THE HIGH COURT

[2021] IEHC 401

[2021 No. 413 JR]

BETWEEN

WHITEMOUNTAIN QUARRIES LIMITED

APPLICANT

– AND –

DONEGAL COUNTY COUNCIL

RESPONDENT

– AND –

CHURCHILL STONE LIMITED

NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 26th May 2021.

SUMMARY

The issue to be decided in this interim/interlocutory application is whether a stay granted at the leave-granting stage of the within proceedings ought to be continued/renewed. For the reasons set out below, the court considers that the said stay ought not to be continued/renewed. This summary is part of the court's judgment.

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1. The issue to be decided in this interim/interlocutory application, heard yesterday, is whether a stay granted at the leave-granting stage of the within proceedings ought to be continued/renewed. (There was some disagreement as to whether what was being sought was a continuation/renewal but it seemed to be accepted by all sides that nothing substantive turned on this). The court does not understand it to be disputed that the onus of proof falls on Whitemountain to establish why the stay ought to be continued/renewed. That the onus so applies is clear in any event from *McDonnell v. Brady* [2001] 3 I.R. 588 and *O'Brien v. An Bord Pleanála* [2017] IEHC 510.

2. The stay prevents Donegal County Council from concluding contracts with Churchill Stone Ltd, which the council awarded to Churchill by decision of 9th April 2021. Whitemountain's case is predicated on the proposition that an air emissions licence (AEL) granted by the Council to Moyle Plant Ltd on or around 12th January 2021. Whitemountain states that the AEL is invalid because a third party has appealed the granting of same to the EPA.

3. Moyle is not party to these proceedings. (It is a company that is associated with Churchill; however, it enjoys separate legal personality). And, notably, although these are judicial review proceedings focused on a procurement process, Moyle played no part in that procurement process. Nor indeed was it a condition of the tendering process that Moyle have an AEL in place. Nor does Whitemountain contend that the absence of such requirement renders the ITT unlawful. Nor indeed is Whitemountain the party that appealed the granting of the AEL to the EPA.

4. In terms of the test for (what is in effect) an interim/interlocutory injunction, the court has been referred, *inter alia*, to *Campus Oil Ltd v. Minister for Industry and Energy* (No. 2) [1983] I.R. 88, *Okunade v. Minister for Justice* [2012] IESC 49; [2012] 3 IR 152, *Merck, Sharpe and Dohme Corp. v. Clonmel Healthcare Ltd* [2019] IESC 65 and *Betty Martin Financial Services Ltd v. EBS DAC* [2019] IECA 327. To the court's mind the key points to be taken from those cases are the following:

   (1) as a starting point, an applicant must establish that there is a serious issue to be tried; if he fails to do so that is the end of matters; if he succeeds in doing so, that by itself will not secure the granting of the injunction sought;

   (2) if a serious issue to be tried is established, a court must go on to consider the balance of convenience/justice. In this context, various factors may come into play; among them will be the question of the adequacy of damages (which is best viewed as part of the balance of convenience);

   (3) the court may place all due weight on the strength or weakness of an applicant's case, especially where the law (being a matter in which the court can justifiably claim expertise) is such that the court can take a tentative view on the merits.

   (4) when considering where the balance of convenience/justice lies in the context of decisions of public bodies, the following factors are of note: (i) all appropriate weight should be given to the orderly implementation of measures that are *prima facie* valid; (ii) such weight as is appropriate should be given to the orderly implementation of the particular scheme; (iii) appropriate weight should be given to any facts that would heighten the risk to the public interest of the specific measure under challenge not being implemented; (iv) all due weight should be given to the consequences for the applicant of being required to comply with (or, it might be added, to live with or endure) the measures under challenge in circumstances where that measure may be found to be unlawful.

   (5) any application for interlocutory relief must be approached with a recognition of the essential flexibility of the remedy of injunctive relief and the fundamental objective of avoiding injustice.

5. Is it possible to reduce the foregoing to a series of questions through which one can more safely arrive at a balanced conclusion as to whether or not an interlocutory injunction should issue in a case such as that now presenting? It seems to the court that the following questions arise:

   (1) Has the applicant established that there is a serious issue to be tried? (If not, that is the end of matters).

   (2) Where does the balance of convenience/justice lie? (In this context, various factors may come into play, among them the question of the adequacy of damages).

(3) Has the court placed all due weight on the strength or weakness of an applicant's case, especially where the law (being a matter in which the court can justifiably claim expertise) is such that the court can take a tentative view on the merits?

(4) Has the court given all appropriate weight to the orderly implementation of measures that are *prima facie* valid?

(5) Has the court given such weight as is appropriate to the orderly implementation of the particular scheme?

(6) Has appropriate weight been given to any facts that would heighten the risk to the public interest of the specific measure under challenge not being implemented?

(7) Has all due weight been given to the consequences for the applicant of being required to comply with (or live with) the measures under challenge in circumstances where that measure may be found to be unlawful?

(8) Has the application for interlocutory relief been approached by the court with due recognition for the essential flexibility of the remedy of injunctive relief and the fundamental objective of avoiding injustice?

6. The court turns below to consider each of the above questions.

(1) Has the applicant established that there is a serious issue to be tried? (If not, that is the end of matters).

7. 'No', the applicant has not established that there is a serious issue to be tried. The critical issue presenting concerns the validity of the AEL granted to Moyle, an entity that is not party to these proceedings. Whitemountain is not the party that appealed the granting of the AEL to the EPA. So far as these ostensibly procurement-focused proceedings are concerned, it was not a condition of the tendering process that Moyle have an AEL in place, Whitemountain does not contend that the absence of such requirement renders the ITT unlawful, and by no stretch of the legal imagination can a complaint about the grant of the AEL to Moyle yield a public procurement-grounded cause of action in the circumstances presenting. In any event, even if the AEL has been effectively suspended by the bringing of the appeal (which is denied by the Council and Churchill) it is impossible to see that this is a bar to the awarding of the public works contract (or indeed its performance through asphalt being sourced other than from Moyle).

8. On a separate but related note, all the foregoing being so, it is difficult to see therefore that (consistent with such authorities as, for example*, Sweetman v. An Bord Pleanála* [2018] IESC 1; [2018] 2 IR 250 and *XX v. Minister for Justice and Equality* [2019] IESC 59) these proceedings do not involve an impermissible collateral attack on the validity of the AEL, though the court does not see that it has to reach a conclusion in this regard, such is the strength of the other factors presenting that militate against the

continuation/renewal of the stay. (The court would note, however, that if Whitemountain was of the view that the granting of the AEL to Moyle was somehow tainted by legality, it could have commenced judicial review proceedings in respect of the granting of same and did not).

9. Given that the court's answer to this first question is 'no', there is, strictly speaking, no need for the court to consider matters further. But even Homer nodded. So it seems prudent to consider the other questions presenting.

(2) Where does the balance of convenience/justice lie? (In this context, various factors may come into play, among them the question of the adequacy of damages).

10. For the reasons identified hereafter, it seems to the court that the balance of convenience/justice lies against continuing/renewing the stay.

11. First, the court's attention has been drawn in the affidavit evidence to the implications for public safety in County Donegal if the county's roads are not properly maintained. It seems to the court that this factor alone offers an *overwhelming* reason for the stay not to be continued/renewed. The public are entitled to expect that their courts will not reach decisions that would unnecessarily imperil public safety.

12. Second, on a related note, the 'weather window' for road repairs in County Donegal, the State's most northerly county, is agreed by the parties to be narrow; there is some dispute between the parties as to the precise extent of this 'weather window'; however, it seems, on their respective accounts, only to extend typically to sometime in August/September, already a relatively short time away, given that this judgment is issuing at end-May.

13. Third, there is no suggestion that the conclusion of contracts between the Council and Churchill would put Whitemountain out of business, lead to job losses within Whitemountain, or cause Whitemountain significant (if any) reputational damage. (By contrast, the court notes, Churchill has now committed itself to carrying out the works that fall to be done, which works comprise a significant portion of its trade, with the result that if the contract does not proceed, jobs may be lost).

14. Fourth, damages do not seem to work for anybody in this case: it is essentially accepted that damages would not be adequate relief for Whitemountain if it succeeded at the substantive hearing. However, damages could also not compensate the Council (let alone public road users) for the occurrence or continuation of dangerous defects in the Donegal road system occasioned by a continuation/renewal of the stay. In truth, the inadequacy of damages as a form of relief for all sides in these proceedings seems essentially to cancel out damages as a factor of relevance.

15. Fifth, although the court has indicated itself to be (and remains) satisfied to hear these proceedings as soon as the parties are ready for it to do so, all court proceedings just

take time to set up so that they are ready for hearing. It is now the end of May, it is difficult to see the matter coming on in June, and even hearing it in June/July and then giving (swift) judgment in July would all be taking place within an ever narrower 'weather window', potentially (perhaps even certainly) frustrating the full completion of this year's road maintenance in County Donegal and potentially endangering the lives and welfare of people living in and visiting that county and using its road system.

16. Sixth, it will be clear from the foregoing that there would be the clearest prejudice arising for the Council and indeed the notice party if the court was to continue/renew the stay.

17. Weighing up all of the just-described factors, it seems to the court that the balance of convenience/justice lies against continuing/renewing the stay.

(3) Has the court placed all due weight on the strength or weakness of an applicant's case, especially where the law (being a matter in which the court can justifiably claim expertise) is such that the court can take a tentative view on the merits?

18. Notwithstanding that it is clear from the judgment of O'Donnell J. in *Merck*, at para.63, that the strength or weakness of the applicant's case is a factor that may tentatively be brought to bear in deciding whether or not to grant injunctive relief, the court does not wish to wander far into this thicketed field. Indeed the Council and Churchill will be conscious from a reading of this judgment that the court has elected to avoid some aspects of their submissions (for example, the 'Brexit' point) because it feared that a consideration of same would involve its adjudicating on the merits of certain aspects of Whitemountain's case. Suffice it for the court to note by reference to the factors touched upon in its answer to Question (1) above, as well as the various other factors considered in this judgment, that it is satisfied that this is not a case in which it would be an affront to law and justice to refuse the continuation/renewal of the stay.

(4) Has the court given all appropriate weight to the orderly implementation of measures that are *prima facie* valid? (5) Has the court given such weight as is appropriate to the orderly implementation of the particular scheme?

19. The critical issue presenting in these proceedings concerns the validity of the AEL granted to Moyle. Whitemountain is not the party that appealed the granting of the AEL to the EPA. And so far as these ostensibly procurement-focused proceedings are concerned, it was not a condition of the tendering process that Moyle have an AEL in place, Whitemountain does not contend that the absence of such requirement renders the ITT unlawful, and by no stretch of the legal imagination can a complaint about the grant of the AEL to Moyle yield a public procurement-grounded cause of action in all the circumstances presenting. Given all the foregoing, the court does not see how it could be said to be giving all appropriate weight to the orderly implementation of a procurement process that is *prima facie* valid if it were now to continue/renew the stay.

(6) Has appropriate weight been given to any facts that would heighten the risk to the public interest of the specific measure under challenge not being implemented?

20. As touched upon above, the court's attention has been drawn in the affidavit evidence to (i) the implications for public safety in County Donegal if the county's roads are not properly maintained; and (ii) the narrowness of the 'weather window' for road repairs in County Donegal (albeit that there is some dispute about the precise extent of this 'window'). The court does not see how, if it were to allow the continuation/renewal of the stay, it could be said to have given appropriate weight to the foregoing facts.

(7) Has all due weight been given to the consequences for the applicant of being required to comply with (or live with) the measures under challenge in circumstances where that measure may be found to be unlawful?

21. There is no suggestion that the conclusion of contracts between the Council and Churchill would put Whitemountain out of business, lead to job losses within Whitemountain, or cause it significant reputational damage. The result of the court's refusal of injunctive relief could potentially operate to deprive Whitemountain of a remedy if a wrong has been done to it. However, as against that one has to set all the other factors touched upon above, including – but far from limited to – the need for safe/r roads in County Donegal and the potential risk to public safety that a continuation/renewal of the stay would present (as well as the increasingly narrowing 'weather window' for repairs within which these proceedings would then play out). Moreover, the court notes in this regard the submission by Churchill that even if Whitemountain is correct in its contentions regarding Moyle, there is, in any event, no obligation on Whitemountain to source its asphalt from Moyle:

> *"[T]he AEL application…was made by Moyle….This is a separate company to the notice party but is associated therewith. Notwithstanding this association, there is no obligation on Churchill…to source its asphalt from Moyle….It is accepted that Moyle is its preferred source of material, but in the event that the applicant is found to be correct, and the notice party could not source its material from that source, a different source could and would be found".*

(8) Has the application for interlocutory relief been approached by the court with due recognition for the essential flexibility of the remedy of injunctive relief and the fundamental objective of avoiding injustice?

22. Given the substance of the rest of the court's judgment, the court's answer to this question is 'yes'.

Conclusion

23. For the reasons stated above, the court declines to continue/renew the stay currently in place. The court will hear the parties on the issue of costs on such day as is convenient for them in the next week or two.