THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 246

Record No. 2017 No. 21

Peart J.
Irvine J.
Hogan J.

BETWEEN:

JAMES McCAFFREY

APPELLANT /

APPLICANT

- AND -

MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

AND

CAILLAN CURRAN

RESPONDENTS/

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 26th day of July 2017

1. This is an appeal from the judgment of the High Court (Heneghan J.) delivered on the 19th December 2016 whereby she refused to quash a decision of the Minister for Agriculture, Food and the Marine ("the Minister") to give consent to a particular afforestation development at Adoon, Gorvagh, Co. Leitrim: see *McCaffrey v. Minister for Agriculture, Food and the Marine* [2017] IEHC 731. The applicant has now appealed to this Court against that decision.

Background to the proceedings

2. The applicant, Mr. McCaffrey, is a farmer who is the owner of some 23 acres of land at Adoon. His family home is located at the end of a rather narrow private road and this road is also the access road to the lands of second named respondent, Mr. Curran. (Mr. Curran is, in fact, incorrectly named as a respondent when he should, in strictness, be named as a notice party. While nothing turns on this, I propose for convenience to refer to him as the notice party.)

3. In the summer of 2015 the notice party became aware of the existence of a forestry scheme run by the Minister. Mr. Curran engaged a forestry consultant with a view to planting forestry on some 9.33 hectares of his land and he duly completed the relevant application form on the 26th August 2015.

4. Once the Minister receives the appropriate application a screening exercise is conducted to determine whether an Environmental Impact Assessment ("EIA") is required. This exercise is originally based on the answers given by the applicant to certain questions contained in the application form in relation to matters such as existing forest cover, the acid sensitivity of the water course, potential impact on protected habitats and a variety of other kindred considerations. Although the initial screening exercise is desk based, if the proposed afforestation may have an impact on the landscape, environment or ecology, a field investigation is carried out.

5. Applicants are also asked whether the application relates to lands situate within a NHA (National Heritage Area), SAC (Special Area of Conservation), SPA (Special Protection Area) or a national park; whether the area contain an archaeological site or features within intensive public usage and whether the area is 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 Minister's website.

6. As it happens, each specified question was (correctly) answered in the negative by Mr. Curran in his application. This meant that Mr. Curran's application was advertised on the Minister's own website – but only on that website - for a period of one month from the 2nd September 2015 - 2nd October 2015 in accordance with the provisions of Article 5 of the European Communities (Forest Consent and Assessment) Regulations 2010 (S.I. 558 of 2010) (as amended) ("the 2010 Regulations"). I cannot help thinking that the restricted nature of the advertising obligations provided for in the 2010 Regulations have given rise to many of the difficulties which manifested themselves in this litigation. I will return to this point at a later stage in this judgment.

7. As a result of the desktop exercise, the Minister determined that a field investigation was not warranted and a technical approval was granted to Mr. Curran on the 5th October 2015. As it happens, following that technical approval, Mr. Curran applied for a change of proposed species within the area originally applied and this consent was duly granted by the Minister on the 2nd December 2015.

8. There was, however, one objector – not Mr. McCaffrey – to Mr. Curran's proposal. That objection was received by letter dated the 21st October 2015. On foot of that objection, Mr. Jhan Crane, the Forest Service District Inspector acting on behalf of the Minister, conducted a field inspection of the site of Mr. Curran's proposed afforestation operations on the 18th November 2015. Mr. Curran was advised in the wake of the objection and the subsequent field inspection that certain portions of the site would be refused due to high water table and drainage issues. The site was otherwise deemed suitable.

9. It is agreed that Mr. Crane happened to meet Mr. McCaffrey at a meeting unrelated to these proceedings on the 7th December 2015, in the Bush Hotel, in Carrick-on-Shannon, Co. Leitrim. It seems that Mr. McCaffrey raised concerns about an afforestation application during a very brief conversation, but without giving details. As Heneghan J. noted in her judgment, Mr. Crane swore an affidavit which was not uncontroverted to the effect that he did not know to what particular application Mr. McCaffrey was referring. Mr. Crane said that while he could not comment, he would nonetheless 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 or any voicemails from the applicant.

10. There matters stood until mid-January 2016 when Mr. Crane received an email on 14th January 2016 on behalf of Mr. McCaffrey from Ms. Geraldine O'Sullivan of the Farm Forestry Executive of the Irish Farmers' Association. The email was in the following terms:-

> "….I have been contacted by Jim McCaffrey who is very concerned about an afforestation application by Caillan 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."

11. 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."

12. In the wake of this correspondence Mr. Crane sent a letter dated the 20th January 2016 requesting Mr. Curran to liaise with Mr. McCaffrey. Mr. Curran responded by letter on the 27th January 2016 saying that he had spoken with Mr. McCaffrey, but that no agreement was possible as he (*i.e.* Mr. McCaffrey) did not want any planting done. Mr. McCaffrey averred that it was only on the 26th January 2016 that he discovered that details of the application and approval process could be found on the Minister's website.

13. While all of this was going on, Mr. McCaffrey's solicitors wrote to the Forestry Services of the Minister on the 26th January 2016 to the following effect:-

> "We have been consulted by Jim McCaffrey, Adoon, Gorvagh, Co. Leitrim in relation to the proposed forestry plantation by Caillan Curran at Adoon, Gorvagh which will necessitate the use of heavy plant and machinery over a narrow private roadway leading to and from our client's family home. We understand that our client has met with Jahn Crane to express his concerns if this development goes ahead and has been re-assured by him that the proposed forestry plantation has been "put on hold.
>
> However, this appears to be at odds with what he has been told recently by the owner of the property, Caillan Curran, that he is now ready to proceed with planting despite our client's objections. It appears from our instructions that the proposed area for planting is wholly unsuitable given its location along a narrow, windy road which our client is dependant upon for access to his family home.
>
> In these circumstances we would be obliged if you would acknowledge receipt of our correspondence and confirm to us in writing by return that no such planting will take place in view of our client's serious reservations. In the absence of a satisfactory response, our client reserves the right to seek injunctive relief and recompense for all losses suffered by him in the use and enjoyment of his property."

14. There was an immediate response to this letter from Ms. Nuala Kennedy of the Forest Service. She stated in an email dated the same day, 26th January 2016, that she would forward that letter to the relevant Forestry Inspector. Ms. Kennedy added:-

> "This application is being processed at present and no decision has been made. The Forest Service will inform you of our decision to approve / refuse this application and any conditions that apply to the approval. Please note public consultation on this application took place from the 2nd September 2015 to the 2nd October 2015."

15. As the email made clear, it is important to recall that the time period for public consultation had expired on 2nd October 2015. Although this email might convey the impression that the consultation period had expired with the result that no submissions would be entertained at this juncture, it is nevertheless clear that the Minister now sought to address the concerns of Mr. McCaffrey once the matter had come to his attention. Mr. Crane first sought to ascertain the views of the local authority regarding the suitability of the access road to Mr. McCaffrey's dwelling and, in particular, whether the northern 200m. of the *cul de sac* was suitable for forestry related traffic.

16. On 4th February 2016 Mr. Crane carried out a further site visit to Adoon with a view to establishing the suitability of the lands by reference to road width, structure, surrounding water table and proximity to dwellings, including that of Mr. McCaffrey. In his affidavit he stated that no reason was found to refuse consent for afforestation by reason of the access road.

17. By end of February 2016 Mr. Crane sought further responses from the local authority, saying that the Department was withholding consent pending a response on this issue. The acting local authority engineer, Mr. Denis Creaton, responded on the 29th February 2016 saying that the last 200m. stretch of roadway was not in charge, so that Leitrim County Council had no remit in relation to it. He did add, however, that the local road adjoining that stretch was in charge and he did request:-

> "the use of smaller vehicles such as tractors and trailers to remove the felled timber as these narrow roads are unsuitable for heavy goods vehicles. The loads could then be transferred to the larger heavy goods vehicles when they reach the regional road."

18. In her judgment, Heneghan J. drew attention to what she perceived as the applicant's inactivity at this crucial stage between mid-January 2016 and the end of February 2016:

> "This court does not know what steps, if any, were taken by the applicant following the email of 15th January, 2016 from the [Minister] 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 Minister on the 26 January [2016], 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.
>
> 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. Insofar 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 [Minister] 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."

19. The decision to approve was ultimately made around this time, because the applicant's solicitor received a letter from the Minister which is date-stamped as having been received on the 2nd March 2016. This stated:

> "Assessment of the application by the Forest Service is now complete. Taking into account the views expressed in your correspondence and following consultation with the relevant statutory bodies, the application has been approved with the following conditions:
>
> All trees and hedges shall be retained.
>
> A minimum of 10% of total area planted shall be broadleaf. Broadleaf shall be
>
> concentrated along road and building buffers.
>
> 60m. set back from all buildings.
>
> 10m. road setback with 5 rows of broadleaves between conifers and road buffer.
>
> Please note public consultation took place from 2nd September 2015 to 2nd October 2015."

20. The applicant's solicitors wrote on the 14th March 2016 threatening judicial review proceedings. Leave to apply for judicial review to quash the forestry consent was granted on 18th March 2016. A further order was granted by the High Court on the 27th April 2016 which prohibited the notice party from carrying out further works pending the determination of these proceedings.

The judgment of the High Court

21. In a comprehensive judgment Heneghan J. ultimately found against the applicant, essentially on the ground that he had received an adequate hearing in respect of his contentions regarding the afforestation plan, save admittedly that these representations were entertained and considered well after the consultation period had ended:

> "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 [notice party'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.
>
> 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.
>
> The application of the [notice party] 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.

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."

The relevant legal provisions

22. Before considering any of the legal issues which arise in this appeal, it is first necessary to examine the relevant provisions, both the original Directive 2011/92/EU (as amended by Directive 2014/52/EU) and the transposing provisions of the 2010 Regulations.

23. Article 1(2)(d) provides that

> "'public' means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."

24. Article 1(2)(e) provides that:

> "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".

25. Article 6(2) provides that:

> "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".

26. Article 6(4) provides that:

> "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".

27. Article 6(5) provides that:

> "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".

28. These provisions reflect the requirements of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) ("the Aarhus Convention") which, inter alia, seeks to promote the notification of the public to all relevant information concerning the environment in a timely fashion. Given that effect has been given to this aspect of the Aarhus Convention by the Union legislator via the 2011 Directive, the 2010 Regulations constitute an EU legal obligation which this Court must uphold. Of course, very different consideration apply in respect of those features of the Aarhus Convention which have not been incorporated into EU law and the extent to which those obligations have been made part of domestic law independently of EU law is governed principally by reference to Article 29.6 of the Constitution and the legislation (if any) enacted by the Oireachtas for this purpose: see, *e.g.*, *McCoy v. Shillelagh Quarries Ltd.* [2015] IECA 28 and *Conway v. Ireland* [2017] IESC 13.

29. At all events, the provisions of the 2011 Directive mirror closely the requirements of the Aarhus Convention. Article 2(5) of 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"

30. Article 6 (2) of Aarhus Convention 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;
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> (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."

31. Article 6 (3) of the Aarhus Convention 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."

32. Turning now to a consideration of the 2010 Regulations, it may be noted that in the definition provisions of Article 2, the word "publish" is given the following particular meaning:

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

33. Article 5 of the 2010 Regulations then deals with the public consultation process:

> "(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."

The publication requirements and fair procedures

34. The combined effect of the inter-action of Article 2 and Article 5 of the 2010 Regulations is that the Minister is entitled to publish the details of the notice on his own website only, *unless* he directs that the application be published more widely. It is true that the Minister did indeed publish the details of Mr. Curran's application on that website, but, critically, *only* on that website. Even this publication of Mr. Curran's application was drowned by its inclusion in a list of hundreds of other similar applicants.

35. The entire procedure calls to mind Jackson J.'s celebrated dissent in *Federal Crop Insurance Corporation v. Merrill* 322 U.S. 380, 387 (1947) where he rejected the argument that a crop insurance contract could be modified by a notice in the Federal Register (the U.S. equivalent of *Iris Oifigiúil*) of which the insured farmer had no real or effective notice:

> "To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains, or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops."

36. The relentless list of afforestation applications and approvals contained in the Minister's website could probably compete effortlessly both in terms of volume and dullness with anything contained in the Federal Register of post-war America. Some sense of the scale of the documentation in question can be gauged from the fact that the print-outs of the list of relevant names and locations which were down-loaded from the Minister's website constituted over 120 pages of exhibits. In this context I do not overlook the fact that Mr. McCaffrey has stated that he lacks any practical experience or competence in relation to the searching of internet sites, but even if he did, the farmer who spent his time scouring the Minister's website for the possibility that, in Jackson J.'s words, "anything has been promulgated" that might affect his rights or interests, would have ceased to be a farmer in all but name, for he would have little time left for farming.

37. Something similar had been stated by the Supreme Court in *Re Mountcharles' Estate* [1935] I.R. 163. This was a case where the Land Commission had purported to determine that the Minister for Industry and Commerce enjoyed certain mining rights over the lands of certain tenant farmers. The only notice which had been given of this determination was a statement to this effect in *Iris Oifigiúil*, but Kennedy C.J. was unimpressed with this, saying that the determination had been made behind the backs of the farmers in question, while ([1935] I.R. 163, 166-167) the very fact of the determination:

> "…is not brought to their notice unless they happen to be members of that comparatively small and very select class of persons, the regular readers of *Iris Oifigiúil…[*These] were tenants of poor holdings, men moreover unlikely in the course of a lifetime to see a copy of *Iris Oifigiúil*. Such a procedure is on the face of it contrary to the elementary principles of natural justice."

38. A similar point was also made by the Supreme Court in more recent times in *MacPhartaláin v. Commissioners for Public Works* [1994] 3 I.R. 353, a case where landowners were denied forestry grants by reason of the earlier designation of the relevant lands by the Wildlife Service as areas of scientific interest. Finlay C.J. held that this amounted to a clear breach of fair procedures ([1994] 3 I.R. 353, 358-359):

> "The final question was not seriously contested either in the court below or on 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."

39. This is also really the nub of the point so far as fair procedures in the present case are concerned, since unless one actually knew that one should look for a pending application on the Minister's website, the very fact of publication would be ineffective to ensure timely notice to persons who might otherwise be affected by the afforestation proposal.

40. This issue was considered by the Court of Justice in Case C-313/99 *Mulligan* [2002] E.C.R. I-5719 where the question was whether it was sufficient that notices providing for a "clawback" of milk quota references should be published in the national newspapers. On this point the Court of Justice stated:

> "….The reason why the principle of legal certainty, as a general principle of Community law, requires appropriate publicity of measures adopted by the Member States in implementation of an obligation under Community law is the obvious need to ensure that persons concerned by such measures are able to ascertain the scope of their rights and obligations in the particular area governed by Community law.
>
> It follows that to be appropriate publicity must be of such a nature as to inform the natural or legal persons concerned by the measure of their rights and obligations under it. It is not therefore ruled out that publication of that measure in the national press may satisfy that condition. However, it is for the national court to determine, on the basis of the facts before it, whether that is the case in the main proceedings."

41. It must, of course, be observed that these clawback measures at issue in Mulligan were of general application to all dairy farmers and had a general effect akin to legislation. Short of a general notice to every farmer in the State, it would be hard to see how anything more could have been done to bring the effect of these general measures to the notice of the farmers concerned.

42. The situation in the present case is rather different. The application in question does not concern general measures of the kind at issue in Mulligan, but is rather a specific application for a particular afforestation consent rather akin to an application for planning permission. If Mr. McCaffrey's contentions are correct – and I express no view on their merits – then Mr. Curran's application for afforestation would have effects on his use of his own home and property by reason of what he alleged was the unsuitable road access for the large scale planting which had been proposed. Elementary fairness required that persons potentially affected by such proposals – such as home-owners and land-owners living in the immediate vicinity – had timely and effective notice of such proposals, by, for example, something like a site notice requirement. Mere publication in itself – and I stress these words – of a notice of an application on the Minister's website would not suffice for this purpose.

43. In passing, it may be noted that s. 22(9)(c) of the Forestry Act 2014 now provides that the Minister may make regulations which "prescribe the placement of public notices on all sites where afforestation, forest road works or aerial fertilisation of forests is proposed."

44. For all of these reasons, therefore, it would have to be concluded that the procedures provided for in the 2010 Regulations were in fact ineffective to give Mr. McCaffrey notice of the application prior to the closing date for public consultation in respect of this particular application on 2nd October 2015. Indeed, it may be significant that Heneghan J. considered that while fair procedures had ultimately been satisfied, it was nonetheless "albeit after the expiration of the public consultation process period", thereby implying that the applicant had in effect insufficient notice prior to that point. At the hearing before this Court, counsel for the Minister, Ms. Reilly, did not seriously dispute this point.

Whether the applicant was given a meaningful opportunity to be heard after the close of the public consultation date

45. Even if the applicant did not receive adequate notice prior to the closing date of 2nd October 2015, what is to be said about what subsequently transpired in both January 2016 and February 2016? It seems hard to gainsay the fact that the Minister's Forestry Inspector, Mr. Crane, did, in fact, conduct a full evaluation (or, perhaps, it might be more correct to say, a re-evaluation) of Mr. Curran's application in the light of the concerns which Mr. McCaffrey had expressed personally and through his solicitors in the letter of January 26th, 2016.

46. While this supplementary process was somewhat unorthodox – given that the Minister was, now, in effect, acting on foot of legal submissions received well after the closing date – I find it hard to say that it was not thorough or meaningful. This correspondence prompted Mr. Crane to conduct a fresh field inspection and it is clear from the email correspondence with Mr. Creaton, the acting Leitrim County Council engineer, that the question of whether the local road in Adoon immediately adjacent to Mr. McCaffrey's dwelling could accommodate the forestry machinery necessary for the proposed planting was now the focus of that inspection The letter granting consent of 2nd March 2016 expressly referred to the solicitor's correspondence. It may be thought that at least some of Mr. McCaffrey's concerns seem to have been reflected in the conditions attached to the grant, not least the requirement of a 60m. setback from all buildings, and a 10m. setback from the road with five rows of broadleaves between the conifers and the 10m. road setback.

47. In her judgment Heneghan J. quoted the following passage from the judgment of McCarthy J. in International Fishing Vessels Limited v. Minister for the Marine (No. 2) [1991] 2 I.R. 93, 102 where he said:

> "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."

48. It is certainly true to say that the procedures followed here were not perfect or the best possible justice: it would have been

necessary for Mr. McCaffrrey to have received effective and timely notice of Mr. Curran's application in early September 2015 before this could have been said. It cannot even be said that the Minister's efforts to address this problem in January and February 2016 – commendable though they were – were entirely satisfactory, because at times the correspondence gave Mr. McCaffrey's advisors the impression that their representations were simply too late, as witness the initial email from Ms. Kennedy from the Forest Service of 26th January 2016 who stated that the consultation period was now closed. One way or the other, however, the fact is that these concerns were in fact investigated by the Minister in January and February 2016.

49. These supplemental procedures were, moreover, not without their own blemishes. It is true that, as Heneghan J. noted, the applicant had not, in fact, produced an engineer's report as he said he would have done had he received timely notice ion the first place. But a difficulty here is that it was never made fully clear to Mr. McCaffrey that the Minister would nonetheless have considered such a report, the closing of the deadline notwithstanding. It is equally true to note that the Minister did not have an engineer's report when considering the impact of any approval for afforestation on the access road in the medium to long term.

50. In making any assessment of this matter, one must also have regard to the interests and rights of Mr. Curran, whose afforestation plans have been interfered with and delayed by reason of legal proceedings not directly of his own making. As I have already made clear, the root of all the subsequent problems lies in the inadequacy of the notice given to Mr. McCaffrey by the Minister. If the matter had been a dispute between Mr. McCaffrey and the Minister only, and did not concern or have implications for a third party, then serious consideration might have to have been given to quashing the Minister's decision given the plain inadequacy of the original notice.

51. The dispute does, however, concern or involve a third party, namely, Mr. Curran. The Supreme Court has repeatedly stressed that even in cases of jurisdictional error – such as here, where the initial notification did not comply with fair procedures – the underlying decision should not be quashed if, in the circumstances of the case, it would work an unfairness to third parties: see, *e.g.*, the comments of Henchy J. in *The State (Cussen) v. Brennan* [1981] I.R. 181, 195-197. Of course, had matters stood as they did after 2nd October 2015 so that the permission was granted without any meaningful opportunity for Mr. McCaffrey to have been heard, an order of certiorari would have been more or less inevitable. Matters did not, however, finish there because one cannot ignore the commendable efforts by the Minister to address Mr. McCaffrey's concerns – admittedly in an after the fact fashion after the closing date – with the result that, like Heneghan J., I cannot say that the substance of these concerns were not addressed, even if the procedure adopted was actually less than perfect or even ideal.

Conclusions

52. In these particular and singular circumstances I agree that the trial judge was entitled to refuse on discretionary grounds to quash the decision to grant approval for the afforestation application. Bearing in mind the dicta of McCarthy J. in *International Fishing*, I consider that the trial judge was entitled to reach that conclusion that it would not be just and proper to quash the approval decision because (i) the Minister did in fact belatedly address the substance of the applicant's concerns and he was given a hearing on the point and (ii) while that hearing was admittedly imperfect, it would be unfair on a third party on the particular facts of this case to quash the approval which the Minister granted Mr. Curran on 2nd March 2016.

53. In conclusion, therefore, I would dismiss the appeal.