have regard to the provisions of Article 10a of the Directive in construing the term "substantial interest" was not raised in *Harding*, or, so far as I am aware, in any of the other cases referred to. It is certainly open to argument that it will be necessary to construe the term "substantial interest" in a manner that does not infringe the Directive. In those circumstances it may well be that, at least in those cases to which the Directive applies, the term "substantial interest" will need to be considered in the light of the requirements of the Directive. It does not, however, it seems to me, follow that there are substantial grounds for contending that Ireland has failed to properly transpose the directive in that regard.

6.4 It is necessary to look, firstly, at what the directive requires. The persons who are given entitlements under Article 10a are those:-

> "(a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, or administrative procedural law of the member state require this as pre-condition".

6.5 However Article 10a goes on to state that "what constitutes a sufficient interest and impairment of a right shall be determined by the member states, consistently with the objective of giving the public concerned wide access to justice". There follows a requirement that appropriate provisions need to be put in place for certain non

governmental organisations. It is clear, therefore, that member states are entitled to determine what is to be regarded as a sufficient interest subject only to an overall requirement that wide access to justice be allowed. Furthermore, where this in accordance with the procedural law of the member state concerned, the right to challenge can be restricted to those who can establish the impairment of a right (although certain non governmental organisations may be deemed to meet that test).

6.6 Mr. Sweetman draws attention to the fact that the law in Ireland formerly required the establishment only of a "sufficient interest" and argues that the more stringent test (by whatever measure the bar may have been raised) inherent in the requirement that a "substantial interest" be established goes too far and is inconsistent with Article 10a. It is important to remember that the meaning to be given to particular terms in EU directives on the one hand and in the domestic legislation of member states on the other is not necessarily such as require that the term concerned must necessarily mean the same thing. The fact that it is necessary, as a matter of Irish law, to meet a higher "substantial interest" bar than the former "sufficient interest" bar does not mean that there is a breach of the "sufficient interest" test as set out in the directive. The terms "substantial interest" and "sufficient interest" have a particular meaning in Irish judicial review law. It could not be the case that the directive intended to use the term "sufficient interest" by reference to the judicial review law of Ireland or, indeed, of the United Kingdom which operates a similar regime. Rather it is clear from the text of Article 10a itself that "sufficient interest" is merely taken to mean the interest which the member state itself determines subject only to the requirement that it give wide access to justice. This latter limitation needs to be seen in the context that the directive itself permits the confining of a right to challenge to those being able to show an impairment of a right.

6.7 In all those circumstances it does not seem to me that the existence of the

"substantial interest" test can be said to give rise to a situation where judicial review, as it is available in Ireland, fails to meet the requirements of the directive. If it should prove to be necessary, on the facts of any individual case, to give a more generous interpretation of the requirement of "substantial interest" so as to meet the "wide access to justice" criteria set out in Article 10a then there would be no difficulty in construing the term "substantial interest" in an appropriate manner. It seems to me that it follows, therefore, that the term "substantial interest" needs to be construed having regard to the requirement that Article 10a, (in the cases to which it applies, such as this) and having regard to the requirement that there be wide access to justice. I propose considering the application of the substantial interest test in this case on that basis. In those circumstances it does not seem to me that there can be said to be any failure to transpose properly on those grounds.

6.8 So far as the second issue is concerned, that is the question of whether the form of review available under Irish judicial review law is adequate to meet the requirements of the directive two subsidiary issues are raised.

Firstly it is said that the requirement for leave amounts to a barrier to the entitlement to the judicial review mandated by the directive. Secondly it is said that the limitations placed upon the scope of the inquiry entered into on a judicial review fails, also, to meet those requirements.

6.9 I am not satisfied that there is any substance at all in the first argument. The fact that, as a matter of Irish procedural law, we speak of a substantive judicial review as referring to a full hearing which occurs after leave has been granted, does not mean that the leave application itself does not amount to a judicial review in the sense in which that term is used in the Directive. It is a review by a court. The applicant, provided that the application is brought in time, can raise whatever issues he, she or it wishes. The court has to give due consideration to all of those issues. Where facts are in issue the

court must, at that stage, give the applicant the benefit of the doubt. The hearing of leave applications under s. 50 of the 2000 Act frequently take a number of days. It does not seem to me that there could be any basis for suggesting that a party who is given access to a court to agitate whatever arguments they wish in support of a leave application has not been given a judicial review in the sense in which that term is used in the Directive.

6.10 The fact that, if the court thinks that the grounds put forward are insubstantial, it follows that the case does not go any further, does not mean that the applicant concerned has not had a judicial review. It simply means that the case was of insufficient merit to warrant further consideration. The person concerned has had their judicial review and has failed to persuade the court that there is a weighty basis for it. On the other hand if facts need to be gone into or complex and difficult issues of law arise upon there are weighty arguments on either side then the court will, as a matter of Irish procedural law, require a further hearing before reaching a final decision. However the process taken as a whole affords the applicant access to a court. The mere fact that leave has to be obtained and that, as part of that process in order to obtain leave, substantial grounds need to be established, does not in any way diminish the entitlement of that party to access to a court and a review that it is (within the parameters of Irish judicial review) conducted by a judge of the issues raised. I am not, therefore, satisfied that there is any basis for the contention that the requirement for leave based on substantial grounds infringes the obligation to provide a judicial review as required by the Directive.

6.11 Under the second heading reliance is placed upon the undoubtedly limited basis upon which a court can review the decision under consideration in the context of Irish Judicial Review Law. This matter was touched on by Kelly J. in one of the passages from *Friends of the Curragh Environment* referred to above. However two matters

concerning the scope of Irish Judicial Review need to be noted.

6.12 Firstly it is important to remember that a court, in judicial review proceedings, is not confined to the irrationality test identified in *O'Keeffe v. An Bord Pleanála* (reference). That is but one ground which can be advanced. A court is also entitled (and indeed is duty bound) to consider matters such as whether the decision maker had regard to factors which ought not properly have been included in the consideration or failed to have regard to factors which should properly have been considered. *O'Keeffe* irrationality only arises in circumstances where the decision maker properly considered all of the matters required to be taken into account and did not take into account any matters which should not. The limitations inherent in the *O'Keeffe* irrationality test, therefore, only arise in circumstances where all, but only, those matters properly considered were taken into account and where the decision maker comes to a judgment based on all of those matters. It is in those circumstances that the court, by reason of the doctrine of deference, does not attempt to second guess the judgment of the person or body concerned provided that there was material for coming to that decision. In particular the court does not attempt to re-assess the weight to be attached to relevant factors.

6.13 The overall jurisdiction is not, therefore, as narrow as a consideration of *O'Keeffe* irrationality alone might suggest.

6.14 Secondly it should be noted that there is the potential for flexibility in the approach to be taken in respect of judicial review in appropriate cases. The courts of the United Kingdom, which apply a largely identical regime in respect of judicial review, have evolved the doctrine of "anxious scrutiny" whereby a higher level of scrutiny is applied to cases involving fundamental human rights. That level of scrutiny has been applied, in appropriate cases, within the rubric of the existing judicial review system. While there has not, as yet, been a definitive determination of the matter in the

courts in this jurisdiction, same has been the subject of some comment. In particular in the area of immigration law this court, placing reliance on a number of dicta from members of the Supreme Court, has accepted that there are substantial grounds for arguing that a higher level of scrutiny needs to be applied in cases involving fundamental human rights in that field. On that basis this court has been prepared, at the leave stage, to apply such a test for the purposes of a leave application. The logic of that approach is that if it can be established at the full hearing that a higher level of scrutiny needs to be applied and if there are substantial grounds for arguing that, on the application of such a higher level of scrutiny, the applicant would be entitled to relief, then there are, in turn, substantial grounds to justify the case going forward.

6.15 Such an approach was taken by this court in, for example, *Gashi v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clarke J., 3rd December, 2004).

6.16 It seems to me that a similar approach can be adopted in planning cases. To the extent that it may be argued successfully that there are substantial grounds to the effect that a greater level of scrutiny is mandated by the Directive in relation to environmental judicial review applications, then such greater level of scrutiny can, by analogy with the position adopted in respect of fundamental human rights cases, be accommodated within the existing judicial review regime. To the extent that substantial grounds needs to be established in order that leave be obtained then leave should be granted where it can be demonstrated that there are substantial grounds for the applicant challenged applying a level of scrutiny which the court is, in turn, satisfied meets a substantial grounds test.

6.17 In those circumstances, it again seems to me that it is possible to accommodate any requirements which may be found to exist within Article 10a, in the existing judicial review regime. It may mean that the court will have to consider, initially on a

substantial grounds basis, and subsequently on a substantive basis, what level of scrutiny is required to meet the Directives requirements. In turn, in determining whether there are substantive grounds on the facts of an individual case for giving leave to challenge, the court will need to consider whether (at the high water mark of the level of scrutiny for which the court is satisfied substantial grounds exist) there are substantial grounds for the challenge itself. In turn at a substantive hearing the court can apply whatever level of scrutiny it considers is mandated by the Directive. I should say that in being satisfied that such a regime can be accommodated within the ambit of existing Irish Judicial Review Law I have had regard to the conclusions which I have reached in respect of the next issue to which I will shortly turn. It might well be that Irish judicial review law could not accommodate a complete appeal on the merits. However for the reasons which I am about to address, I am not satisfied that such a review is required by the Directive. The sort of review which I am satisfied the Directive does require may not, indeed, in practice in most cases, go beyond the parameters of existing Irish judicial review law. However to the extent that it may, (and that is an issue which it is not appropriate for me to determine definitively at this stage in these proceedings) I am satisfied that it can be accommodated within the existing regime.

6.18 In that context it is, therefore, necessary to turn to the precise requirements of the Directive itself.

6.19 It is important to note that what the Directive allows persons to challenge is "the substantive or procedural legality of decisions". While it is clear that Irish judicial review law allows an extensive review of the procedural legality of decisions it is important to note that the Directive does not require that there be a judicial review of the substance of the decision itself but rather the "substantive legality" of the decision. It seems clear therefore (any indeed it was not otherwise argued on behalf of Mr.

Sweetman) that the Directive does not require a complete appeal on the merits. In addition to a review of the procedures followed, to determine whether they were in accordance with law, it is also necessary that there be a review of the "substantive legality" of the decision. It seems to me that current Irish Judicial Review Law goes along way towards (and indeed may well meet) that requirement. Judicial review proceedings can review whether it was, as a matter of law, open to the decision maker to come to the decision taken. It can review whether all proper matters were taken into account and no improper matters taken into account. The limitation on the review is that the court is not permitted to "second guess" a judgment made by the decision maker on the basis of materials which could allow such a judgment to be reached.

6.20 It is instructive to note that when considering the proper interpretation of the Public Procurement Directives in *SIAC v. Mayo County Council* [2002] 3 I.R. 148, Fennelly J., having concluded that the proper interpretation of the Directive was to incorporate into that law, the EU internal review mechanism of "manifest error", noted that it was likely, in practice, that the application of that regime would not be very different from the application of traditional Irish Judicial Review Law.

6.21 For the reasons extensively set out in that judgment it is clear that the EU courts apply a test of "manifest error" when considering technical judgments made by institutions of the EU. It is difficult to envisage that the imposed requirement on member states to provide a judicial review of substantive legality in respect of environmental decisions was intended to impose a higher level of scrutiny on the courts of Member States than the EU Court itself would apply to decisions of EU institutions. It is, therefore, difficult to see any substantial argument for the contention that the requirement that there be a judicial review of the substantive legality of a decision in the environmental field goes beyond the test of "manifest error" analysed by Fennelly J. in *SIAC*. I am, however, satisfied that to the extent that it may emerge that it may be

necessary to allow, in certain circumstances, for a review so as to meet that test which goes beyond the existing parameters of Irish judicial review law, that law is more than capable of being adapted by the courts to accommodate such a requirement. In those circumstances I am not satisfied that it has been established that there is any failure to transpose.

6.22 I am equally satisfied that the appropriate approach to be taken in respect of a challenge to a particular decision is to consider whether there are substantial grounds for suggesting that, in relation to that decision, a higher level of scrutiny is required on the facts of the case and, in turn, to determine whether, on applying such a higher level of scrutiny, there would be substantial grounds for the challenge itself. That is the approach which I propose taking in this case.

7. <u>Excessive Cost</u>

7.1 The final aspect of the argument to the effect that Ireland has failed to properly transpose the directive stems from the requirement that the judicial review mandated by Article 10a is to be free from excessive cost have not been met. It is important to note that this is the aspect of the directive that Kelly J. specifically determined could not be of direct effect on the grounds of lack of clarity. I see no reason to depart from that view. Therefore I am not satisfied that this aspect of the directive could, in any event, be of direct effect or, more accurately, at this stage, I am not satisfied that there are substantial grounds for such a contention.

7.2 I have also had the benefit of more extensive argument, most particularly from the State, in relation to the proper interpretation of that aspect of the directive. Indeed without the benefit of such argument Kelly J. noted that there was an issue as to whether costs, as the term is used in the directive, referred to, on the one hand, matters such as court fees which need to be discharged as the price of bringing litigation or, on the other hand, the exposure of unsuccessful parties to the possibility of having to pay

the costs of other parties.

Counsel for the State drew attention to the Aarhus Convention. Recital 3 of the directive expresses the purpose of the directive as being to align community law with the provisions of the Aarhus Convention which was signed by the European Community on 25th June, 1998.

7.4 The text of Article 9 of the Aarhus Convention states as follows:-

"Each party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition.

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable or being impaired for

the purposes of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administration review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law."

Article 9, paragraph 4, goes on to provide:

"In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

The provisions of Article 9, paragraph 5 should also be noted:

"In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

7.5 It will be seen that there is a very great similarity between the terms of Article 9 of the Aarhus Convention and Article 10a of the directive.

7.6 In addition, Article 9 para. 3 of the Aarhus Convention makes it clear that the

provisions of that Convention are not intended to cover court costs. It is in the following terms:-

> "Each party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings".

7.7 Counsel for Mr. Sweetman makes the point that it is, as he put it, "a bit rich" for Ireland to place reliance on the Aarhus Convention when it would appear that Ireland has not ratified that Convention. While that may be a good debating point, it does not seem to me to relevant to the questions of construction which I have to address. It is clear on its terms that the directive was put in place to enable the EU to act in conformity with the Aarhus Convention which it, the EU, had signed. It is, therefore, clear that proper regard should be had to the Convention in construing the directive. The directive must mean the same thing in each member state. This will only not be so in circumstances (such as a derogation) where is express provision in a directive excluding or varying its application to one or more member states. If, therefore, the directive as a whole needs to be construed in the light of the Aarhus Convention then it follows that its application in each member state needs to be so construed whether or not that member State has itself ratified the Aarhus Convention.

7.8 With the benefit of that reference to the Aarhus Convention I am satisfied that the "absence of excessive cost" requirement in the directive is not intended (nor are there substantial grounds for arguing to the contrary) to cover the exposure of a party to reasonable costs in judicial proceedings.

7.9 It is also clear that, while the costs of judicial review proceedings in the planning context will, ordinarily, follow the event, there is a discretion either not to award costs against an unsuccessful applicant or, indeed, in particular cases to award costs in favour

of such an applicant where the public interest test detailed by Macken J. in *Harrington* is met. I do not, in those circumstances, believe that there are substantial grounds for the contention that the level of exposure which a party might have to costs in the Irish judicial review context is "unreasonable" so as to be in breach of Article 9 para. 3 of the Aarhus Convention.

7.10 Lastly I should also say that I do not regard that there are substantial grounds for the contention that such costs may be regarded as unreasonable by virtue of the two stage process involving potentially two significant hearings which derives from the substantial grounds and notice requirements of s. 50 of the 2000 Act. It may be that in some cases the overall costs of the proceedings may be increased by that fact. However it has been noted in a number of judgments (examples) that where respondents or notice parties do not reasonably cooperate with measures to mitigate such costs then that failure to cooperate may be reflected in the costs order at the end of the day. In addition it needs to be noted that where the courts do not consider a case to be substantial, the existing procedures will inevitably lead to a lower level of costs being imposed upon an applicant. Finally it has to be acknowledged that an important part of the role of the courts in the award of costs is to ensure that parties who are put to the expense of defending cases which turn out to be unmeritorious are not, themselves, unduly penalised and, in addition, are not penalised by any steps taken in the procedure which have the effect of increasing costs and which the court considers not to have been justified.

7.11 All in all I am not satisfied that there are substantial grounds for the contention that there has been a failure to properly transpose under this heading. Nor am I satisfied that the directive requires that there be an immunity from exposure to the sort of costs which arise in Irish judicial review proceedings in any event.

8. Conclusions on Transmission

8.1 For all those reasons I am not satisfied that any case has been made out, in the context of the facts of this case, for a failure to transpose. The applicant has, of course, only standing to make an argument on failure to transpose where it can be shown to arise out of the facts of this case. I am, not, therefore, satisfied that there is any basis for granting leave in respect of that part of the case that is brought in relation to transmission. It follows that all of the case as against the State must fall.

8.2 For the reasons which I have set out I am satisfied that, in so far as it may be necessary (without necessarily being satisfied that it is necessary) to have regard to the directive in construing both the threshold that must be met to meet the "substantial interest" test and in relation to the extent of the review that may be required to meet the obligations of the directive, both of these matters can be adequately dealt with within the context of the existing law. If it should transpire to be required, the definition of the threshold in respect of "substantial interest" can reflect, in appropriate cases, the requirements of the directive. Insofar as it may be necessary to "fine tune" the nature of the review in relation to substantive legality that may be mandated by the Directive then that also can be accommodated within existing Irish judicial review law. Having regard to the well established principles that Irish statue and other law should, where possible, be interpreted in a way so as to bring Irish law into conformity with mandatory requirements of EU law, then it seems to me that any such adjustment is more than well capable of being made without breaching the boundaries of the evolution of the principles of judicial review or the statutory interpretation of the term "substantial interest".

8.3 I therefore propose approaching the question of whether the applicant is entitled to leave on the basis of considering whether he has established a substantial interest taking into account the provisions of the directive and, if so, whether he has established substantial grounds giving him the benefit of the maximum level of review which may

be argued (on a substantial grounds basis) to exist under the directive. I therefore propose to approach the substantive issues on that basis.

9. Substantial Interest

9.1 As I indicated in *Harding* amongst the factors that should properly be taken into account in assessing whether a person has established a "substantial interest" is the question of whether the person has asserted the issues sought to be raised in the judicial review, at an appropriate earlier stage of the process. Mr. Sweetman meets that test. While limited in scope, the very direction of the comments which he made in his observations were towards the monitoring of the consequences of the development and any action that might require to be taken on foot of such monitoring. He therefore has raised the issue that he now seeks to litigate.

9.2 The second leg of the substantial interest test concerns the connection which the applicant must have with the development. As I pointed out in *Harding* the nature of the development itself (and this obviously includes the location of the development) necessarily has an effect on the judgment as to what persons can reasonably be said to be effected by it in a way such as would give them a substantial interest in the development itself.

9.3 That point applies with particular force in the case of specially sensitive areas such as a cSAC. Such areas are frequently remote and many persons who have real and genuine interest in them may not live proximate to them. In particular having regard to the obligation under the directive to allow wide access to justice and the application of that principle to the necessity to afford a reasonably wide range of people with an opportunity to have their concerns dealt with in relation to sensitive areas, I am satisfied that Mr. Sweetman meets the substantial interest test in the unusual circumstances of this case. Therefore it only remains to consider whether he has met the substantial grounds test.

10. Substantial Grounds

10.1 It seems to me that on a fair reading of the Inspector's report, the Inspector was satisfied that the fact that the road was to be built on an embankment and had specific remediation measures, which he mentions, for diverting water from the road development in an appropriate way, led to the conclusion that it was unlikely that there would be any significant impact on the cSAC. The fact that certain marginal doubts were expressed about this does not alter that underlying conclusion. There was more than ample material in the EIS from which the Inspector could reach that conclusion. While raising the issue in general terms Mr. Sweetman did not put forward any specific evidence or argument to An Bord Pleanála to suggest that the conclusions in the EIS were incorrect.

10.2 It would, therefore, appear to be appropriate to characterise the decision of the Inspector as amounting to a decision that the risk of any adverse consequences was so small that it did not warrant refusing the application but that, for an abundance of caution, it was appropriate to impose a monitoring requirement so that, not only the local authority but the public generally, could be made immediately aware of any unexpected consequences. Of course at a time when any such adverse consequences occurred the road would in fact have been built and could not, in all probability, be undone. Therefore the judgment as to whether the project was to go ahead at all necessarily involved assessing the level of risk of adverse consequences. It would appear that that risk was found to be extremely small and thus not such as would justify refusing the project. In those circumstances it seems to me that the question of whether any additional measures were required on top of the monitoring was more than within the technical judgment of the Inspector and An Bord Pleanála who came to consider his report and the other materials in the case. It does not seem to me that it could be said that the Inspector considered any inappropriate factors, failed to consider any

appropriate factors, or came to an unreasonable decision on the materials. Likewise the same applies to the Board. Even applying a more stringent test (if it be so required) of manifest error it is difficult to see how the decision could be said to show a manifest error.

10.3 In all those circumstances I am not satisfied that Mr. Sweetman has established substantial grounds for contending that the decision ought be overturned even on the basis of a generous interpretation of the jurisdiction so to do that might be mandated by the directive. In those circumstances I am not satisfied that it would, in any event, be appropriate to grant leave and for those reasons it does not appear to me to be necessary to revisit the question of whether it would have been permissible to allow the amendment referred to earlier given that even if it had been allowed, leave would not have been granted in any event.

I therefore refuse to grant leave on all grounds.

Approved: Clarke J.