

THE HIGH COURT

[2015 2 JR]

BETWEEN

PETER SWEETMAN

PLAINTIFF

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL, AND THOMAS HEUSTON

DEFENDANTS

DECISION of Mr. Justice Hedigan delivered the 15th of May 2015

1. This is an application by the second and third respondents state to strike out the judicial proceedings insofar as they seek to challenge certain provisions of the planning legislation. The state contends that the challenge to the planning legislation is inadmissible by reason of delay. The application is based upon the proposition that the applicant is in reality mounting a collateral challenge to the decision or determination of Donegal County Council made on the 29th June 2012 in which it directed the notice party herein to apply for *substituted consent* pursuant to s.261a and Part 10a of the Planning and Development Act 2000 as amended. If it is such a collateral challenge then, argue the state, it is well out of time pursuant to s. 52 of the same Act.

2. The applicant argues that not only has he no interest in challenging this decision of Donegal County Council in fact he strongly agrees with it. He considers it is in accord with and required by Irish and European law. He argues that the "*substitute consent*" in question is granted by An Bord Pleanála and it is that grant which he challenges in the substantive action. He wishes to argue that if the board is required by Irish law to ascertain whether the case is exceptional and the developer is not trying to circumvent EU law, then if did not do so, In that case, its decision to grant the substituted consent is unlawful. In the alternative if the board is not under such a legal obligation then he will argue that Irish law is not in conformity with EU law as expanded by the Courts of Justice in *Commission v. Ireland* case 215 06 where it stated at para. 57 of its judgment as follows

"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."

3. In short whether it is in violation of Irish law or EU law. the applicant wishes to argue that the "*substitute consent*" granted by the board was unlawful because it did not consider whether the regularisation of the developer's operations by virtue of the substitute consent offered the opportunity to it to circumvent community rules and that it was an exceptional case.

4. The application for judicial review in this case is not in my judgment a collateral attack on the decision of Donegal County Council. It is a direct challenge to the decision of An Bord Pleanála dated 4th November 2014 in which it granted substitute consent to the third party developer. It is the body which grants or withholds "*substitute consent*". I am satisfied that Donegal County Council's role was the very limited one of identifying those quarries which it considered fell within the criteria set out in s.261A (2) and (3), then determining that a particular quarry did fall within the criteria and if so, directing the developer thereof to apply for "*substitute consent*" in order to regularise their operations. The legislation does not appear to require the local authority to consider whether the case is an exceptional one nor whether the persons concerned were being offered through this process the opportunity of circumventing community regulations. The local authority's role seems to be a somewhat mechanical one, a process almost like box ticking. Having found the quarry meets the criteria it must direct the application for substitute consent. Thus the only body that can consider the issues of exceptionality and circumvention seem to be An Bord Pleanála. If Irish legislation does not require Bord Pleanála to consider these issues then the applicant will argue that Irish law is not in accord with EU law as cited above. Thus in my judgment the applicant's case is properly first against An Bord Pleanála and in the alternative against the State. It is not a collateral attack and on the decision of Donegal County Council and so the issue of delay does not arise. The relief sought in the motion will be refused.