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THE HIGH COURT

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

[2016 No. 868 J.R.]

BETWEEN

AN TAISCE

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SHARON BROWNE

NOTICE PARTY

THE HIGH COURT

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

[2016 No. 542 J.R.]

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SHARON BROWNE

NOTICE PARTY

JUDGMENT of Mr. Justice Eagar delivered on the 19th day of October, 2017.

1. This is a judgment on an application by the applicants for:-

(1) An order of *certiorari* quashing the decision of the first named respondent dated the 14th of October, 2016 to reject a submission made by the applicant in respect of an application for leave to apply for substitute consent.

(2) A declaration that the decision of the first named respondent was in breach of and contravenes Directive 2011/92/EU of the 13th of December, 2011 on the assessment of the effects of certain public and private projects on the environment (the Consolidated Environmental Impact Assessment (EIA) Directive) and the jurisprudence of the European Court of Justice (ECJ) and the Court of Justice of the European Union (CJEU) as specifically the decision of Case C-215/06 *Commission of the European Communities v. Ireland* [2008] I-04911.

(3) A declaration that the applicant is entitled to make a submission to the first named respondent in respect of an Application Registered Ref. No. LS09, LS0023 and that the statutory scheme contained in Part XA of the Planning and Development Act 2000 is to be construed as containing a right for interested members of the public to be heard prior to An Bord Pleanála making a decision pursuant to s. 177D of the Planning and Development Act 2000.

(4) A declaration that the respondent's decision is contrary to the public participation provisions of the Aarhus Convention.

(5) An order staying the consideration of Application Registration Ref. No. LS09, LS0023 until the determination of the within proceedings and in the alternative a declaration that the second named respondent has failed to correctly transpose the requirements of Directive 2011/92/EU.

Background

2. The factual background to these proceedings is as follows. The notice party owns and operates a quarry at Ballysax, Co. Kildare. The quarry is an unauthorised development. No planning permission or other development consent was ever obtained and no environmental impact assessment or appropriate assessment of the development was carried out.

3. Kildare County Council commenced enforcement proceedings against the quarry in the Circuit Court in Co. Kildare. These proceedings stand adjourned having regard to these proceedings and in the light of these proceedings the notice party applied for leave to apply for substitute consent pursuant to s. 177 of the Planning and Development Act 2000 as amended (the PDA 2000). The applicants sought to make submissions in respect of this application for leave. However, both applicants had their submissions returned to them by the respondent on the basis that the respondent's interpretation of the legislation that there is no facility for the Board to receive or consider as submissions from the public on an application for leave to apply for substitute consent.

4. The applicants contend that as a matter of national and European law this is incorrect and in summary the applicants contained as follows:-

> (1) The legislation properly construed, in fact does not make provision for the consideration of submissions from members of the public and/or environmental NGOs.
>
> (2) There is no legal requirement for an enabling provision in order to facilitate the Board having regard to information that comes before it. The Board is fully entitled to have regard to any information that is relevant to its determination irrespective of how such information came before it.
>
> (3) In the particular context of an application for substitute consent and having regard to the matters to be determined by the Board in respect of same, it is impossible for the Board to reach a fair or proper determination without the submissions of the applicant for leave and/or possible submissions of the planning authority. It is manifestly necessary for the public concern to be afforded an opportunity to make submissions on the application for leave in order that a properly informed decision can be made.
>
> (4) Excluding the public from making submissions or observations on the entitlement to seek leave is contrary to fair procedures and natural and constitutional justice.
>
> (5) Having regard to the provisions of European law public participation is required at the early stage in the process and the options are opened to the competent authority. Once the competent authority has determined that a developer may apply for a substitute consent, this decision is made and the option of refusing regularisation is no longer opened to the competent authority.

Sections 177(C) and (D) of the Planning and Development Act 2000 – Submission by the Applicant

5. The facility of substitute consent arises from the preclusion on a grant of retention permission for developments that require EIA and/or AA. In Case C-215/06 *Commission v. Ireland,* infringement proceedings were taken by the Commission against Ireland for breaches of the EIA Directive. One of the complaints made was that in allowing the facility under Irish law of obtaining retention permission for the development of already carried out at required EIA, Ireland was in breach of the requirement that a development be subject to an EIA before allowing it to be carried

6. The court held as follows:-

> "54. As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.
>
> 55. However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.
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> 56. In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.
>
> 57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.
>
> 58. A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects."

Counsel for the applicants submitted that the judgment of the court holds that Community law requires the carrying out of an EIA before the grant of development of consent.

7. In order to meet the requirements of the above decision the Oireachtas enacted Part X of the Planning and Development Act 2000 which created the facility of substitute consent. This part enabled applications for substitute consent to be made in certain circumstances. Broadly there are three circumstances namely quarries that are directed to apply pursuant to s. 261(a) where there are permissions that have been quashed by the courts or otherwise in firm and upon a successful application made pursuant to s. 177C (granted under s. 177D) all three of these gateways have been challenged in different proceedings by the applicants herein.

8. Counsel referred to s. 177C which states as follows:-

> "(1) A person who has carried out a development referred to in subsection (2) or the owner or occupier of the land as appropriate to whom no notices have been given under section 177B may apply to the Board for leave to apply for substitute consent in respect of the development.
>
> (2) A development in relation to which an applicant may make an application referred to in subsection (1) is a development which has been carried out where an Environmental Impact Assessment, a determination as to whether or not an Environmental Impact Assessment is required or an appropriate assessment was or is required in respect of which:-

(a) the applicant considers that a permission granted for the development by a planning authority or the Board may be in breach of law, invalid or otherwise defective in a material respect, whether pursuant to a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union or otherwise by reason of:

(i) any matter contained in or omitted from the application for permission including omission of an Environment Impact Assessment or natural impact statement on both of those statements as the case may be or inadequacy of an environment impact statement or a Natural impact statement or both of these statements as the case may be; or

(ii) Any error of fact or law or a procedural error;

(b) The applicant is only looking in that exceptional circumstances exist such so that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

(3) An applicant for leave to apply for a substitute consent under subsection (1) shall furnish the following to the Board:-

(a) Any document that he or she considers relevant to support his or her application;

(b) Any additional information or documentation that may be requested by the Board within the period specified in such a request.

(4) Where an applicant for leave to apply for substitute consent under subsection (1) fails to furnish additional information and documentation within the period specified in a request under section of the subsection (3) (b) or such additional period as the Board may allow the application should be deemed to have been withdrawn by the applicant.

(5) The Board may seek information and documents as it sees fit from the planning authority for the administrative area in which the development the subject matter of the application under this section is situated, including information and documents in relation to a permission referred to in subsection (2)(a) and in relation to any other development that may have been carried out by the applicant and the planning authority shall furnish the information not later than six weeks after the information is sought by the Board.

9. Section 177(2)(b) enabled an application for substitute consent to be made if a person has carried out a development that required EIA but in respect of which no assessment was made or made properly and that person believes that there exist exceptional circumstances such as one would warrant the grant of substitute consent. The application for leave is to include such information and/or material as the applicant for leave considers appropriate. The Board may seek further information if it considers it necessary and may seek information from the planning authority if it desires, however this is discretionary.

10. Section 177D then states as follows:-

"177D (1) Subject to s. 261A (21) the Board shall only grant leave to apply for substitute consent in respect of an application under s. 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied:-

(a) that a permission granted for development by a planning authority or the Board is in breach of law, invalid or otherwise defective in a material respect whether by reason of a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union, or otherwise, by reason of:-

(i) any matter contained in or omitted from the application for the permission including omission of an environmental impact statement or a Natural impact statement or both of those statements as the case may be, or inadequacy of an environmental impact statement or a Natural impact statement or both of those statements, as the case may be,

(ii) Any error of fact or law or procedural error,

(b) That exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:-

(a) Whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

(b) Whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

(c) Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

(d) The actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

(e) The extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

(f) Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

(g) Such other matters as the Board considers relevant.

(3) In deciding whether it is prepared to grant leave to apply for substitute consent under this section the Board shall have regard to any information furnished by the applicant under section 177C(3) and any information furnished by the planning authority under section 177C(5).

(4) The Board shall decide whether to grant leave to apply for substitute consent or to refuse to grant such leave.

(5) The decision of the Board under subsection (4) shall be made:-

(a) 6 weeks after the receipt of an application under section 177C (1),

(b) 6 weeks after receipt of additional information from the applicant under section 177C (3) (b), or

(c) 6 weeks after receipt of information from the planning authority under section 177C (5), whichever is the later.

(6) The Board shall give notice in writing to the applicant of its decision on the application for leave to apply for substitute consent and of the reasons therefore.

(7) Where the Board decides to grant leave to apply for substitute consent, the notice under subsection (6) shall also contain a direction:-

(a) To apply for substitute consent not later than 12 weeks after the giving of the notice, and

(b) To furnish with the application a remedial environmental impact statement or a remedial Natural impact statement, or both of those statements as the Board considers appropriate.

(8) The Board shall give a copy of the notice of its decision under subsection (6) and direction under subsection (7) to the planning authority for the administrative area in which the development the subject of the application for leave to apply for substitute consent is situated and details of the decision and direction shall be entered by the authority in the register.

11. Counsel for the applicants said that the notice party had applied for leave to apply for substitute consent on the 20th of November, 2015, that the applicants then sought to make submissions to the Board in respect of this application and both were returned. It was contended for by the Board that the legislative provision set out above does not make provisions for the making of submissions by members of the public in respect of such an application for leave. The respondent contends that absent an expressed power to receive and have regard to submissions made that it was legally precluded from considering same. Counsel for the applicants said "this cannot be correct".

12. The applicants submit that in the first instance public consultation must be undertaken but, in any event even if this Court finds that there is no mandatory requirement that public consultation be formally undertaken then there is certainly no legal basis for arguing that public submissions cannot be received and/or must be excluded from consideration. No legal basis for such a contention is advanced.

13. Counsel for the applicants accepted that s. 177C makes no expressed provision for consultation. The Board is expressly empowered, at its discretion, to seek information from the planning authority and the applicant, interestingly if the Board chooses not to exercise its discretion to seek information from the planning authority or seek further information from the applicant for leave, on the Board's interpretation of the legislation would also be precluded from receiving information on an unsolicited basis from the planning authority. He submitted that this could not be correct in law.

14. He also suggested that the Board could not seek or receive any submissions from any of the statutory authorities or prescribed bodies such as the Department of the Environment and Local Government, the Department of Arts, Heritage and the Gaeltacht. The Board could also not receive information as submissions from the EPA, the GSI, the NPWS or the IFI. He suggested that it was unthinkable that the bodies with the greatest knowledge and expertise could be precluded from consultation if the Board considers same to be necessary in order to consider the matters that it is required to determine pursuant to section 177D.

15. He also further submitted that submissions from the public and/or concern bodies and indeed must be received by the Board and considered and he referred to s. 177D (2) (g) "such other matters as the Board considers relevant". This section affords the Board a discretion to consider any matters that are considered relevant. He suggested that this must include matters brought to its attention by members of the public and he submitted that the Board cannot be expected to make a decision on the entitlement to apply for substitute consent based only on the information given to it by the applicant for such consent.

16. He submitted that in answering the questions as to whether or not EU law or the Directives have been frustrated the Board has chosen to ignore the submissions made by the public, thus frustrating one of the directives key objectives namely ensured public participation and good environmental decision making make after a consideration of all relevant material, regardless of its source and in particular, information that comes from the public. Again it is impossible to understand how this information could be excluded. The submission returned contained information that was clearly relevant to the Boards consideration.

Fair Procedures and Public Participation

17. Counsel submitted that it was clear from the legislation that in making a determination as to whether or not to allow leave to apply for substitute consent, the Board is making a determination under national and European law. The Board is determining whether or not to allow a retrospective regularisation of development. He submitted that this effects the rights of the public to ensure compliance with European law and the right of those with an interest or stake in the outcome of the process, including the applicants herein, and the interests of the local residence who they represent.

18. It is submitted that having regard to the nature of the process and the effects of the outcome that natural and constitutional justice requires that those effected or interested must be entitled to be heard in such a determination. He submitted that the

established practice of the Board is not to reconsider the application for leave in the application for a substitute consent and it will not be considered in this matter. The determination will now be made and will be made without reference to the information provided by the applicants and the applicants will not have any further opportunity to put such or indeed any information before the Board (regardless of its relevance) at a time when all options including the option of refusing leave to apply (or indeed refusing substitute consent on the basis of a non-entitlement to obtain same) are opened to the Board, the decision will be made and will be final and there is no facility for an appeal.

19. Counsel for the applicants indicated that the respondent in para. 6 of the Directive states that the rights to participate in the EIA process only arise after an application for development consent is made. The Board maintains that the public does not have any rights to participate in earlier determination such as for instance screening determination. He noted that the recitals of the EIA Directive states as follows:-

> "(29) When determining whether significant effects on the environment are likely be caused by a protest, the competent authority should identify the most relevant criteria to be considered and should take into account information that could be available following other assessments required by European Union legislation in order to apply the screening procedure effectively and transparently. In this regard, it is appropriate to specify the content of the screening without mention, in particular where no Environment Impact Assessment is required. Moreover, taken into account unsolicited comments it might have been received from other sources such as members of the public authorities even though no formal consultation is required at the screening stage constitutes good administrative practice."

20. Counsel submitted that in the context of deciding whether or not to allow an application for substitute consent to be made the Board is concerned with substantially more than just the likelihood of significant effects of a promoted development and unlike a screening assessment the Board is making a determination in respect of the historical compliance with and ensure the non-circumvention of EU law. These are matters that do require public participation on a formal basis.

21. He submitted that once leave to apply for substitute consent is granted, all options including refusing the leave or determining the scope of the leave, or of the remedial statement to be provided are no longer opened to the Board. Accordingly, public participation must be facilitated in advance of the determination being made on the application for leave.

22. Counsel for the applicants cited Case C-72/12 and is called *Altrip*, the CJEU held as follows:-

> 43. The first sentence of the third paragraph of Article 10a of Directive 85/337 further states that what constitutes impairment of a right is to be determined by the Member States consistently with the objective of giving the public concerned wide access to justice.
>
> 44. Accordingly, it is in the light of that objective that the compatibility with Union law must be assessed of the conditions invoked by the national court that make it possible to determine, according to the national law at issue, whether a right has been impaired, as a necessary condition of the admissibility of those actions.
>
> 45. Where, there being no rules fixed in this sphere by Union law, it is for each Member State to lay down, in its legal system, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law, those detailed rules (as pointed out in paragraph 30 above), in accordance with the principle of equivalence, must not be less favourable than those governing similar domestic actions and, in accordance with the principle of effectiveness, must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law.
>
> 46. Accordingly, although it is for the Member State to determine, where this is provided for in its legal system, as it is in the present case, which rights, if impaired, may give rise to an action relating to the environment, within the limits laid down by Article 10a of Directive 85/337, the conditions fixed by the Member States for that purpose may not make it in practice impossible or excessively difficult to exercise the rights conferred by that directive in order to give the public concerned wide access to justice, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health.

23. Counsel for the applicant submitted that the facility of substitute consent is designed to rectify an earlier breach of Community law and he submitted that before a competent authority could decide to allow access to a rectification process, the authority must consult the public or at very least receive submissions relevant to its determination.

24. Counsel for the applicants submitted that the principles of public participation in an EIA Directive mirror those contained in the Aarhus Convention, the Aarhus Compliance Committee noted that:-

> "the Convention does not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed, to do so would be particularly difficult taken into account the great variety of approaches to conducting EIA vested in the region."

Submissions by the First Named Respondent (An Bord Pleanála)

25. In relation to the factual basis which is set out in the applicants' submissions counsel for the Board noted that the notice party applied to the Board for leave to apply for a substitute consent. The applicant in the Sweetman case sought to make a submission on the 23rd of May, 2016 to the Board on the application for leave. The Board did not accept this submission and returned it on the 7th of June, 2016. Equally in the An Taisce case, submission was forwarded on the 1st of June, 2016 with the Board returning same on the 13th of October, 2016. In both cases, this was on the basis that the Board had no power or function to receive and consider submissions from the public in relation to an application for leave to apply for substitute consent.

26. Counsel for the first named respondent said that the core issue in both cases for the courts to determine is whether the Board was correct or whether the applicants had a right to make submissions and have them considered. The Board's position is that there was no such entitlement.

Planning Control of Quarries and Substitute Consent

27. Counsel for the first named respondent said that quarries give rise to unique considerations for planning law. Many quarries predate planning control in Ireland. Arising from constitutional considerations, the legislature did not apply the rigours of the Local Government (Planning and Development) Act 1963 to developments commenced before that Act to effect which is the 1st of October, 1964. An application for development of land in accordance with the permission regulations may be made for the retention of

unauthorised development and this section shall apply to such an application subject to any necessary modifications. A planning authority shall refuse to consider an application to retain unauthorised development of land where the authorities decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried.

28. Counsel for the first named respondent cited Charleton J. in *An Taisce v. An Bord Pleanála* [2010] IEHC 415:-

> "The Oireachtas made a decision that all such quarries should be registered and, when their operation had been properly analysed by local planning authorities as to the information which must be supplied for this process, quarries might need to be further regulated beyond the restrictions that the commencement of operations prior to 1st October 1964 would have necessarily attracted."

29. Section 261 of the PDA was commenced on the 28th of April, 2004. The effect of this was that on the 27th of April, 2005, the onus for operations of all quarries save those which were granted planning permission in the proceeding five years but including those that were being "outside the net" had to provide certain information to the planning authority. The planning authority was not obliged to seek out quarries but failure to register automatically rendered a quarry unauthorised regardless of its previous status. Counsel submitted that on the 3rd of July, 2008 the unrestricted availability of so called "retention permission" for an authorised development that should have been assessed under the EI Directive or Habitat Directive was condemned by the Court of Justice in the *Commission v. Ireland* (previously cited).

30. The focus of the CJEU was with retention proper that is the ability to retrospectively obtain development consent in circumstances where the development had taken place without the relevant assessments. The CJEU did not hold that this was impossible but rather the court held that it was not permissible for Ireland to operate and across the board retention scheme which could have the effect of discouraging developers for compiling with the EIA Directive. If, the retention permission was always (and without restriction) opened as an option and she suggested that the legislature had responded to this in two ways:-

> Response 1:
>
> In response to the decision of the CJEU a formal statutory prohibition was enacted within the Planning and Development (Amendment) Act 2010 at s. 23(c). Before the amendments s. 34(12) provided "an application for development of land in accordance with the permission regulations may be made for the retention of unauthorised development and this section should apply to such applications subject to any necessary applications" and after the amendment s. 34(12) now provides:-
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> > "An application for development of land in accordance with the permission regulations may be made for the retention of unauthorised development and this section shall apply to such an application, subject to any necessary modifications. A planning authority shall refuse to consider an application to retain unauthorised development of land before the authorities decide that if an application for ???? had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out:-
> >
> > (a) an Environment Impact Assessment;
> >
> > (b) a determination to whether an Environment Impact Assessment is required; or
> >
> > (c) an appropriate assessment.

and she argued the retention permission is no longer available for the kind of development that had been a concern to the European Commission.

31. The second response to the judgment of the CJEU is whether that there is an exception to the ordinary rule a special form of retention permission called substitute consent which may be granted under Part XA of the PDA. The substitute consent process was introduced from the 21st of September, 2011. Counsel submitted that the availability of substitute consent is restricted and an application for substitute consent can only be made in four very limited circumstances. The circumstances are as follow:-

> (a) Where a planning authority directs that an application is required under s. 261A(3) this direction can only be made after a special procedure involving an examination of all quarries to find out those where development is carried out that should have been (but was not) assessed under European law. Only quarries that commenced before the 1st of October, 1964 (or had a permission) and had registered under s. 261 applicable where applied to apply for substitute consent. All other quarries where to be issued with enforcement notices.
>
> (b) Where a planning authority directs that an application is required under s. 177B(1) this direction can only be made where a planning authority becomes aware of a court has quashed a certain type of permission for specific reasons.
>
> (c) Where the Board grants leave for an application for a substitute consent under s. 177D(1)(a) this can only cover where a court has quashed a certain kind of permission for certain very specific reasons.
>
> (d) Which is relevant to this case. Where the Board grants leave to apply for an application for substitute consent under s. 177D(1)(b) this can only occur where in exceptional circumstances just by an opportunity to regularise the development.

32. She emphasised that under s. 177D gateways, the only thing that is determined is that leave to apply for substitute consent is granted. The applicants' submissions continuing conflate this with the actual decision on substitute consent but she argued that these are entirely different things.

The Substitute Consent Scheme

33. Counsel on behalf of the first named respondent submitted that the two substitute consent scenarios pursuant to s. 177D require the Board to determine its leave to apply should be granted and quoted from s. 177D(1) and s. 177D(2) where she specified that the legislation set out a specific tableau of matters which are relevant to a determination as to whether exceptional circumstances exist within the meaning of s. 177D(1)(b) and suggested that the provisions of s. 177D(3) are instructive as they highlight the necessary "closed" nature of the Boards consideration of the application for leave and that is in section 177D(3):-

> "In deciding whether it is prepared to grant leave to apply for substitute consent under this section the Board shall have regard to any information furnished by the applicant under section 177C(3) and any information furnished by the planning authority under section 177C(5)."

Referred to those sections. The decision on the application for leave need only be communicated to the applicant or the relevant planning authority under s. 177D(6) and (8).

34. She argued that there is no legislative provision at all for third party's submissions at the leave stage. Still less is there any suggestion or kinds upon what publication or notification procedures might apply as a necessary precursor to such third party's submissions nor is there any guidance on procedures for such third party submissions such as notice provisions, time limits, default procedures, circulation of such submissions, replying submissions etc. There is in the legislative scheme no scope or provision for third party submissions at all.

35. She then noted that any subsequent planning process is entirely different. If the application for leave to apply is successful then an application for development consent will follow and the scheme goes on to set out the dismay required, the submission of a remedial EIS and remedial NIS. Part XIX of the Planning and Development Regulations 2001 provides a suite of notice provisions for substitute consent applications, none of which apply to the application for the leave stage.

36. In summary, the applicant who substitutes the consent must place newspaper advertisements two weeks before making the application alerting the public which states that the application and the accompanying documentation are available for public inspection and indicates that submissions may be made to the Board within five weeks of the date of receipt of the Board of the application.

37. Section 177H(1) gives a clear and unambiguous right to make submissions on the application:-

> "Any person other than the applicant for substitute consent or a planning authority may make submissions or observations in writing to the Board in relation to an application for substitute consent."

And once the application for a substitute consent is being made then under s. 177K(1) the Board may grant or refuse the substitute consent subject to or without conditions.

38. Section 177K(2) provides that:-

> "When making its decision in relation to an application for substitute consent, the Board shall consider the proper planning and sustainable development of the area, regard being had to the following matters:-
>
> (a) the provisions of the development plan or any local area plan for the area;
>
> (b) the provisions of any special amenity area order relating to the area;
>
> (c) the remedial environmental impact statement, or remedial Natural impact statement, or both of those statements, as the case may be, submitted with the application;
>
> (d) the significant effects on the environment, or on a European site, which have occurred or which are occurring or could reasonably be expected to occur because the development concerned was carried out;
>
> (e) the report and the opinion of the planning authority under section 177I;
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> (f) any submissions or observations made in accordance with regulations made under section 177N;
>
> (g) any report or recommendation prepared in relation to the application by or on behalf of the Board, including the report of the person conducting any oral hearing on behalf of the Board;
>
> (h) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c), that fact;
>
> (i) conditions that may be imposed in relation to a grant of permission under section 34(4);
>
> (j) the matters referred to in section 143;
>
> (k) the views of a Member State where the Member State is notified in accordance with regulations under this Act;
>
> (l) any relevant provisions of this Act and regulations made thereunder.

Further the PDR contains a suite of notification obligations under Article 230 in relation to prescribed bodies. Where notice of the decision to grant leave is only required to be sent to the applicant and the relevant planning authority under s. 177D(6) and (8), Article 235 requires notice of the decision on the application for substitute consent to be sent, *inter alia*, those parties who make submissions or observations.

39. Counsel for the first named respondents said in summary it is entirely clear that the Scheme positively envisages a "closed" process during the leave application with input limited to that of the developer and the planning authority. This is entirely different to the actual application for substitute consent which involves the full panoply of participation requirement. The legislative of intention is entirely clear.

Should a Right Be Implied or Inferred?

40. Counsel for the first named respondent said that the applicants argued that natural justice and European Law require right to make submissions and in response counsel for the first named respondent said that the legislation is entirely clear in terms of what the legislature intended by way of participatory rights and that none of what the applicants sought are afforded. This is the clear and unambiguous legislative intention particularly because there are very clear and particular participatory rights elsewhere in the PDA within the substitute consent regime itself. Where participatory rights are found the legislature set out time limits and procedures for same or same have been fleshed through secondary legislation. The PDA has very clear examples of where the legislature is clearly made provisions for submissions or participatory rights and she quotes from Denham J. (as she was then) in *Liam Lawlor v. Flood*

[1999] 3 I.R. 107:-

> "In applying the ordinary meaning of the words the Court is enforcing the clear intention of the legislature. This aspect of statutory construction is an essential part of the separation of powers. Further, it is an illustration of appropriate respect by one organ of government to another."

And quoted also from Charleton J. in *J.C. Savage Supermarkets Limited v. An Bord Pleanála* [2011] IEHC 488:-

> "This principle of conforming interpretation between Irish statute law and the European legislation which necessitated that measure cannot be used beyond the scope of its proper purpose so as to impose a solution which contradicts the plain terms of national law, even though such a strained interpretation may be in conformity with an obligation under a Directive. The limit of the duty of the national courts is to interpret national law in the light of any European law obligation as far as this is possible. This cannot lead to results which are a distortion of what the enactment means or, as the European Court of Justice has put it, *contra legem*.

41. Counsel referred to *Callaghan v. An Bord Pleanála* [2015] IEHC 357 that case concerned the process whereby the Board determined that a proposed development, if built would be "strategic infrastructure" and is thus required to undergo a specific application procedure which involved an application direct to the Board. Under that system various types of development in the 7th Schedule maybe strategic infrastructure if the Board reaches various opinions on the matter in s. 37a(2) of the PDA. If the Board determines that the proposed development is SID, it then subject to a planning application process before the Board. In *Callaghan* the applicant argued that he was entitled to make submissions to the Board under SID designation process and not simply under subsequent planning application. This was rejected in the High Court and the Court of Appeal but Counsel indicated that the Supreme Court has recently granted leave to the applicant to appeal the conclusions of the Court of Appeal. Counsel for the second respondent argued that the vast bulk of the applicant's legal submissions appeared to be referenced on a factual assumption that in the absence of right to make submission the Board is necessarily incapable of properly considering the matters relevant to whether the leave to apply for substitute consent should be granted or not.

42. However, she submitted that the Board must be presumed to act in accordance with law until it has proven to the contrary. The court should presume until the contrary is shown that the Board has performed its functions properly and will do so in the future and that there is a presumption of validity attaching to the Board's actions and that the applicant in a judicial review contending that the decision is invalid or that in this case that invalid decision will be made) where the onus of proving this to be the case.

43. She submitted that an application for leave to apply for substitute consent is simply that an application for permission to apply for a particular type of development consent.

The Argument as Based on European Law
44. She submitted that there was nothing of substance in the Aarhus Convention that is not in the EIA Directive. The Aarhus Convention led the European Institutions to amend the EIA Directive via Directive 203/35/EC. This originally inserted an Article 10a to the EIA Directive (now Article 11) and made other amendments to the EIA Directive under the banner including additional rights of participation. However, the EIA Directive the mirrors the Aarhus Convention in terms of public participation plus the Aarhus Convention actually adds nothing to legal argument advanced on behalf of the applicant. She also argued that the Public Participation Directive made no actually amendments to this Directive at all and there are no specific participation provisions in respect of same. She submitted that it is absolutely clear as a matter of European Law that the provisions is certified that Public Participation Directive arrives only after an application for development consent has been made. She referred to the case C41/92 *Commission v. Germany* where the CJEU considering an argument that the public participation provisions of the EIA Directive applied at a site prior to the application for development consent "the date when the application for consent for formerly lodged this constitutes the sole criteria which may be used. Such criterion accords with the principle of legal certainty and this designed to safeguard the effectiveness of the Directive." There was absolutely nothing in the EIA Directive as implementing the Aarhus Convention which grants any rights of involvement submission or impropriety to the application for the grant of development consent.

45. Counsel also referred to *Altrip* case previously cited where the CJEU held that it would apply to a permit a challenge to a development consent granted after the 25th June, 2005. This was all that that case was about.

Submissions by Ireland and the Attorney General
46. Counsel for the *Ireland v. the Attorney General* summarised the position and submitted that the issue was whether a member of the public or an environmental nongovernmental organisation is entitled to make a submission in the context of procedure which allows a developer to apply for development consent retrospectively. Under National Law, the entitlement to apply for development consent retrospectively is determined as a threshold interest by An Bord Pleanála in advance of the making of application for development consent. He summarised the case law on retrospective development consent in the context of the Court of Justice of European Union referring in particular to *Commission v. Ireland* (previously cited) and referred also to the decision of the CJEU in case c-348/15 *Stagt Wiener*:-

> 36. EU law does not preclude national legislation which, in certain cases, permits the regularisation of operations or measures which are unlawful in the light of EU law. However, such a possibility is subject to the condition that it does not offer the persons concerned the opportunity to circumvent EU law or dispense with applying it, and that it should remain the exception (*Commission v. Ireland*).
>
> 37. Accordingly the court held that legislation which gives regularisation permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning consent disregards the requirements of Directive 85/337. Projects for which an environmental impact assessment is required must, by virtue of Article 2(1) of that directive, be identified and then — before the grant of development consent and, therefore, necessarily before they are carried out — must be subject to an application for development consent and to such an assessment (Commission v Ireland).

47. Counsel on behalf of the second and third named respondents stated that in response to the decision of the *Commission v. Ireland* the Irish State put in place a series of legislative measures to give effect to the judgment.

48. He submitted that the Planning and Development (Amendment) Act 2010 removes the possibility of obtaining retention planning permission for EIA protects. Provision was also made under the 2010 Act for the possibility of applying for development consent retrospectively in the case of EIA projects in very little circumstances. A new form of development consent entitles substitute consent was introduced. Special rules applicable to certain enquiries under s. 261 A of the PDA 2000. The general rule is that a

development who seeks to regularise the planning status of development subject to the EIA Directive and/or the Habitats Directive by applying for development consent retrospectively must firstly leave from An Bord Pleanála to do so, he referred to s. 177D. Prior to the criteria under which An Bord Pleanála have regarded determining whether "exceptional circumstance" exist under s. 177D2 and he stated that it was clear from the structure of Part XA of PDA 3000 that the entitlement if any of a developer to apply for development consent retrospectively is determined as a threshold issue prior to any application for development consent.

Environmental Impact Assessment Directive
49. Counsel on behalf of the first second and third named defendants said it will deny that there had been any failure to transpose the EIA Directive properly in national law. And it was denied that the admission of an express statutory item makes submissions where observations and an application for leave to apply for substitute consent is inconsistent with requirements of the EIA Directive and said that the public participation rights under the EIA directive only arrives after an application for development consent is being submitted by a developer. And submitted that the public participation rights under EIA Directive only arise once an application for development consent has been made. There are a number of the public non environmental non-government organisations has the right to participate in the pre application procedures. He referred also to *Callaghan v. An Bord Pleanála*. He referred to the Advocate General's opinion in the case at case c-570/13 *Gruber*:-

> "EMA rightly submits that the decision on carrying out an environmental impact assessment does not acquire any public participation and concludes that Article 11 of the EIA Directive does not apply this is because Article 11 concerns only measures that are subject to the Directive's public participation provisions. However, the question whether any public proceedings are required to be carried out it is the central fundamental provision concerning public participation. Observance of the duty to involve the public must therefore fall, at least as a preliminary decision within the scope of Article 11 of the EIA Directive".

50. The Advocate General in the case of C-416/10 *Krizan* stated:-

> "According to the grounds set out in the reference where preliminary ruling, the Supreme Court would like to know whether the updating assessment maybe made solely on the basis of an application by the developer without any further participation".
>
> 134 In that regard it must be noted that the updating assessment should determine whether repeat public participation is necessary. The interests in effective and timely administrative proceedings must be balanced against the rights of the public. Public participation would make the procedure more cumbersome especially since in the course of permit procedure it would possibly be necessary to examine on more than one occasion whether the Environmental Impact Assessment is sufficiently up to date following changes in the circumstances which have occurred in the meantime.
>
> 135 Even if there is no public participation with regard to updating decisions, the public is not left without rights. The updating decision demonstrates power as to the preliminary investigation as to where the smallest bill projects, which are limited to annex 2 of EIA Directive must be subject to an assessment at all. For the purpose of the preliminary investigation the competent authorities must ensure that no projects are likely to have significant effects on the environment, within the meaning of the Directive should be exempt from assessment, unless this specific project excluded could, on the basis of a comprehensive screening be regarded as not being likely to have such effect. The public, as well as the other national authorities concerned must be able to ensure if necessary to legal action compliance with the competent authorities screening obligation. In order to guarantee affective remedies, the competent national authorities under a duty to inform the public and the authorities of the reasons on which its refusal is based either in the decision itself and a subsequent communication made of by request"

51. Counsel for the second and third named respondents finally argued that the applicant allegations that there had been a breach of fair procedures and/or the principle of the *Altra Audi alteram partem* are misconceived. The decision by An Bord Pleanála to grant leave to apply for substitute consent does not constitute it to termination which adversely effects any interest or right of the applicant. Interest or right of the applicant is engaged prior to the making of an application for development consent. If and when an application is made the applicants would be entitled to participate in the application for substitute consent.

The Court's Decision
52. Following the decision of the CJEU in the Case C-215/06 *Commission v. Ireland*, the Irish legislature established Part X of the Planning and Development Act 2000. This created the facility for substitute consent and there are a number of steps provided by the legislature in an application for leave consent.

53. In this case the application for substitute consent was in relation to a quarry.

54. The focus of the judgment in *Commission v. Ireland* related to retention that is the ability to retrospectively obtain development consent in circumstances where the development had taken place without the relevant assessments. The availability of substitute consent is restricted and an application for substitute consent can only be made in very limited circumstances and the provisions of s. 77D clearly established what might be described as the closed nature of the Board's consideration of an application for leave.

55. The application for leave is limited to input (in accordance with the legislation) to that of the developer and the planning authority. However, once leave is granted the actual application for substitute consent then involves the full panoply of participation. The legislative intention of the Oireachtas is clear.

56. Counsel for the applicant argues that this Court should direct that there is a right for members of the public to make submissions in relation to an application for leave for substitute consent. However, it is clear that the legislation in this planning situation is clear. It is also noted that once leave is granted the applicants can make such submissions as they think fit having regard to the various divisions under section 177K(2). The court is satisfied that no right to make submissions at the application for leave stage should be implied on behalf of the applicants.

57. The applicants further argue that the lack of participatory rights at the application for leave stage are in breach of European law. The court is of the view that there are ample participatory rights after the application for leave is granted and when the notice party must then apply for substitute consent and it is clear from the jurisprudence that there is a limit to public participation and the court notes the Advocate General's decision in Case C-416/10 *Krizan* at 134:-

> "134. In that regard, it must be noted that the updating assessment should determine whether repeat public participation is necessary. The interests in effective and timely administrative proceedings must be balanced against the rights of the

public. Public participation would make the procedure more cumbersome, especially since the course of the procedure it would possibly be necessary to examine, on more than one occasion, whether the Environmental Impact Assessment is sufficiently up to date following changes in the circumstances which have occurred in the meantime." (This Courts emphasis added).

58. Having regard to all the circumstances of the case, the court is satisfied to refuse the reliefs sought in the notice of motion by both applicants.