Neutral Citation [2016] IEHC 731

THE HIGH COURT

[2016 No. 190 J.R.]

BETWEEN

JAMES MCCAFFREY

APPLICANT

AND

MINISTER FOR DEPARTMENT OF AGRICULTURE,

FOOD AND MARINE

AND

CAILLIN CURRAN

RESPONDENTS

JUDGMENT of Ms. Justice Heneghan delivered on the 19th day of December, 2016

Background

1. The applicant is a farmer, and the owner of circa 23 acres at Adoon, Gorvagh, Co. Leitrim. The applicant's dwelling house is located at the end of a narrow private road, which is also the access road to the second named respondent's lands.

2. The fist named respondent is the decision making authority in respect of an afforestation development consent granted to the second named respondent.

3. The second named respondent is the legal owner of agricultural lands also situated at Adoon, Gorvagh, Co. Leitrim. Following the purchase of the said lands, the second named respondent invested in the lands, and carried out works to improve the lands. In his affidavit in these proceedings, at para. 7 thereof, the second named respondent avers that there was an undercurrent of animosity and acrimony towards him from neighbouring landowners in that area, that continued for a number of years resulting in a deterioration of his health and wellbeing. The second named respondent became aware of a forestry scheme, he engaged a forestry consultant with a view to planting forestry on the said lands, and he completed an application form which was received by the first named respondent on or about 26th August, 2015. The said application requested approval for afforestation of an area of 9.33 hectares.

4. Once such an application is received by the first named respondent, it is assessed to consider whether there are particular features associated with the particular site. That assessment is carried out on the basis of certain information provided in the application in answers to question 2.1, 3.1, and 4.1 of the environmental considerations. On 2nd October, 2015, a screening was carried out for and on behalf of the first named respondent to determine whether an "Environmental Impact Assessment" [hereinafter; E.I.A.] was necessary. That screening involved the assessment of the proposed afforestation operations for potential impact on fisheries, fresh water pearl mussel, the Water Framework Directive, acid sensitivity of water course, Natura 2000 sites, NHA / pNHA sites, archaeology, protected habitats / species under the Habitat Directive, landscape sensitivity and existing forest cover. E.I.A. screening is a desk based screening, whereby the potential impact of afforestation to the landscape, environment and ecology can be detected. If the proposed afforestation may have an impact on the landscape, environment or ecology, a field investigation is carried out.

5. Question 2.1 in the afforestation application is as follows:-

> *"Is the area within a NHA (National Heritage Area), SAC (Special Area of Conservation), SPA (Special Protection Area) or National Park?"*
>
> Question 3.1 is as follows:-
>
> *"Does the area contain an archaeological site or features within intensive public usage?"*
>
> Question 4.1 is as follows:-
>
> *"Is the area within a prime scenic area in the County Development Plan?"*

If any of those questions are answered in the affirmative, the application is then advertised in local newspapers in addition to being published on the website of the first named respondent. In the application by the second named respondent, each specified question was answered in the negative. Thereafter, the application of the second named respondent was advertised on the website of the first named respondent for a period of one month from 2nd September, 2015 - 2nd October, 2015 in accordance with the provisions of s.5 of the European Communities (Forest Consent and Assessment) Regulations 2010 as amended [hereinafter; The Regulations].

6. On the basis of the E.I.A. screening, it was determined that a field investigation was not warranted, and a technical approval was granted by the first named respondent to the second named respondent on or about 5th October, 2015. Following that technical approval, a change of proposed species within the area originally applied for was sought on behalf of the second named respondent, this was approved by the first named respondent and the decision was notified to the second named respondent on 2nd December, 2015.

7. An objection to the second named respondent's application was received from an individual other than the applicant by way of letter dated the 21st October, 2015. On foot of that objection, Mr. Crane, the Forest Service District Inspector on behalf of the first named respondent, conducted a field inspection of the site of the proposed afforestation operations on 18th November, 2015, all plots were inspected on that date. Following that field inspection, the second named respondent was advised that certain portions of the site would be refused due to high water table and drainage issues. Thereafter, Mr. Crane, on behalf of the first named respondent, had no further concerns in relation to the suitability of the site, based on his field inspection.

8. Mr. Crane avers in his affidavit to a meeting unrelated to these proceedings, on 7th December, 2015, in the Bush Hotel, in Carrick-on-Shannon, where he met with the applicant, who raised non-specific concerns about an afforestation application during a very brief conversation. Mr. Crane avers in his affidavit at para. 9 thereof, which is uncontroverted, that he did not know what application the applicant was referring to, and therefore Mr. Crane could not comment, but advised that he would be happy to discuss it if he had more detail. Mr. Crane stated that they did not discuss the application any further, and that he has no memory of any telephone discussions of any voicemails from the applicant. He avers that any person raising objections by phone would be advised to put the matter in writing in order for it to be considered.

9. Mr. Crane stated that on or about 14th January, 2016, the first named respondent received an email on behalf of the applicant from the Irish Farmers Association.

That email reads as follows:-

> *"Hi Jhan,*
>
> *Happy New Year to you.*
>
> *I have been contacted by Jim McCaffrey who is very concerned about an afforestation application by Caillin Curran to plant forestry on both sides of a private laneway up to his house. I understand that he was speaking with you yesterday and that the application is 'on hold', is that correct?*
>
> *Mr. McCaffrey would like to write to the Forest Service to formally outline his objections to the application on the grounds that the applicant does not have the required access to harvest the timber and therefore the application should not be approved. Please could you advise who Mr. Caffrey should address the letter and also the contract number.*
>
> *Thanks in advance for your assistance in this matter,*
>
> *Kind regards,*
>
> *Geraldine. (Geraldine O'Sullivan – Farm Forestry Executive)."*

Mr. Crane replied by email dated 15th January, 2016, as follows:-

> *"Hi Geraldine,*
>
> *Mr. McCaffrey should address his letter of objection to proposed planting to:*
>
> *Joanne Robinson,*
>
> *Approvals Section,*
>
> *Forest Service,*
>
> *EAFM,*
>
> *Johnstown Castle Estate, Wexford.*
>
> *Before Christmas I requested that Applicant / Forester liaise with both house owners between Plots one and two. I have received an email informing me that one house owner has been contacted (Edward McGarty) but not Jim McCaffrey. I shall ask Mr. Curran and his forester to make contact with Jim prior to any Approval being issued.*
>
> *Kind regards,*
>
> *Jhan."*

10. Following receipt of this email on behalf of Mr. McCaffrey, by letter dated 20th January, 2016, the first named respondent requested the second named respondent to liaise with Mr. McCaffrey. By letter dated 27th January, 2016, the second named respondent wrote to the first named respondent, as follows:-

> *"I am writing to confirm that I spoke with Jim McCaffrey and that we could not come to any agreement as he does not want any planting done.*
>
> *Yours sincerely,*
>
> *Caillin Curran."*

11. Thereafter Mr. Crane avers that whilst the time period for public consultation pursuant to The Regulations had passed, he nevertheless took account of the comments of the objectors. On 3rd February, 2016, Mr. Crane emailed the local authority for comment in relation to the suitability of the access road referred to by the applicant. This correspondence was as follows:-

> *"Good evening,*
>
> *I have a query in regards to the suitability of a road for Forestry related traffic. The road is a cul de sac and is shown as grey on 05 map.*
>
> *I would appreciate if a roads engineer would make contact with me,*
>
> *Many thanks,*
>
> *Jhan Crane."*

By replying email of the same date, Mr. Crane was asked to attach a map so the engineering area referred to could be ascertained, to which Mr. Crane replied as follows:-

> *"Hi Johanna,*
>
> *The road in question is the cul de sac leading south to Adoon Lough, between parcels 604 and 617 (see attached map).*
>
> *My query is whether the northern 200m of the cul de sac is suitable for Forestry related traffic.*
>
> *Many thanks for your prompt response.*
>
> *Jhan Crane*
>
> *District Inspector*
>
> *Forest Service."*

12. On the 4th February, 2016, Mr. Crane carried out a site visit for the purposes of a full assessment of the access to the southern plots in terms of road width, structure, surrounding water table and proximity to dwellings. He avers that after a careful assessment of the findings of the site visit, no reason was found to refuse permission to plant afforestation on the grounds of access. On 24th February, 2016, Mr. Crane emailed the Local Authority as follows:-

> *"Subject: Suitability of road for Forestry related traffic*
>
> *Hi Johanna,*
>
> *Any updates on this road issue. We are withholding the Approval for planting until we get your response. The Applicant is obviously keen to plant before planting period ends.*
>
> *Jhan Crane*
>
> *District Inspector*
>
> *Forest Service."*

On the 29th February, 2016 at 11:35am, Mr. Crane sent a further email to the local authority as follows:-

> *"Subject: Suitability of road for Forestry related traffic*
>
> *Hi Johanna,*
>
> *In the absence of any response I am assuming county council have no comment to make on the above. I will proceed with processing the Application for Afforestation Permission and Grant / Premium today.*
>
> *Yours sincerely*
>
> *Jhan Crane*
>
> *Forest Service."*

By further email of 29th February, 2016, Mr. Crane contacted Joanne Robinson, in the Approvals Section Forest Service, as follows:-

> *Subject: Suitability of road for Forestry related traffic*
>
> *"Hi Joanne,*
>
> *Could you please scan email(s) to CN72736 Caillin Curran.*
>
> - *The applicant has made every effort to liaise with local residents but there seems to be a small amount of local feuding in the area.*
> - *An objection was received in regards to the road access to the 2 southern Plots. Despite the objection being received outside of the public consultation period, I requested that the council roads engineer investigate and make comment on the issue. The council have not returned comment and have informed the Applicant that the road is not their concern.*
> - *I have assessed the access to the southern plots in terms of road width, structure, surrounding water table, proximity to dwellings and see no reason to refuse permission to plant on access grounds.*
>
> *I will be processing CN72736 today.*
>
> *Kind regards*
>
> *Jhan Crane."*

In his affidavit, Mr. Crane avers that a decision was made on or about the 1st March, 2016, and permission was granted to the second named respondent with conditions attached. Details of the decision were made available on the website of the first named respondent, subsequently thereto.

13. In an undated letter, but date stamped receipt 2nd March, 2016, by the applicant's solicitors, Nuala Kennedy of the Forest Service on behalf of the first named respondent advised that the second named respondent's application had been approved with conditions, which are set out in the said letter. The letter advised that Public Consultation took place from 2nd September, 2015 - 2nd October, 2015. The letter also advised that an application to review a decision shall be made by application to judicial review under O. 84 of the Rules of the Superior Courts.

14. By letter dated 14th March, 2016, solicitors on behalf of the applicant, wrote to the first named respondent, advising that their client had no alternative but to issue the within proceedings for judicial review of the decision to approve the application reference No. CN72736. By order of the High Court dated 18th March, 2016, the applicant was granted leave to bring judicial review proceedings. Further, by order of the High Court dated 27th April, 2016, *inter alia* the second named respondent was restrained from carrying out further works pending the determination of these proceedings.

Reliefs Sought
15. The applicant now seeks an order of *certiorari* quashing the decision made by the first named respondent on 1st March, 2016, a declaration that the said decision is contrary to the provisions of Regulation 5 of the European Communities (Forest Consent and Assessment) Regulations 2010, a declaration that the decision was made without consultation which prevented the applicant from making written submissions and observations within the time frame and was in breach of the applicant's right to fair procedures and his rights to natural and constitutional justice, a declaration that the decision was in breach of the applicant's property rights as protected by the Constitution, a declaration that the decision of 1st March, 2016, was unreasonable and irrational and, further, that the decision of 1st March, 2016, is invalid and of no effect. A further relief was sought at para. (iii) of the notice of motion, seeking a declaration that Articles 5 and 6 of The Regulations are in breach of and fail to give effect to various Articles of the Directive 2011/92/EU of 13th December, 2011, and are therefore *ultra vires* and invalid.

The applicant's factual submissions
16. The applicant submitted as follows:-

> I. Whilst the application by the second named respondent was published on the website of the first named respondent, no notification was given directly to the applicant by either respondent, and the applicant had no means of knowing that the second named respondent had made an application which affected his lands. The applicant was not alerted to seek access to the ministerial website containing the relevant information about the proposed development.
>
> II. The applicant was unable to raise any objection and make submissions within the statutory time period provided for doing so, because the public consultation period had expired by the time the applicant first became aware of the proposed development on 7th December, 2015.
>
> III. By reason of the provisions of The Regulations, and the manner in which they were applied and operated by the first named respondent, the applicant was not made aware of the second named respondent's application to carry out forestry development on the land.
>
> IV. Any consideration of the applicant's complaints by the first named respondent after the expiry of the public consultation period, does not, and can not regularise his exclusion from participating in the statutory public consultation process, and does not cure the mischief arising from the applicant being precluded from making a properly presented objection.
>
> V. The first named respondent failed to carry out an E.I.A. and/or failed to determine whether the same was required, and the screening process was entirely focused on the protection of the environment, but to the exclusion of any consideration of the property rights or personal rights of persons potentially impacted by the development.
>
> VI. The first named respondent failed to identify the criteria or factors taken into account to be satisfied that the application should be granted, thereby displacing any "presumption of regularity" in the decision-making process.
>
> VII. In the absence of any engagement with the applicant by the first named respondent, the decision of 1st March 2016 could not have been concluded lawfully or rationally.
>
> VIII. The applicant was deprived of a meaningful opportunity to make representations and was deprived of his constitutional rights to fair procedures regarding decisions likely to impact on his personal and property rights under Article 43 and Article 40.3 of the Constitution.

The applicant's legal submissions
16. The Regulations:-

Article 8 of (S.I. No. 558 of 2010) The European Communities (Forestry Consent and Assessment) Regulations, 2010, which were effected to implement the provisions of the EIA Directive (Council Directive 85/337 as amended by Council Directive 97/11/EC and Directive 2003/35/EC), provides for judicial review of decisions made under The Regulations.

Article 8. – Review of decision:-

> *"8. (1) The High Court shall be the court of law for the purposes of Article 10a of the EIA Directive.*
>
> *(2) An application to review a decision shall be made by way of application for judicial review under Order 84 of the Rules of the Superior Courts (S I. No. 15 of 1986).*
>
> *(3) The High Court shall not grant leave in such an application unless the applicant –*
>
> *(a) has a sufficient interest in the matter, or*
>
> *(b) is a consultation body.*

(4) In this Regulation –

'decision' means –

(a) any decision or purported decision made or purportedly made,

(b) any action taken or purportedly taken, or

(c) any failure to take any action;

'sufficient interest' is not limited to an interest in land or other financial interest".

It is common case that Article 8 of The Regulations provides that the High Court is the court of law for the purposes of review of decisions made pursuant to the Regulations.

Article 5 - Public consultation

"5. (1) Where the Minister receives an application he or she shall, before making a decision, publish a notice of the application.

(2) A notice under paragraph (1) shall state –

(a) the reference number of the application,

(b) the location, town land and county to which the application relates,

(c) the nature and extent of the proposed development,

(d) the nature of possible decisions or, where there is one, the draft decision,

(e) that any person may make a submission or observation to the Minister within 4 weeks from the date of the notice of whatever longer time frame appears on the notice,

(f) where and when the application and documents may be viewed,

(g) any other details of public participation, and

(h) any other information that the Minister believes relevance to the application.

(3) the Minister shall make the application available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing so, a map of the proposed development and any other information or documentation relevant to the application that the Minister has in his or her possession.

(4) the public may make submissions or observations in writing concerning the application to the Minister within 4 weeks from the date of publication or whatever longer timeframe is set out in the notice, and where additional information is published, at least 4 weeks from the date of the publication of that information."

Article 2 – Interpretation:-

"'publish' means publishing on the internet website of the Minister or in such other manner as the Minister may direct.

2 (2) Subject to paragraph (1), a word or expression that is used in these Regulations and is also used in the EIA Directive has, in these Regulations, the same meaning as in that Directive"

18. The applicant submitted that the limitation by the first named respondent of the publication of the second named respondent's application on the ministerial website only, without direct notification to the applicant a person affected by the proposed development, excluded the applicant from participation in the required public consultation process. The applicant was excluded in a way which failed to meet the requirements of The Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 as amended by Directive 2014/52/EU of European Parliament and of the Council of 16th April, 2014 [hereinafter: The Directive], regarding appropriate public consultation. It was submitted that Article 2 of The Regulations does not stipulate that publication of a notice must only be confined to publication on the website, and there is nothing in The Regulations which precludes a newspaper notice being put in place or the sending of a letter directly to persons affected by the proposed development. It was submitted that the same would alert affected persons to the application, and a newspaper notice or letter would indicate that all the relevant information about the proposed application could be accessed on the website.

19. The Directive:-

Article 1.2 of the Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 as amended by Directive 2014/52/EU of European Parliament and of the Council of 16th April, 2014 provides the following definitions shall apply.

Article 1.2 (d):- *"'public' means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."*

Article 1.2 (e):- *"'public concerned' means the public affected or likely to be affected by, or having an interest in the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting*

environmental protection and meeting any requirements under national law shall be deemed to have an interest".

Article 6 .2:- *"The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided".*

Article 6 .4:- *"The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken".*

Article 6 .5:- *"The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States".*

20. The applicant submitted that the intention of The Directive is that effective opportunities were to be given for the public to participate in the environmental decision-making process. This is not limited to promulgation by means of electronic media, but rather it envisages other means of communication, such as bill posting within a certain radius etc. It is also submitted that the Minister was not solely limited to publication on the Ministerial website because of the flexibility afforded under the provisions of Article 2 of the Directive. It was submitted that the provisions of The Regulations are to be interpreted in a purposive way which gives full effect to the provisions of The Directive, and is also consistent with the provisions of the Aarhus Convention, which has been ratified by the European Union as well as by individual Member States (including Ireland).

21. The Convention:-

Article 2 (5) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - done at Aarhus, Denmark, on 25th June, 1998 (Aarhus Convention), provides:-

> *"'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making"*

Article 6 (2) provides:-

> *"The public concerned shall be informed, either by public notices or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter-alia, of:*
>
> *(a) The proposed activity and the application on which a decision will be taken: –*
>
> *(b) The nature of possible decisions or the draft decision;*
>
> *(c) The public authority responsible for making the decision;*
>
> *(d) The envisaged procedure, including, as and when this information can be provided:*
>
> > *(i) The commencement of the procedures;*
> >
> > *(ii) The opportunities for the public to participate;*
> >
> > *(iii) The time and venue of any envisaged public hearing;*
> >
> > *(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;*
> >
> > *(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and*
> >
> > *(vi) An indication of what environmental information relevant to the proposed activity is available; and*
>
> *(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure."*

Article 6 (3) provides: –

> *"The public participation procedures shall include reasonable time -frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision- making."*

22. It was submitted by the applicant that the provisions of the Convention are almost identical to the provisions of The Directive. It was outlined to the court by counsel for the applicant that the exclusion of the applicant in this case from having any notification of the second named respondent's proposed development at any time prior to the statutory window for making submissions regarding the proposed development under The Regulations was a breach of The Regulations and/or The Directive, and was not consonant with the requirements of the Aarhus Convention.

23. It was further submitted that the core point in the case is that in failing to direct notification by any other means other than electronic notification, the Minister failed to adhere to Article 6(2) and 6 (5) of The Directive. It was submitted that the public concerned were not given an effective opportunity to participate in the decision making process.

24. The court was referred to the Court of Appeal case of *McCoy. v. Shillelagh Quarries Limited & Ors* [2015] IECA 28 (Unreported, Court of Appeal, Hogan J.,19th February, 2015), where it was decided that because the dispute involved in that case was governed by national law, it was not necessary to consider the application of the Aarhus Convention. It was, however, submitted that the provisions of the Convention are applicable as a tool for the proper interpretation of the Directive in this case.

25. Constitutional Justice:-

In addition to placing reliance on the argument that the Minister failed to adhere to Articles 6 (2) and 6(5) of the Directive, it was also submitted that the applicant was relying on breaches of constitutional justice. It was submitted that by the time the applicant became aware of the pending application for development consent, it was already too late for him to make any representations. It was submitted that in the screening process, undertaken by the first named respondent for possible impacts on environmentally sensitive sites, and in the view taken that the development did not warrant an E.I.A., that the first named respondent excluded the applicant from having any opportunity to participate in the process even though the enjoyment of his home and access to his home were to be potentially impacted. It was submitted that the management by the first named respondent of the consultation process was entirely focused on the protection of the environment, to the exclusion of any consideration of the property rights or personal rights of persons potentially impacted by the development.

26. The court was referred to the judgment of *McCarthy J. in State (Irish Pharmaceutical Union) v. EAT* [1987] ILRM 36 at p. 40.

> *"1. Whether it be identified as a principle of natural justice derived from the common law and known as audi alteram partem or, preferably, as the right to fair procedures under the Constitution in all judicial or quasi-judicial proceedings, it is a fundamental requirement of justice that person or property should not be at risk without the party charged being given an adequate opportunity of meeting the claim, as identified and pursued.*
>
> *2. If the proceedings derive from statute, then, in the absence of any set or fixed procedure, the relevant authority must create and carry out the necessary procedures and if the set of fixed procedure is not comprehensive, the authority must supplement it in such a fashion as to ensure compliance with constitutional justice".*

It was submitted that although the facts were different in the instant case, that the same principles apply.

27. It was submitted that The Regulations do not confine the Minister to publish just on the website, however, it was submitted that The Regulations allow for the flexibility of where other types of notice might be allowed. It was submitted that the failure of the Minister in this case to give directions for publication in some other form falls short of the fair procedures as referred to by the Supreme Court in *State (Irish Pharmaceutical Union) v. EAT*.

28. The court was also referred to the decision of Finlay C.J. in the case of *(State) MacPharthalain v. Commissioners of Public Works* [1994] 3 I.R. 353, p. 358:-

> *"In those circumstances it seems to me that the learned trial judge could only come to the one conclusion and that was that it was that designation which affected the lands. That being so it is quite clear in my view that this decision fell within the categories of a decision reviewable by the courts and was of a judicial nature to that extent. The final question was not seriously contested either in the court below or on [sic] appeal and that is that, being a decision which affected the rights of those particular landowners, insofar as their land had never before been designated, it was reached in 1987 without giving to them any opportunity to be heard or to object or to make representations on that issue whether in a formal or informal way and as such was wanting in the first fundamental requirement of natural justice".*

29. The court was also referred to the *dicta* of O'Flaherty J. in *MacPharthalain* at p.359:-

> *"This case highlights the need to inform landowners about decisions which may affect them. No particular formality is required. I believe, but it is necessary to afford landowners an opportunity to dispute a particular proposed designation that may be in the minds of, as in this case, the Wildlife Department of the Commissioners of Public Works. Such landowners should be given an opportunity to dispute such a potential finding and it was not afforded in this case".*

It was submitted that as the decision of the first named respondent impacted on the access road to the applicant's lands and dwelling that he should have been afforded an opportunity to be heard in the public consultation period.

30. The court was also referred to the cases of *Garvey v. Ireland & Ors.* [1981] I.R. 75, the *State (Christopher Philpott) v. the Register of Titles* [1986] ILRM 499, and *John McCormack v. the Garda Siochana Complaints Board & Ors.* [1997] 2 I.R. 489, all of which were referred to in the recent Supreme Court decision of *Dellway Investments Ltd & Ors v. NAMA* [2011] 4 I.R. 1 and quoting from the judgment of Denham C.J. at para. 109:-

> *"Although the right to be heard is not stated explicitly in the constitution of Ireland 1937, it is an inherent part of fair procedures and in that context, and as part of due process, is woven into the fabric of rights in the Constitution. There is a right to fair procedures which includes the right to be heard".*

31. At. para. 112, Denham C.J. quotes from McCarthy J. as set out above. At para. 135, Denham C.J. states as follows:-

> *"It is presumed that the Oireachtas intends that procedures provided for in legislation will be conducted in accordance with the principles of constitutional justice. To paraphrase Walsh J. in East Donegal Co-operative Livestock Mart Limited v. Attorney General [1970] I.R. 317at p. 341, the Oireachtas intended that procedures and discretions provided for in the Act are to be conducted in accordance with the principles of constitutional justice. A fundamental principle of constitutional justice is the right to be heard. Thus any analysis of the Act should be made in light of these constitutional principles".*

32. The court was also referred to the judgment of Hardiman J. at para. 308, as follows:-

> *"Similarly, in* The State (Philpott) v. Registrar of Titles *[1986] I.L.R.M. 49…. At p. 57 Gannon J. said:-*
>
> > *'because of the grave nature of the interference with rights over land … I am of opinion that, unless the urgency of the circumstances otherwise requires, justice requires that notice should be given to the person whose rights may be affected of the intention to enter such an inhibition and an opportunity given to show cause why it should not be entered'".*
>
> *At para. 311, Hardiman J. stated as follows:*

> *"Very similar language was used by O'Higgins C.J. giving judgment in the Supreme Court in* Garvey v. Ireland [1981] I.R. 75, *'… Article 43.3, there is guaranteed to every citizen whose rights be affected by decisions taken by others the right to fair and just procedures. This means that under the Constitution powers cannot be exercised unjustly or unfairly.....' 312. More generally, Costello P. in* McCormack v. Garda Síochána Complaints Board *[1997] 2 I.R. 489 said at pp. 499 and 500:-*
>
> *"It is now established as part of our constitutional and administrative law that the constitutional presumption that a statute enacted by the Oireachtas intended that proceedings, procedures, discretions and adjudications permitted, provided for or prescribed by Acts of the Oireachtas are to be conducted in accordance with the principles of constitutional justice…. It follows therefore that an administrative decision taken in breach of the principles of the constitutional justice will be an* ultra vires *one and may be the subject of an order of* certiorari. *Constitutional justice imposes a constitutional duty on a decision making authority to apply fair procedures in the exercise of its statutory powers and functions".*

33. The court was further referred to the judgment of Fennelly J. at para. 436 as follows:-

> *"Walsh J. stated in a famous passage at p. 341 in* East Donegal Co-operative Livestock Mart Limited v. Attorney General *[1970] I.R. 317 "… the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."*

34. It was submitted by the applicant that it is not appropriate for the first named respondent to contend that account was taken of representations made by the applicant outside the public consultation period. It was submitted that the engagement of the applicant on such an ad hoc basis does not make up for the fact that he has been deprived of an opportunity to make full and appropriate representations within the proper statutory time frame for doing so. It was further submitted that it is not appropriate for the first named respondent to contend that even if the applicant did have an opportunity to make appropriate submissions that his representations would have made no difference to the final decision. The applicant relied on the judgment of Murphy J. in the *State (Boyd) v. An Bord Pleanála* [1983] IEHC 8 (Unreported, High Court, Murphy J,, 18th February 1983) and submitted it is authority for the proposition that even if the outcome would have been the same, it is not acceptable to suggest the same as a line of defence to procedural unfairness.

35. It was submitted that the failure of the first named respondent to exercise any discretion, as afforded under Article 2 of The Regulations, to require the applicant to be notified of the second named respondent's application for development consent in a timely way, prior to the expiry of the timeframe for public consultation in respect of the proposed development, led to the decision of the first named respondent to grant development consent, which decision which was made unlawfully and irrationally because it precluded consideration of a possible submission or material which might be presented by persons potentially affected by the proposed development.

36. It was submitted by the applicant that the first named respondent failed to require direct notification to be made to the public "affected" who had dwelling houses and farms in the area and this meant the applicant could not reasonably have known of the existence of the second named respondent's application. It was also submitted that the applicant could he have known of the timeframe for making appropriate representations by way of objections. In those circumstances, it was submitted the applicant was deprived of a meaningful opportunity to make representations and he was deprived of his constitutional rights to fair procedures, regarding decisions likely to impact on his property rights under Article 43 and Article 40.3 of the Constitution.

The first named respondent's factual submissions

37. It was submitted on behalf of the first named respondent as follows:-

> I. The application of the second named respondent was published on the website of the first named respondent in accordance with Regulation 5(1) of the Regulations, and that the notice of the application fulfilled the requirements of Regulation 5(2) of The Regulations.
>
> II. Whilst the applicant complains that the failure of the first named respondent to properly publish the notice is in breach of fair procedures and his constitutional rights, no direct challenge to the constitutionality of the legislation is made.
>
> III. The publishing of the notice on their website by the first named respondent pursuant to Regulation 5(2) is in accordance with Article 6(2) of the Directive, and the purpose of The Directive is to ensure the assessment of the effects of certain projects that have a major or significant effect on the environment.
>
> IV. An assessment carried out by the first named respondent by way of an E.I.A. screening process was adequate, it revealed no significant effects on the environment were found to be likely, and in the absence of any particularised defect, the task was within the experience of the first named respondent and the court should not likely interfere in relation to the same.
>
> V. No significant issues were raised by the applicant in relation to the screening process. The applicant is simply alleging that the screening process was deficient. The applicant in failing to raise any particular issue with, or point to any particular defect in the screening process, has failed to make out any case that the decision taken by the first named respondent in granting the application to the second named respondent was unreasonable.
>
> VI. The applicant was afforded the opportunity to put forward his concerns, and that he did, in fact, make representations which were fully heard by the first named respondent, that those concerns were considered, addressed and taken into account by the first named respondent in the decision making process.
>
> VII. Further, the applicant has failed to particularise the issues which he alleges were not considered by the first named respondent, and further fails to identify any disadvantage or continuing disadvantage of the alleged breach of fair procedures.
>
> VIII. Because the applicant's concerns were heard in the decision making process, he has no *locus standi* to pursue any claim as against the procedures followed by the first named respondent.

38. It was submitted that the facts of this particular case are very different from the facts that pertained in the case of *State (Irish Pharmaceutical Union) v. EAT* [1987] ILRM 36, in that in the instant case, the applicant was not shut out from the process. It was submitted that if the first named respondent had conveyed to the applicant that the statutory notice period had expired, that he had missed his opportunity to make a submission, that a decision was made in those circumstances, the situation would be different. However, in the immediate circumstance, the applicant was, in fact, invited to put whatever submission he had to make in writing to a named person, the decision making process was put on hold to allow him to do so, various steps were taken to facilitate the applicant in that regard, but the applicant chose not to do so, and chose not to communicate with the first named respondent at all.

39. It was submitted that following a site visit on 4th February, 2016, and confirmation from the local authority to the second named respondent that the road was not their concern, (the applicant avers in his affidavits that the road concerned is a private road) and in the absence of any further objections or submissions or any contact at all from the applicant, the first named respondent saw no reason to refuse the permission and the decision was made on 1st March, 2016. It was submitted that the facts of the instant case could also be distinguished from the facts in the *McPharthlain* case, in that a decision had been made some two years prior to the applicants becoming aware of the decision whereas in the instant case the applicant was informed on the 13th January, 2016 that the decision was *"on hold"*. It was submitted the *dicta* of O'Flaherty J. was in fact adhered to in that the applicant was given an opportunity to dispute such a potential finding, and that opportunity was specifically afforded in this case when he was invited on the 15th January, 2016 to write and communicate his concerns to a named person. It was submitted that apart from his solicitor making contact with the first named respondent on 26th January, 2016, that nothing further was heard from the applicant or anyone on his behalf in relation to any concern, objection or observations he had, and ultimately the decision was made on 1st March, 2016, it was communicated to his solicitors, and received by them and 2nd March, 2016.

40. It was submitted that the applicant was afforded time in this case from 7th December, 2015, when he himself says he first became aware of the application, up to the date of 1st March, 2016, the date on which the decision was made, which was approximately a three month period in which to make his objections or observations or concerns known to the first named respondent. In the email of the 14th January from the I.D.A. the first named respondent was informed that *"Mr. McCaffrey would like to write to the Forest Service to formally outline his objections to the application on the grounds that the applicant does not have the required access to harvest the timber and therefore the application should not be approved"*. It was submitted that the applicant had ample time within which to do so, having enquired and having been furnished with the name and address of the appropriate person to contact.

41. It was submitted that within that three month time period, the applicant did not produce an engineers report, although he avers to the fact in his affidavit that he would have engaged an engineer. Neither, it is submitted did the applicant put forward the views of an environmental consultant or a planner or any such other expert person. It was also submitted that the applicant was not "alone" in that he had the assistance of the I.F.A., who were available to assist him and he had the assistance of his solicitor. It was submitted that the factual reality is that the applicant took no further active or constructive steps at all, following his becoming aware of the application of the second named respondent on the 7th December, 2015, to communicate any objections or observations to the first named respondent, notwithstanding he was aware an application was "pending" and that he had been informed "the matter was on hold". It was submitted that even though time has elapsed between 1st March 2016, the date of the decision and the date of the hearing of this case, it was of some importance that within that time, the applicant has failed to utilise the opportunity to produce an engineer's report which he could place reliance upon in support of his observations as to the unsuitability of the access road for forestry.

42. In response to the submissions made on behalf of the applicant in relation to the *dicta* of Costello P. in the *McCormack* case, as referred to by Hardiman J. in the *Dellway* case, and in particular the following:- *"that a…decision taken in breach of the principles of constitutional justice will be an* ultra vires *one and may be the subject of an order of* certiorari", that the emphasis was on the word "*may*". It was submitted that there was a vast difference between the words "*will*" and "*may*" and whilst a court may grant an order of *certiorari* as a consequence of the facts in a particular case, that the court should not grant an order of *certiorari* in relation to the decision taken by the first named respondent when it considers the facts as they occurred in this case.

43. The court was referred to the decision of McCarthy J. in *International Fishing Vessels Limited v. Minister for the Marine (No. 2)* [1991] 2 I.R. 93, at p. 102, as follows:-

> *"Neither natural justice nor constitutional justice requires perfect or the best possible justice; it requires reasonable fairness in all the circumstances; often it is a matter of impression as to whether or not there was unfairness. The Minister does not contest the right to fair procedures; he says that he employed such procedures giving every opportunity to the applicant to make representation both by letter and orally in meetings with the Minister's officials. He agrees that the two matters to which I have referred were not expressly raised with the applicant; takes issue with the allegation that he agreed to overlook illegal fishing (certainly no steps were taken nor have yet been taken to prosecute the company for such offences) but, in effect, says that the applications were refused for a number of reasons, each one of which was a perfectly good reason; therefore, even if there was a failure to provide fair procedures in respect of some of the matters, it did not apply to the others and his decision should not be condemned."*

44. It was submitted that the court has to require that there be reasonable fairness, and that the concept of natural justice or constitutional justice is not required to be perfect, or the best possible justice all of the time. It was submitted that it falls to the trial judge in each individual case with its individual set of facts to decide whether or not there was an unfairness.

45. The first named respondent also relied on the judgment of Fennelly J. in *Dellway v. NAMA*, at para. 370, as follows:-

> *"By way of preliminary observation, I suggest that it is important to bear in mind that the purpose of the right to be heard is to enable the person potentially affected by the contemplated decision to make representations to the decision maker concerning the effects any decision will have on him with a view to persuading the latter to make or not to make the decision or to make it in certain terms."*

46. It was submitted that the first named respondent gave consideration to the concerns expressed by the applicant, and the decision making process was put on hold to do that, and that is borne out by the series of emails (which the court has already referred to in the background facts). It was submitted that the facts demonstrate that the applicant was invited to make submissions, that matters were put on hold for him to do so, that a further site visit was carried out and that enquiries were made with the local authority in relation to access road. It was submitted that the applicant has not identified any disadvantage to him, and in the particular circumstances of this particular case, an order of *certiorari* should not be granted.

47. The court was referred to the *dicta* of Geoghegan J. in *Village Residence Association Limited v An Bord Pleanala* [2000] 1 IR 65, at

> *"I turn now to* locus standi*. I am quite satisfied that the applicant has no* locus standi *to seek judicial review on the grounds of the defective site notice. That could only be done by somebody who tried to satisfy the court that he or she was misled and did not realise that they could inspect the planning application documents in the offices. There is no such suggestion in this case and I must therefore hold that the applicant has no locus standi to raise this point".*

It was submitted that the applicant was in a position to make representations when he became aware of the application, that he did not in fact avail of the opportunity afforded to him to do so, that such concerns as he did express, namely concerns in relation to the access road, were addressed, and the applicant does not assert that he was misled. Therefore the applicant has no *locus standi* to pursue any claim against the procedures followed by the first named respondent.

48. It was submitted that the respondent was specifically not making the argument that even if the applicant had made objections, it would have made little difference to the decision itself being made. However, it was submitted that the applicant had ample time from the 7th December, 2015 to make his observations/objections, and in any event he had ample time to do so from the 15th January, 2016, the date he was notified by email of the appropriate person to whom he should address his concerns. It was submitted that one cannot sleep on one's rights, that one has to advance the matters, make the arguments, and that the reality in this case is that the applicant had his opportunity to do so, but that he failed to do so.

49. It was further submitted by the first named respondent that it was not meeting a case that the applicant had been shut out of the process, rather it was meeting a case that following the expiry of the period provided for public consultation, the applicant was given ample opportunity to put forward his objections/observations, and at best he was given a three month period in which to do so. It was submitted that although the applicant claims that the situation cannot be regularised because of his exclusion from the public consultation process, and that procedures have to be fair, the reality is that the procedures in the instant case, in affording the applicant ample time in which to make his observations/objections, were fair in all of the circumstances.

50. It was submitted that in submissions the applicant refers to the fact that he became aware of the "*pending*" application for development consent and thereby acknowledges that he knew that the application was pending. It was submitted in those circumstances that he was indeed afforded the opportunity to have an input, as the application was put on hold, and that he knew the same. It was submitted the applicant was presented with the opportunity to make his observations/objections, albeit it, outside the four week period of the public consultation process, but that he chose not to communicate further with the first named respondent in any way, or at all. It was submitted that the observations/objections process is not a dialogue between the Minister and the observer/objector, rather where one is given the opportunity to participate, one cannot then sleep on ones rights, and complain later that one was denied the opportunity to participate in the engagement.

51. It was submitted there were fixed procedures in place that the first named respondent should publish on its website, and thereafter a four week period for public consultation process followed. However, when the first named respondent was notified via the correspondence from the I.D.A., that the applicant had concerns in relation to the second named respondent's application, the first named respondent supplemented those fixed procedures, and gave the applicant an opportunity to make his submissions. At his request he was provided by return with the details of the appropriate person to correspond with, further site visits were carried out by the second named respondent, and all appropriate enquiries were made with the local authority in relation to the access road. It was submitted that in reality, what in fact occurred is that the first named respondent in seeking to facilitate the applicant, and providing him by return email with the name and details of the appropriate person for the applicant to correspond with, in carrying out a further site visit, and putting the application on hold, the first named respondent supplemented the fixed procedures and thereby ensured compliance with the requirements of constitutional justice, in that the applicant was given every opportunity to put forward his observations/objections and /or concerns to the development consent application.

52. It was submitted on behalf of the respondent that whilst the applicant argued that he was deprived of a meaningful opportunity to make representations, that the facts demonstrate the subsequent actions taken by the first name respondent to facilitate the applicant in making any concerns he had known to the first named respondent were such as to ensure that he was not in fact deprived of such a meaningful opportunity, and reliance was placed on the presumption that there was regularity, lawfulness and legality in the actions of the first named respondent.

53. It was submitted that the notice of the application fulfilled the requirements of Regulation 5 (2), The Regulations give effect to the European Council Directive, and the information was available for inspection on request in accordance Regulation 5 (3). The respondent relied on the *dicta* of Cregan J. in *Electricity Supply Board v Killross Properties Ltd* [2016] IECA 210 (Unreported, Court of Appeal, Hogan J., 11th July, 2016), in relation to meeting the statutory requirements of a notice. It was submitted the statutory instrument is to be interpreted purposefully and not simply to be interpreted in terms of the literal words of the statutory instrument. It was submitted that The Regulations require that a notice be published on the "*internet website*" of the Minister, and that that is the literal meaning of the requirement. It was submitted that a word or expression in The Regulations is to have the same meaning as in the Directive, and that is to ensure harmony between The Regulations and the Directive. It was submitted that the Directive obviously envisages publication by electronic means, but does not require that it be supplanted with anything else. It was submitted that there is absolute harmony between Article 2 of the Regulation which is the domestic legislation, and Article 6 of The Directive.

54. The court was also referred to the *dicta* of Hogan J., at para. 32, as follows;-

> *"The notice given ... complied fully with that prescribed by s. 53 (3) of the 1927 Act and Killross was not… entitled to advance notice that a formal statutory notice of this kind would be served. To hold that such was required would be in effect to amend or supplement that already prescribed by and set out in the sub-section in question. I would, however, additionally reach this conclusion because Kllross's arguments amount in substance to a contention that s. 53 (3) of the 1927 Act is unconstitutional by reason of the inadequacy of notice procedures… If however, the company wished to make this case it was obliged, at a minimum, by the requirements of Ord. 60, r.1 RSC to make this case directly...."*

The court was reminded that no such case has been made directly by the applicant.

55. The court was further referred to the dicta of Murphy J. in *Green & Ors -v- Minister for Agriculture & Ors.* [1990] 2 I.R. 17, at p. 24:-

> *"The fact that a scheme may produce anomalies which more detailed consideration or more sophisticated drafting might obviate would not be a sound reason for condemning the validity of the scheme. In my view the series of schemes made by the Minister in purported compliance with directive 75/268 where an appropriate means of implementing that*

> *directive having regard to its purpose and the express powers conferred on the individual Member States. Accordingly the argument by the plaintiffs to the effect that the schemes where* ultra vires *the directive fails*."

56. It was submitted that at the time that the first named respondent was contacted by the I.F.A. on behalf of the applicant, that no decision had been made, no irreversible step had been taken that could demonstrate that the applicant did not have an opportunity to have his observations and/or submissions heard. It was further submitted that the opportunity given to the applicant to communicate any concerns that he had was both early and effective, and that a "hold" was put on the decision itself following contact from the applicant. It was submitted that both the European legislation and The Regulations referred to a right to participate, and that in fact the applicant was given the right to participate, he was given the right to be heard and he was given the opportunity, to communicate with the first named respondent and outline any observations/objections which he had to the development consent application. It was submitted in the circumstances any arguments made by the applicant that the decision of the first named respondent was *ultra vires* fails and that there was no breach of fair procedures. It was further submitted that the applicant was not excluded from the process, nor was he misled. It was submitted that the courts' function is not to supplant the decision taken by the first named respondent, but rather to determine the matter at issue as to whether the process of the decision making was fair and lawful.

57. It was submitted in relation to the applicant's criticism of the screening process carried out by the first named respondent that no specific issues had been raised by the applicant and that the assessment of whether the development poses a significant risk is a matter for the relevant authority. The first named respondent relied on a number of authorities including the *dicta* of Lindbolm J. in *Hockley v. Essex County Council* [2013] EWHC 4051 and Moore-Bick L.J. in *R. (on the application of Bateman) v. South Cambridgeshire District Council* [2011] EWCA Civ 157 and in particular that screening is:-

> *"a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment."*

The court was also referred to the decision of Hedigan J. in *Kelly v, Minister for Agriculture & Ors.* [2012] IEHC 558, (Unreported, High Court, Hedigan J., 21st December, 2012), at para. 6:-

> *"The court is concerned only with the legality of the decision and the lawfulness of the process by which it has been reached.....the court must assess whether the material conclusions reached are tainted by any irrationality or unreasonableness having regard to the facts found or accepted and the evidence and information before it."*

The court was further referred to the judgement of Sullivan L.J. in *Boggis v. Natural England* [2009] EWCA Civ 1061, a decision of the Court of Appeal in consideration of a breach of Article 6(3) of the Habitats Directive:, *"(a claimant) ...must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered."* It was submitted in the instant case that the first named respondent had in fact carried out an adequate screening test to determine the necessity for an E.I.A. in accordance with the provisions of the Directive. It was further submitted that applicant had failed to produce any credible evidence of any risk.

Discussion

58. The development consent application made by the second named respondent was received by the first named respondent on 26th August, 2015. The application was advertised on the website of the first named respondent, in accordance with Article 5 of The Regulations, and there followed a period for public consultation between 2nd September, 2015 and 2nd October, 2015. Article 6.2 of The Directive provides that the public shall be informed whether by public notices or by other appropriate means such as electronic media where available, of matters early in the environmental decision-making procedures referred to in Article 2(2) and at the latest, as soon as information can reasonably be provided. Article 6.5 of The Directive provides that the detailed arrangements for informing and consulting the public concerned shall be determined by the Member State. Article 2(5) the Aarhus Convention provides that the public concerned means the public affected or likely to be affected by, or having an interest in the environmental decision making; and Article 6(2) provides that the public concerned shall be informed either by public notice or individually as appropriate early in an environmental decision making procedure and in an adequate, timely and effective manner. Following the decision of the Court of Appeal in *McCoy v. Shillelagh Quarries Limited & Ors* [2015] IECA 28 (Unreported, Court of Appeal, Hogan J., 19th February, 2015), as the dispute in this case is also governed by national law, it is not necessary to consider the application of the Aarhus Convention.

59. The applicant complains that he was not alerted to seek access to the ministerial website containing the relevant information about the proposed development, and the public consultation period had expired by the time he first became aware of the proposed development on 7th December, 2015. Indeed it is common case that the applicant did not engage in the public consultation period between 2nd September, 2015 and 2nd October, 2015. Gerard Cassidy in his affidavit on behalf of the first named respondent, avers that publication may take place in such manner as the Minister may direct, and applications which might affect high risk areas such as a National Heritage Area, a special area of conservation, a special protection area or National Park containing an archaeological site, or features within intensive public usage, within a prime scenic area in the county development plan, such application may at the direction of the Minister be advertised in a local newspaper. There were no such considerations relating to the application of the second named respondent and accordingly his application was published in accordance with s.5 of The Regulations, on the website of the first named respondent.

60. The applicant sets out in the statement to ground his application for judicial review and in his first affidavit that he first became aware of the application for afforestation of the lands made by the second named respondent at a meeting in the Bush Hotel on 7th December, 2015. The applicant states he expressed his concerns to Mr. Crane and the applicant was assured the first named respondent took the issue of access to forestry seriously and that Mr. Crane would meet with him and investigate his concerns further. The applicant states thereafter on an unknown date he telephoned Mr. Crane and left a message requesting Mr. Crane to return his call, which he failed to do. The applicant states he again telephoned Mr. Crane on an unknown date and Mr. Crane informed him that he and the second named respondent should "*sort it out between them*". The applicant avers that subsequently, on a date unknown, but well before the 1st March, 2016 the applicant met the second named respondent who told him he was ready to proceed with planting. It would seem that the events as the applicant outlines them must have occurred at some time between the 7th December, 2015 and 14th January, 2016, the date on which the IFA contacted the first named respondent, on behalf of the applicant.

61. Mr. Crane in his affidavit states he did meet the applicant at the Bush Hotel on the 7th December, 2015 where he avers the applicant raised non specific terms about an afforestation application. Mr. Crane avers that the he did not know what afforestation the applicant was referring to and he has no memory of any telephone discussions or any voice mails with the applicant. The applicant's solicitor wrote to the first named respondent by letter of the 26th January, 2016 and on the same date the first named respondent acknowledged receipt of the letter of the same date. Thereafter there were a number of emails as referred to the in

background facts to the case. This court does not know what steps were taken by the applicant between 7th December, 2015, and 14th January, 2016, but it appears from the email of the 14th January that the applicant had been speaking with Mr. Crane of the first named respondent on 13th January, 2016, and was advised by Mr.Crane that the application was on hold. This court does not know what steps, if any, were taken by the applicant following the email of 15th January, 2016 from the first named respondent whereby the applicant was furnished with the name and address of the appropriate person to whom his concerns should be addressed. It is clear the solicitor for the applicant wrote to the first named respondent on the 26th January as referred to above, however this court does not know what steps, if any, were taken by the applicant between that date and the 1st March, 2016 not withstanding that the applicant avers in his affidavit that on the 27th January, 2016 he discovered from a neighbour that the only means of taking part in a public consultation process was through the first named respondent's website. It is clear from the applicant's own affidavit that neither he, nor anyone on his behalf, contacted or attempted to contact the first named respondent to inform them of any objections, observations or concerns, following his solicitor's letter to the first named respondent of 26th January, 2016. The applicant's affidavit is silent as to what steps, if any, the applicant took in the six week period between the 26th January, 2016 and the 1st March, 2016.

62. In his fourth affidavit in these proceedings, the applicant avers that if he had been aware of the application within the public consultation period, he would have raised the issue of the significant impact of the project on the access road leading to his home, and that he would have engaged an engineer with expertise in road construction, safety and access, to carry out an assessment of the impact of the afforestation project on the access road. The applicant offers no explanation as to why he did not raise his stated concerns regarding what he refers to as the significant impact of the project on the access road leading to his home at any stage with the first named respondent, and in particular why he did not do so after he first became aware of the afforestation application on 7th December, 2015. The applicant offers no explanation as to why he did not engage the services of an engineer with expertise in construction safety and access at any stage between 7th December, 2015, up to and including 1st March, 2016. In so far as the applicant indicated his intention in his affidavit to obtain an expert engineering report, the court notes that no such report appears to have been commissioned or obtained, and that no such report has been put before this court, notwithstanding the matters as set out in the applicant's affidavit. The applicant does not particularise any issues that the first named respondent failed to take into account, and the results of the screening process carried out by the first named respondent was, and is, available to the applicant from the first named respondent's website.

63. Following what appears to be a phone call between the applicant and Mr. Crane on 13th January, 2016, and an email from the I.D.A. on behalf of the applicant to the first named respondent on 14th January, 2016, the application was "*put on hold*" by the first named respondent, and the applicant does not dispute the same. Thereafter, on 3rd February, 2016, by email, Mr. Crane on behalf of the first named respondent contacted the local authority in relation to the access road. On 4th February, 2016, Mr. Crane himself carried out a second site visit to the lands in question. In his affidavit Mr. Crane avers that after a careful assessment of the findings of the site visit, no reason was found to refuse planning permission to plant, on the grounds of access. Notwithstanding that no reason was found to refuse permission to plant on the grounds of access, the decision was further delayed by the first named respondent for a period of approximately a further four weeks up and until 1st March, 2016.

64. The applicant acknowledges at para.7 of his first affidavit in these proceedings that following receipt of his solicitor's letter on 26th January, 2016, the first named respondent replied by email of the same date and stated that the application was being processed and that no decision had been made.

65. It is submitted on behalf of the applicant that by the time he became aware of the 'pending' application for development consent for afforestation, it was already too late to make any such representations. It is clear from this submission that the applicant was aware on 7th December, 2015 that the afforestation application was pending. The submission is correct insofar as it states at that time it was too late for the applicant to make representations during the one-month period for the public consultation process. However, the applicant avers in his first affidavit that he met with Mr. Crane on 7th December, 2015, that he expressed his view to Mr. Crane regarding the fact that the private road is very narrow and entirely unsuitable for access of machinery to lands planted with trees for the purposes of afforestation, and that he received assurances from Mr. Crane that the first named respondent took the issue of access to forestry seriously, and that he would meet with the applicant and investigate his concerns further. It appears that in a telephone conversation of the 13th December, 2016 between the applicant and Mr. Crane that the applicant was aware the decision has been put "*on hold*". A decision was ultimately made on the 1st March, 2016.

Decision

66. This court respectfully adopts the *dicta* of Hedigan J. in *Kelly v. Minister for Agriculture & Ors* [2012] IEHC 558 (Unreported, High Court, Hedigan J., 21st December, 2012) Hedigan J. stated as follows:-

> *"In this application the court is not concerned with the merits of the recommendations made and the decisions taken by the respondents. It is not the function of the High Court in judicial review to decide whether the respondents have made a correct decision, whether a better decision might have been made or whether the decision is justified on the merits of the claim… The Court is concerned only with the legality of the decision and the lawfulness of the process by which it has been reached.*
>
> *The court must assess whether the material conclusions reached are tainted by any irrationality or unreasonableness having regard to the facts found or accepted and the evidence and the information before it".*

67. This Court is of the view that the applicant was afforded an opportunity to be heard, he was afforded an opportunity to have an input in relation to his concerns, albeit after the expiration of the public consultation process period. The applicant does not identify or particularise issues which he alleges the first named respondent failed to take into account or have regard to in making its decision. He was not prevented from making submissions, rather he was invited to do so in writing, and details were furnished to him of the appropriate person to whom he should address his concerns. In the view of this court taking into account the words of McCarthy J., *International Fishing Vessels Limited v. Minister for the Marine (No. 2)* [1991] 2 I.R. 93, "*neither natural justice nor constitutional justice requires perfect or the best possible justice; it requires reasonable fairness in all of the circumstances*" the steps taken by the first named respondent in seeking to accommodate and facilitate the applicant to make his objections/observations by furnishing him with the name of the appropriate person to correspond with, by putting the matter on hold, by carrying out a further site visit, were all additional steps taken by the first named respondent to ensure that the applicant had an opportunity to be heard, and had an opportunity to address his objections/concerns. The fixed procedures were supplemented by these additional steps taken to facilitate the applicant by the first named respondent. Having regard to the facts found in the case, the court is satisfied the decision made by the first named respondent was reasonable and fair in all circumstances and was not tainted by any irrationality or unreasonableness.

68. The function of this Court is to determine whether, on the facts the applicant was given an opportunity to be heard, whether he

was given an early and effective opportunity to be heard and whether he was given an opportunity to engage meaningfully with the first named respondent. The time period for the public consultation process was one month from 2nd September - 2nd October, 2015. The applicant himself states that he became aware of the second named respondent's development consent application on 7th December, 2015. The practical interpretation of what, in fact, occurred is that the applicant was given ample time to make any concerns he had known to the first named respondent. Following the email from the first named respondent dated 15th January, 2016 nothing further, save and except a letter from his solicitor dated 26th January, 2016, was heard or communicated to the first named respondent by the applicant. For reasons best known to the applicant, and unexplained in his affidavit, there was no further direct or indirect contact, verbal, written or otherwise from the applicant.

69. The applicant complains that there was an unfairness in the procedures adopted by the first named respondent, but in the view of this Court, the reality of what in fact occurred is that the applicant "*sat on his hands*", there being no evidence of any active steps being taken by him following his becoming aware of the pending application. The court is satisfied there was no unfairness in the procedures adopted by the first named respondent.

70. The application of the second named respondent was advertised on the website of the first named respondent in accordance with the provisions of s.5 of The Regulations and Article 6 (2) of The Directive. Those fixed procedures were supplemented by the additional steps taken by the first named respondent to facilitate the applicant so as to afford him reasonable fairness in all the circumstances. The powers of the decision making authority were exercised in a just and fair manner. The decision of this decision making authority was not *ultra vires*, and therefore the court will refuse an order for *certiorari*.

71. Fair procedures were applied by the decision making authority in the exercise of its statutory powers and functions. In the view of this court, there was no departure from, and no lack of compliance with the principles of constitutional justice by the decision making authority. This Court finds that this is not a case where the applicant's constitutional rights were breached having regard to the facts as found in this case, and accordingly, this Court will refuse the reliefs as sought.