

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 735
Record No. 2020/481JR

BETWEEN:

LORRAINE COSTELLO

APPLICANT

-AND-

**THE MINISTER FOR AGRICULTURE, FOOD & THE MARINE
AND THE FORESTRY APPEALS COMMITTEE**

RESPONDENTS

Judgment of Mr. Justice Cian Ferriter delivered this 24th day of November 2021

Introduction

1. In these proceedings, the Applicant seeks to challenge by way of judicial review a Replanting Order made on 8th March, 2019 by the first named Respondent ("the Minister") pursuant to s.26 of the Forestry Act, 2014 ("the 2014 Act") and a separate decision of the second named Respondent ("the Forestry Appeals Committee" or "FAC") made on 16th April, 2020 upholding a decision of the Minister made on 20th February, 2019 revoking the Applicant's tree-felling licence. Both decisions are challenged on the essential ground that the Minister, in the case of the Replanting Order decision, and the FAC, in respect of the Applicant's appeal against the Minister's licence revocation decision, acted in breach of fair procedures.

Background

2. The material background to this case is as follows. The Applicant and her husband, James Costello, have a farm and land at Silvergrove, Kilbarry, County Cork. The Applicant submitted an application to the Minister for a General Felling Licence pursuant to s.49 Forestry Act, 1946 ("the 1946 Act") on 31st January, 2017, to permit her to fell trees on the land. The application was made in circumstances where an earlier felling licence was about to expire. The application was accompanied by a letter from the Applicant's consultant forester, Mr. Sean McGinnis of Ecoplan Forestry Limited ("Mr. McGinnis"), which stated:

"Trees requiring a licence will be selectively thinned, removing any poor quality stems as necessary without opening large gaps in the existing canopy. Tree [sic] to be removed will be chosen on a priority basis with non-native to be removed first, and natives set to remain with Oak, Ash and Holly considered as most important. Any diseased or cankered stems will also be removed if found. It is expected that the majority of stems to be removed will be Birch. Thinning intensity will be 30%."

3. As can be seen, it was asserted on the Applicant's behalf in support of the licence application that the "thinning intensity" would be 30%. It is common case that the licence was granted by the Minister on foot of that representation.
4. The licence granted by the Minister on 7th April, 2017 authorised:

"In accordance with paragraph (a) of sub-section (1) of [Section 49 of the Forestry Act, 1946], the uprooting or cutting down of trees in the woods specified in the

Second Schedule hereto on land owned by the Licensee in the ordinary course of thinning, in accordance with the practice of good forestry, that wood".

5. The licence was for a period of 5 years. As can be seen from its terms, the licence authorised the Applicant to thin woods. It was not a licence for the clear-felling of a wood. Furthermore, the thinning activity permitted under the licence was required to be carried out "*in accordance with the practice of good forestry*".
6. A covering letter, accompanying the Licence, was sent to the Applicant, also dated 7th April 2017, which informed the Applicant that she was obliged to adhere to the following instruction:

"The licensee shall ensure that all felling and planting operations are carried out in accordance with Forestry and Water Quality, Forest Biodiversity, Forest Harvesting and the Environment, Forestry and Archaeology, Forestry and the Landscape and Forestry and Aerial Fertilisation guidelines and the Code of Best Forest Practice – Ireland and the Irish National Forest Standard published by the Department."

Complaints, Inspections of site and interaction between the Costellos and the Minister's Department

7. The Applicant's husband, James Costello communicated on the Applicant's behalf at various stages in the interaction with the Minister's Department during the period in issue in these proceedings. Mr. Eugene Curran (a Forestry Inspector with the Department who was based with the Forest Service in Skibbereen, County Cork) says that he first met Mr. Costello on 13th October, 2017 after the Felling Section of the Department had received a number of complaints from a neighbour of the Costellos. (This is set out in a statement of evidence dated 26th February, 2019 which was part of the evidence before me in the judicial review.) Mr. Curran says that in a conversation with Mr. Costello, he told Mr. Costello that he felt enough trees had been felled. At that point, Mr. Curran says that all of the felling was north of the public road and that no work had taken place on the trees on the southern part of the road. Mr. Curran says that Mr. Costello told him he would like to clear some of the trees to facilitate cattle grazing in the area and that he (Mr. Curran) informed him that this was not compatible with the Felling Licence or the plan issued by Mr. McGinnis which indicated that woodland work was to facilitate natural regeneration.
8. Mr. Curran says that he inspected the site again on 14th September, 2018 with a Forest Service colleague, Mark Twomey, after receiving a number of complaints from the public. He says that he could "*clearly see more trees, including oak with fresh green leaves, had been felled and cleared. The land was being prepared for re-seeding with grass. At this stage, tree clearance had finished on the northern side of the road*". He says that he met Mr. Costello and "*cautioned him*" and explained that he was there due to further public complaints and on the instruction of the Felling Section of the Department. He also says that there was "*a chainsaw operator just starting work on the southern part of the road*" and that he cautioned that operator and the work ceased.

9. Shortly after this visit, Mr. Curran prepared a statement dated 18th September, 2018. In that statement Mr. Curran said as follows in relation to his inspection of the site on 14th September, 2018:

"On arrival, I met Mr. Costello and cautioned him and explained that there had been complaints. I also cautioned Mr. Wayne Delaney who was cutting trees at the time and requested that felling should cease until the Department had time to review the situation. I also cautioned Mr. Jerry O'Sullivan who was operating a Hymac and requested that no further damage to trees was to occur until the Department had reviewed the situation".

20th September 2018 Licence Suspension

10. On 20th September, 2018, a letter was written from the Felling Section of the Forest Service of the Department to the Applicant advising her as follows:

"As a result of a recent inspection of the above site, a number of issues have arisen.

In line with the management plan submitted by your forester, Mr. Sean McGinnis, which was the basis for issuing the Thinning Licence GFL20650, it states that any scrub on the ground or shrub layer not requiring a licence will be removed by Ms. Sheehan, this will scarify the ground and facilitate natural regeneration of the nature broad leaves. It stated trees would be removed without opening large gaps in the existing canopy. It also stated that native trees were said to remain with Oak, Ash and Holly considered most important.

The inspector noted that the detail set out in the management plan is not being adhered to. Large gaps in the canopy were clearly seen and also the removal of Oak trees from the site. The areas that were left clear to encourage natural regeneration appear to be reclaimed for grass.

You must immediately cease and desist from any further felling at the above lands while this matter is being reviewed by the Department of Agriculture, Food & Marine.

The Department will be in touch with you in due course".

11. This letter was responded to by a letter dated 27th September, 2018 from Mr. McGinnis. He made representations on the Applicant's behalf to the effect that there was no valid reason for a suspension of the licence and demanding that the suspension "be lifted immediately". Among the complaints contained in that letter was an allegation that the Applicant had been "denied fair treatment and due process". This letter concluded as follows:

"If Lorraine Costello does not receive confirmation, in writing, of this [i.e. a lifting of the suspension], by 05/10/18, a solicitor's letter will be sent directly to the Minister

holding the Department responsible for the considerable expense, mental anguish, and damage to her reputation”.

12. The Forest Service replied to Mr. McGinnis by letter of 1st October, 2018 reaffirming that the licence suspension remained in place *“pending the submission of a management plan as outlined in our letter to Ms. Costello on 27th September, 2018. Under Section 7(2) of the Forestry Act, 2014, a tree felling licence may be suspended where there are substantial grounds warranting that course of action”*. The letter also referenced the management plan submitted with the licence application and pointed out that *“the area which has been cleared with the stated intention to ‘facilitate natural regeneration of the native broad leaves’ now appears to have been reclaimed for agricultural use. This is a substantial change to what was proposed at licensing stage”*.
13. In the early hours of 2nd October, 2018, Mr Costello e-mailed the then Minister for Agriculture (Minister Tom Creed) by way of apparent follow-up to a phone conversation with the Minister earlier that day. This e-mail (which was signed *“James and Lorraine Costello”*) called upon Minister Creed for help on the basis that neighbours had suggested they contact him directly as he was *“the Minister in charge of this department and a local man”*.
14. This e-mail alleged that the Costellos were being harassed by the Department’s Inspectors. Mr. Costello followed up with a further e-mail to Minister Creed later on in the evening of 2nd October, 2018 again making allegations that the Inspector who had suspended the licence had acted unfairly.

30th October 2018 – Licence Suspension Lifted

15. It appears that John Redmond of the Forest Service reviewed the file at this point and spoke to both Mr. Costello and Mr. McGinnis in the weeks that followed. In an e-mail to colleagues in the Department, Mr. Redmond stated as follows:-

“The felling licence that was issued for this site contain no conditions. As there were no conditions attached, there is currently no breach so I don’t think there are substantive grounds to hold the suspension in this case. I recommend that the suspension that is currently in place on [the Applicant’s licence] is lifted”.

16. A letter was sent to the Applicant by the Forest Service to that effect on 30th October, 2018 stating that:

“Following a review and discussions in relation to this matter, the suspension on [the Applicant’s licence] has been lifted and works can resume.

John Redmond plans to visit the site during the week commencing the 19th Nov 2018 and would like to meet you to discuss any outstanding works that are to be completed. He will contact you directly closer the time to discuss a day and time that is suitable for you”.

17. It appears that attempts were made by Mr. Redmond to arrange to meet with Mr. Costello and Mr. McGinnis in December 2018 but that did not prove possible given prior commitments. An e-mail exchange between Mr. Costello and Mr. Redmond of 11th December was left on the basis that a meeting would take place in the New Year.

A further licence suspension – 9th January 2019

18. On 9th January, 2019, the Forestry Division wrote to the Applicant notifying her that her licence *"has been suspended with immediate effect"* and informing her that *"all felling/forestry operations must cease"*. The letter stated that *"the Department has received numerous reports regarding what may be non-compliant felling of lands at Silvergrove"* and stated that *"Department officials will visit the lands today and investigate these reports"*.
19. It appears that around this time concerns were also expressed by other divisions of the Department of Agriculture and by the National Parks & Wildlife Service ("NPWS").
20. On the same day, 9th January, 2019, two inspectors from the Department visited the site, being Brian Mahoney and Eugene Curran. On the basis of this inspection, the inspectors formed the view (set out in an internal report of Mr Mahoney of 11th January, 2019) that *"well in excess of 80% of the trees"* on the site had been felled which they believed was *"massively in excess of the proposed 30% selective thinning stated by Mr. McGinnis in his letter of 31 January, 2017 accompanying the licence application"*.
21. It appears from the papers exhibited to the affidavit of Ann Cunningham (an official in the Department's Forestry Division) (at pages 33 to 37 of Exhibit AC1) that Mr. McGinnis posted a blog online on 14th January, 2019 (headed *"Forest operations in Silvergrove, County Cork"*) which made reference, in the context of commentary on the first licence suspension and the inspection conducted by Department inspectors on 14th September 2018, to the *"statement of evidence"* of the inspector. This would appear to be a statement of evidence of Eugene Curran of 14th September, 2018 which was apparently in the possession of the Applicant and her advisor at this time.
22. The Applicant e-mailed Ann Cunningham on 16th January, 2019 (copying the e-mail to, amongst others, Minister Creed) asking for the suspension to be lifted immediately.
23. On 17th January, 2019, Mr. McGinnis e-mailed Frank Barrett of the Department (copying James Costello) by way of follow-up to a discussion which Mr. McGinnis and Ms. Costello had had with Mr. Barrett the previous day (16th January). This e-mail referenced Mr. Barrett saying during the course of the previous day's call that an *"investigation was ongoing"*. Mr. McGinnis in his e-mail asked *"what exactly are you investigating? What is Lorraine being accused of?"*. The e-mail referenced a *"DAFM Farmer's Charter of Rights"* which, according to Mr. McGinnis, stated that farmers *"will be presented with a preliminary inspection report which will include preliminary notice of findings"* and sought a copy of any such preliminary inspection report.

24. The e-mail went on to state that *"there is certainly a distinct feeling that [Forestry Service of the Department] are aiding and abetting a campaign against Lorraine Costello. She has been attacked, bullied, harassed, often with ammunition (claimed) to be from the FS [i.e. the Forestry Service]. Lorraine wants answers to the above, and the results of the "investigation" as soon as possible, to reassure her that FS are acting objectively and fairly. She is eager to complete the works at Silvergrove, restore her reputation, and prove she has done nothing wrong"*. Mr. McGinnis's email concluded with the following sentence:

"Entrapment: the action of luring an individual into committing a crime in order to prosecute the person for it".

25. On 18th January, 2019, Mr. McGinnis e-mailed Frank Barrett calling for a decision and stating *"either the Forestry Service thinks there was a breach [of the licence] or not"*.
26. There were further communications on 28th and 29th January, 2019, including a call between Mr. Barrett and James Costello. In an internal departmental e-mail from Mr. Barrett to a colleague in the Department on 29th January, Mr. Barrett summarised a call he had had with Mr. Costello in which Mr. Barrett stated that he *"restated to Mr. Costello that the Department was carrying out an investigation on whether there was a breach of the felling licence issued"* and that he had stated to Mr. Costello *"that the investigation would determine whether there was a breach of the licence"*.
27. On 28th January, 2019, the Applicant made a Freedom of Information Act ("FOI") request to the Department. This was responded to by the Department on 8th February, 2019, enclosing a series of documents. (It appears that the Applicant appealed against that FOI request on 15th February, 2019 and on 7th March, 2019, her appeal against the FOI request decision was refused.)
28. On 30th January, 2019, Claire Greehy sent an e-mail to the Department on behalf of the Costellos stating that she acted *"as the agricultural advisor for Lorraine and James Costello"* and calling for the *"clear reason as to why there is a suspension on the licence as well as a reason as to why it is taking so long to get any answers to queries being put to the Forest Service about this"*.
29. On 13th February, 2019, Mr McGinnis emailed Mr Barrett of the Department making a submission in respect of the allegations made and issues raised in the complaints receive by the Department.
30. On 15th February, 2019, Mr. Brian Mahoney and Mr. Luke Heffernan of the Minister's Forest Service conducted a further site inspection. As a result of this inspection, Mr. Mahoney concluded that several areas of the woodland covered by the licence had been *"seriously damaged"* as they had been clear-felled and the land re-seeded with agricultural grass. On the basis of these inspections and findings, Mr. Mahoney recommended that the licence would be revoked and a Replanting Order issued.

31. Mr. Mahoney prepared an internal report and statement of evidence on 19th February, 2019 containing findings to the effect that the felling was in breach of the licence and making various recommendations, including recommendations that a Replanting Order be issued and that the “*licence should be terminated due to failures to adhere to the required guidelines*”.

Licence Revocation – 20th February 2019

32. On 20th February, 2019, acting on the Inspector’s recommendation, the Minister (acting through Ms. Ann Cunningham) revoked the licence pursuant to s.7(2) of the 2014 Act.
33. The Minister’s decision (and the reasons for it) were communicated to the Applicant by letter of 20th February, 2019 which read as follows:

I refer to the above mentioned felling licence and to the licence suspension letter dated 9th January, 2019.

The Department has finalised its investigation into the tree felling operations Silvergrove. On the basis of the investigation this Department has concluded that the tree felling within the area licenced for thinning under GFL20650 is not compliant with Section 49(1)(a) of the Forestry Act 1946.

The extent of tree removal that has occurred, while exercising this thinning licence, is excessive and not in accordance with the general practice of good forestry as stated in Section 49(1)(a) of the Forestry Act 1946 and which was specified in the licence GFL20650. Therefore, under Section 7(2)(b) of the Forestry Act 2014, this Department hereby revokes GFL20650.

If you wish to appeal this decision, you may do so in writing within 28 days of the date of this letter. Section 7(3) of the Forestry Act 2014 provides a basis to appeal against the decision to revoke the licence. Your appeal must be made in writing and addressed to the Forestry Appeals Committee (FAC), Agriculture Appeals Office, Kilminchy Court, Portlaoise, Co. Laois. The appeal must set out the grounds on which you intend to rely and include any supporting documentation. Please see the FAC website for further information on the appeals process; www.agriappeals.gov.ie.

The revocation of the above felling licence is without prejudice to any further action that may be taken by the Minister for Agriculture, Food and Marine.”

34. As can be seen, that letter advised the Applicant of her statutory entitlement under s.7(3) of the 2014 Act to appeal the licence revocation decision to the FAC.
35. Following the revocation of the licence, the Applicant made a further FOI request to the Department on 22nd February, 2019 on foot of which additional documentation was provided to her on 28th February, 2019, including the statement of Mr Mahoney of 19th February, 2019 recommending, *inter alia*, the making of the Replanting Order.

Replanting Order – 8th March 2019

36. On 8th March, 2019, Jade McManus of the Forest Service of the Department wrote to the Applicant notifying her of the issuing by the Minister of a Replanting Order to the Applicant pursuant to s.26(1)(c) of the 2014 Act, which required the replanting of certain lands in the manner set out in the Replanting Order.

37. The letter of 8th March, 2019 stated as follows:

"The extent of tree removal that has occurred, while exercising this thinning licence, is excessive and not in accordance with the general practice of good forestry pursuant to Section 49(1)(a) of the Forestry Act, 1946 and was specified in the licence GFL20650. These works have seriously damaged the forest area.

Due to the serious damage caused to the forest area, a Replanting Order is hereby issued (pursuant to Section 26(1)(c) of the Forestry Act, 2014) requiring you to replant forest areas by 30th June, 2020. The purpose of this Replanting Order is to address the damage to the forest, through the imposition of measures aimed at rejuvenating the forest.

Please be advised that failure to comply with this Replanting Order is an offence under Section 26(6) of the Forestry Act, 2014 which provides that

An owner who fails to comply with a replanting order shall be guilty of an offence and be liable-

(a) on summary conviction, to a class D fine, or

(b) on conviction on indictment, to a fine not exceeding €5,000, for every period of 30 days during which such failure continues.

Furthermore, section 26(5) of the Forestry Act 2014 provides that:

[W]here a replanting order is served on any person or company its provisions shall be binding on that person or company and on his or her successors in title to the land concerned.

Please inform the undersigned when the planting works specified in the attached Replanting Order have been completed. The site will be inspected to ensure compliance with the Replanting Order."

38. It might be noted at this juncture that the Replanting Order was made on the basis of s.26(1)(c) of the 2014 Act, i.e. that the Minister was of the opinion that there had been "serious damage" to specified woodlands, as opposed to under s.26(1)(b) (which permits the making of a Replanting Order where trees have been felled under a licence where a condition of the licence has been contravened). Accordingly, the Replanting Order was not, in terms of legal basis, linked to the revocation of the Applicant's licence.

Applicant Lodges appeal with FAC – 20th March 2019

39. On 20 March, 2019, the Applicant appealed the revocation decision to the FAC by delivering a Notice of Appeal form to the FAC. The Applicant also sought to have the Replanting Order rescinded as part of that appeal, although as we shall see the FAC wrote to her in July 2019 making clear that it had no jurisdiction to deal with an appeal against the Replanting Order.

The FAC Appeal proceedings

40. Following the Applicant filing her appeal notice against the Licence Revocation Decision, the following steps occurred in the course of the appeal proceedings:
- (i) The Applicant was provided by letter dated 21st March, 2019, with the FAC Appeals Procedure document. That letter also expressly informed the Applicant that the FAC had requested a statement and the relevant file from the Department.
 - (ii) On 24th April, 2019, the FAC provided the Applicant with the Department's response to the appeal, which was comprised of a Forestry Division Statement to the FAC and the two statements of Brian Mahoney and Eugene Curran.
 - (iii) The FAC received, on 4th February, 2020, unsolicited, further documents from the Forestry Service being an environmental damage assessment report prepared by NPWS and an EPA document which assessed the potential breach of environmental liability regulations. These were forwarded to the Applicant on 6th February 2020 and the FAC offered the Applicant an adjournment of the oral hearing scheduled for 11th February, 2020, if she so wished, to allow her additional time to consider the NPWS and EPA documents. The Applicant replied to say that having discussed the matter with Mr McGinnis she wished to proceed with the oral hearing as scheduled for 11th February, 2019 and that she would deal with the new information at the oral hearing.
 - (iv) The oral hearing took place on 11th February, 2020.
 - (v) A detailed 9 page written decision was handed down by the FAC on 16th April, 2020, in which the FAC upheld the revocation of the licence.
41. As noted above, the Applicant in her appeal notice to the FAC of 21st March 2019 also sought to challenge the making of the Replanting Order. She followed up with a letter of 4th July, 2019 inquiring as to whether the licence revocation and the replanting order could be cancelled straight away. The FAC acknowledged this letter on 15th July, 2019 and then by letter dated 17th July, 2019, the FAC wrote to the Applicant in the following terms:

"Further to our letter dated 15th July 2019, I wish to advise that your FAC appeal FAC053/2019 is against the Department of Agriculture, Food and The Marine's (DAFM) decision to revoke licence GFL20650, and does not apply to the replanting order issued by DAFM.

I have been advised that the DAFM will issue a reply to your correspondence dated 8th July 2019”.

42. I will return below to the significance attached by the Minister to the terms of this letter in the context of the Minister’s contention that the Applicant is wholly out of time with her application for an Order of *Certiorari* quashing the Replanting Order.

These Judicial Review Proceedings

43. The Applicant was granted leave to apply for judicial review on 16th July, 2020. Among the reliefs she was granted leave to apply for were an Order prohibiting the Minister from prosecuting the Applicant in respect of any or any purported failure on the part of the Applicant to comply with the Replanting Order.
44. I was told at the judicial review hearing (in October 2021) that, in fact, the Minister had instituted criminal proceedings in August 2021 against the Applicant for alleged breach of the terms of the Replanting Order and that these proceedings stood adjourned in the District Court. While counsel for the Applicant reserved his client’s position as regards any potential application to this Court relating to that prosecution, counsel on behalf of the Respondents helpfully indicated that he did not anticipate that the Minister would take further steps in the prosecution pending this Court delivering Judgment on the Applicant’s judicial review challenge to the Replanting Order and the FAC Decision.
45. Insofar as complaint was sought to be made on behalf of the Applicant that she did not receive sworn affidavits until shortly before the judicial review hearing, I do not believe there is any substance in this complaint insofar as the Applicant was furnished with draft affidavits (in materially equivalent terms to the sworn versions) many months before the judicial review hearing and had ample opportunity to consider those with her legal advisors in advance of the hearing. The Applicant did not file any further affidavit in response to the Respondents’ affidavits.

The Applicant’s challenge to the conduct of the FAC hearings

46. I propose firstly to deal with the Applicant’s case against the FAC.
47. The Applicant’s case centres on an alleged unlawfulness arising from the fact that the FAC requested the Minister’s file, at the outset of the appeal process, and an allegation that the FAC did not furnish that file to the Applicant (as Appellant) in advance of the oral hearing.

The parties’ submissions on the FAC issue

48. The Applicant contends that it was a fundamental breach of fair procedures for a statutory body invested with the responsibility of conducting a fair and impartial hearing to seek and receive this file without informing the Applicant of same or otherwise giving the Applicant an opportunity to make submissions as to whether it was appropriate for the FAC to be furnished with the file. Further, the Applicant contends that the FAC should have corresponded with the Applicant and the Respondents to the appeal as to the implications of the FAC having this file in its possession and as to whether or not the file should be furnished to the Applicant in advance of the appeal hearing.

49. The Applicant relies in support of its position on authorities such as *State (Murphy) v Kieilty* [1984] IR 458, *Georgopoulos v. Beaumont Hospital Board* [1998] 3 IR 132 and *Cassidy v. Shannon Castle Banquets & Heritage Limited* [1999] IEHC 245 which encapsulate the well-established principle of *audi alteram partem* that a decision-maker should not rely on material to ground a decision where the subject of the decision has not been furnished with their material or had an opportunity to consider same.
50. In response, the FAC submits that the extent to which there was any breach of fair procedures arising from the FAC's handling of the Departmental file must be assessed in context. In this regard, the FAC relies on the following matters.
51. Firstly, the Applicant had been notified at the very outset of the appeal process of the fact that the FAC had sought the Department's file. As noted earlier in this judgment, by letter of 21st March, 2019, the Forestry Appeals Committee wrote to the Applicant acknowledging receipt of her "*appeal against a forestry licence decision*", received on 20th March, 2019. The letter advised the Applicant to "*please read the enclosed FAC appeal procedures document which includes information on the FAC appeals process and oral hearings*". The letter then stated:
- "This Office has requested a statement and the relevant file from the Department of Agriculture, Food & The Marine. We will return to you once this documentation has been received and the Committee is ready to progress with the appeal".*
52. Secondly, the FAC rely on the fact that the Departmental file had, in fact, been provided to the Applicant in response to her FOI requests long before the appeal came on for hearing. The FAC says it was clear to it from the face of the file that the Applicant was in possession of all relevant documents from the file in circumstances where documentation was provided to her by the Department on foot of two freedom of information requests (affidavit of Ruth Kinehan of the FAC, paragraph 37). While the Applicant complained in reply that this was no substitute for disclosure from the FAC itself and that the FOI documentation was heavily redacted, no evidence was put before the Court by way of affidavit by or on behalf of the Applicant to demonstrate what material from the Departmental file received by way of FOI she was not able to comprehend or identify as a result of redaction. Accordingly, the FAC maintain that the Applicant was at no loss whatsoever from not being formally furnished with the Departmental file as received by the FAC from the Department.
53. Thirdly, the FAC point out that the Applicant was in fact furnished with material considered to be relevant by the FAC pursuant to the regulations then governing the conduct of FAC appeals. The FAC has confirmed on affidavit that the Applicant was provided with or in possession of all of the information on which it relied in making its decision (affidavit of Ruth Kinehan, paragraph 35). The FAC says it furnished the relevant material to the Applicant well in advance of the appeal hearing before the FAC and no issue was raised by or on behalf of the Applicant as to the adequacy of that documentation.

54. Finally, the FAC contends that the Applicant never made any complaint either before or during the course of the FAC appeal hearing as to any inadequacy in the documentation. The Applicant did not express any concern about the fairness of the oral hearing or suggest that she was being taken by surprise by any documentation that was produced or relied upon by the Minister in the course of the oral hearing. Indeed, as set out earlier, when the Applicant was furnished with additional material by the FAC a number of days before the appeal hearing, she was offered an adjournment to facilitate her consideration of that material and she declined that offer. Accordingly, it was submitted on behalf of the Respondents that the Applicant never identified any prejudice or handicap to her arising from the alleged failure by the FAC to furnish her with the full Departmental file.

Discussion

55. I accept the Respondents' submission that any evaluation of a complaint of breach of fair procedures through provision of relevant documentation must occur in a fact-sensitive context: see Supreme Court decision in *Crayden Fishing v Sea Fisheries Protection Authority* [2017] 3 IR 785 at 806 (O'Donnell J., as he then was). The reality here is that the Applicant was in possession of the Departmental file prior to the FAC appeal process commencing. She was represented at all times by an expert forester advisor (including at the hearing of the appeal) and never at any point either prior to the oral hearing or at the oral hearing itself complained that she was disadvantaged through the absence of any relevant documentation. Furthermore, no issue is sought to be taken by the Applicant with the detailed written decision of the FAC; for example, it is not contended on behalf of the Applicant that the FAC relied in arriving at its decision on documentation from this file which she did not have and ought to have been furnished with.

56. The point is well made by counsel on behalf of the Respondents that the line of authority relied upon by counsel for the Applicant is readily distinguishable on the basis that in each of those cases, documentation or material that was centrally relied upon by the relevant decision-maker was not furnished to the subject of the decision in advance of the decision being made with the result that the subject of the decision had no meaningful opportunity to address that material before the decision-maker made its decision. The facts here are radically different; the Applicant in fact had all relevant material before her at the time of the appeal hearing. There is no simply question of any "ambush" of the Applicant or any other unfairness by the FAC as regards disclosure of relevant documentation.

57. Accordingly, I am satisfied that there was no breach of fair procedures on the facts of this case as regards the FAC's handling of the question of the Departmental file.

Appeal on point of law?

58. The FAC advanced an alternative submission, to the effect that the Applicant was disentitled to relief in any event because she had failed to exercise her statutory right of appeal from the decision of the FAC to the High Court on a point of law.

59. Counsel for the Respondents relied in this regard on the recent decision of Murray J. in the *Court of Appeal in Chubb European Group v. HIA* [2020] IECA 91 ("*Chubb*").

60. The point was made that arising from the terms of the decision in Chubb, a judicial review-type complaint as to lack of fair procedures can be encompassed in an appeal on a point of law to the High Court and that that was the appropriate route for the Applicant's case here.
61. In light of my finding on the substantive point raised by the Applicant that there was in fact no breach of fair procedures in the FAC appeal process, I do not see the need to address this point. In particular, I would prefer greater argument on the question of whether the existence of an appeal to the High Court on a point of law from a decision of a statutory body such as the FAC would suffice to preclude an applicant seeking to advance a point as to breach of fair procedures by way of judicial review where the applicant is also seeking to advance separate judicial review grounds against a related decision, which arises from the same factual matrix, but in respect of which there is neither a statutory appeal nor any further recourse to the High Court on a point of law. This type of scenario might well constitute "an exigency in the interests of justice" contemplated by the relevant case law such as to justify an applicant seeking to challenge both related decisions in one judicial review proceeding.

The Applicant's Challenge to the Replanting Order

Objection to relief sought on grounds of delay

62. The Applicant moved her application for leave to challenge the Replanting Order of 8th March 2019 just over 16 months later, on 16th July 2020. Order 84 requires that such leave application be brought within 3 months, i.e. on or before 8th June 2019 in this case. The Minister contends that the Applicant is debarred from relief on the basis that she is hopelessly out of time and has not satisfied the requirements of Order 84, Rule 21(3).
63. Order 84 Rule 21(3) provides as follows:
- "Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:*
- (a) *There is good and sufficient reason for doing so, and*
- (b) *The circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:*
- (i) *were outside the control of, or*
- (ii) *could not reasonably have been anticipated by the applicant for such extension"*

64. It is clear from the Supreme Court decision in *OS (M) v. Residential Institutions Redress Board* [2018] IESC 61 ("OSM") that the onus is on the Applicant to demonstrate that she satisfies the requirements of O.84, r.21(3), i.e. that there is "good and sufficient reason" for the Court extending the period in which an application for leave to apply for judicial review may be made *and* that the circumstances that resulted in the failure to make the application for leave within the period specified in O.84, r.21(1) (i.e. 3 months from 8th

March, 2019 in respect of the Replanting Order) were either outside the control of the Applicant or could not reasonably have been anticipated by the Applicant.

65. O.84, r.21(4) provides that *"in considering whether good and sufficient reason exists for the purposes of sub-rule (3), the Court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party"*.
66. O.84, r.21(5) obliges an applicant for an extension of time to swear an affidavit setting out the reasons for the applicant's failure to make the application within time and to verify any facts relied upon in support of those reasons. Counsel for the Applicant relies on the *dictum* of Finlay Geoghegan J. in OSM (at paragraph 40) to the effect that where a refusal to grant relief sought by way of judicial review on the grounds of a failure to comply with O.84, r.21(3) arises at the full substantive hearing (as opposed to the *ex parte* leave stage) an applicant *"has had full access to the Courts and a consideration of his substantive claim"* in which case the question of prejudice to the respondent or third party also comes into play.
67. The Respondents contended that prejudice would be suffered in the event that an extension of time was granted, being the delayed regeneration of the woodland improperly felled in an important woodland and the damage to the certainty and good order of the finality of the Minister's decisions in relation to environmental matters.
68. As Finlay Geoghegan J. made clear in OSM (at paragraph 72), the onus is on the applicant to give reasons which explain the delay and which satisfy the Court as being a justifiable excuse.
69. The Applicant's averments as to the reasons for her delay are worth setting out in full. In her affidavit of 14th July, 2020, which was the only affidavit sworn by her in these proceedings, the Applicant averred as follows:

[45]. *I accept that there has been a delay in bringing proceedings to challenge the Replanting Order. By way of explanation for this delay, I say and believe and pray this Honourable Court to accept that I wanted to defer any decision concerning the Replanting Order until such time as the Forestry Appeals Committee had ruled on my appeal.*

[46]. *I say that the decision to revoke the licence and the decision to make the Replanting Order, while they were made under different provisions of the Forestry Act, 2014, appeared and from the information I had that they were directly connected to each other.*

[47]. *I say and pray this Honourable Court to accept that the said decisions, whilst in a sense separate and discrete, appear to both have been based on the aforementioned Statement of Evidence, the recommendations and/or conclusions as per the statement of Mr. Mahoney as hereinbefore deposed to.*

[48] *In the particular circumstances, I genuinely believed that it would have been wrong of me to move to challenge the Replanting Order in circumstances where I had an appeal pending before the Forestry Appeals Committee and where that appeal concerned in substance issues which, if decided in my favour, were likely to have had a significant bearing on the Respondent Minister's decision to grant a Replanting Order.*

[49] *In the circumstances I felt that it would have been wrong of me and in a sense premature for me to move to challenge the Replanting Order until such time as I had received the decision of the Forestry Appeals Committee following my appeal.*

[50] *Further, I say and believe and pray this Honourable Court to accept that my Agent, Mr. McGinnis, acting in good faith, sought and by way of appeal to the Forestry Appeals Committee to challenge the Respondent Minister's decision to make a Replanting Order against me. I say and believe and as appears from the documentation as submitted by Mr. McGinnis to the Forestry Appeals Committee to rescind the Replanting Order. I say and believe and pray this Honourable Court to accept that Mr. McGinnis did so in good faith and because and in the circumstances this presented as the only potential and/or available means by which the said Order could be challenged. I say and believe and pray this Honourable Court to accept that the relevant legislation does not, it seems, provide any formal or informal structure whereby persons such as myself who is aggrieved at the making of a Replanting Order, can appeal such decision.*

[51] *I say and believe and pray this Honourable Court to accept that your Deponent did not know until the Forestry Appeals Committee gave its decision on 16th April 2020 and wherein the Forestry Appeals Committee declined to deal with your Deponent's challenge to the making of the Replanting Order that I did not have available to me any means and/or mechanism, be it formal or informal, by which I could take issue with and/or challenge the said Replanting Order."*

70. I am prepared to accept that the Applicant made out good and sufficient reasons to excuse not applying for leave to apply for judicial review before 17th July, 2019, being the date of the letter from the FAC which made clear in plain language to the Applicant (who was also being advised by an expert forester at the time) that the FAC was not dealing with an appeal against or challenge to the Replanting Order. On a benign view of the facts that obtained in July 2019, given that it does not appear that the Applicant in fact accessed legal advice up to that point (although Mr McGinnis had threatened a solicitor's letter on her behalf in September 2018, as set out earlier in this judgment), I am prepared to accept that the circumstances that resulted in the failure to make the application for leave before July 2019 were outside the control or could not reasonably have been anticipated by the Applicant in that she may have reasonably thought, as a lay person who did not apparently at that point have the benefit of legal advice, that the decision to revoke the licence and the Replanting Order were sufficiently linked for her to be able to agitate her case against both before the FAC.

71. However, I am driven by the terms of O.84, r.21(3), and the case law that considers that provision (including, in particular, the Supreme Court decision in OSM), to conclude that the Applicant has not discharged the onus on her of demonstrating that there was good and sufficient reason for her not bringing a separate judicial review challenge to the Replanting Order once it had been made very clear to her on 17th July, 2019 by the FAC in its letter of that date that her challenge to the Replanting Order was not going to be dealt with by the FAC.
72. There is no affidavit evidence from the Applicant (or Mr McGinnis) as to why she was not in a position to understand the plain and clear terms of the FAC's letter of 17th July 2019 i.e. that the FAC was not dealing with a challenge to the Replanting Order. There is no suggestion that the Applicant was impecunious or was not otherwise in a position to take legal advice at that point. Notwithstanding the Respondents making it very clear in their opposition papers that they were seeking to take a point on the failure of the Applicant to satisfy the requirements for an extension of time, no further affidavit evidence was put in by the Applicant to seek to bring herself within the terms of O.84, r.21(3) for the 12 month period between July 2019 and July 2020.
73. I should also say that the Applicant, as with all applicants for leave to apply for judicial review, was under an obligation to place all relevant material before the Court. The Applicant should have brought the Court's attention, in her grounding affidavit, to the 17th July, 2019 letter which was, on any view, very material to the question of the Court's discretion under O.84, r.21(3) to consider an extension of time. It is difficult to see how the Applicant could have averred as she did at paragraph 51 of her affidavit (set out above) in light of this letter.

Alleged Lack of Candour

74. The Respondents have urged me to take the view that the Applicant has been guilty of a lack of candour in her affidavit grounding her application for judicial review. While I have no reason to doubt the *bona fides* of the Applicant, it suffices to say that the Applicant should have put all relevant facts before the Court, in particular the fact and contents of the 17th July, 2019 letter from FAC and also the fact that the Applicant had received extensive material from the Department *via* FOI requests. That material could and should have been put before the Court without prejudice to the Applicant's position that the uncovering by her of material and information *via* FOI requests was no substitute, on her case, for the Respondents' obligations to have furnished such material to her. The judicial review process, typically involving as it does *ex parte* applications for leave to the High Court, depends for its effective operation on applicants discharging their duty of *uberrimae fides* and making full and appropriate disclosure of all material facts, including those facts which may go to undermine the relief they seek. That duty was not discharged in this case.

Breach of Fair Procedures in relation to Replanting Order?

75. In case I am wrong on the extension of time application, I set out my views on the substantive grounds of complaint levelled by the Applicant as to the alleged want of fair procedures in the making of the Replanting Order.

76. The Replanting Order was made by the Minister pursuant to s.26(1)(c) of the 2014 Act. Section 26 (1) permits the issuing of replanting orders in three scenarios:

"26(1)Where trees have been –

(a) *Felled or otherwise removed without a licence under section 7,*

(b) *Felled under a licence and, either at the time of such felling or subsequently, a condition of the licence is contravened, or*

(c) *In the opinion of the Minister, seriously damaged,"*

77. As we have seen, the Minister relied on the third ground above i.e. that in the Minister's opinion pursuant to S.26(1)(c) trees had been seriously damaged. As noted above, this is a distinct and separate jurisdiction from the jurisdiction at s.26(1)(b) to issue a Replanting Order where a licence has been contravened.

78. The first ground of challenge of the Applicant to the lawfulness of the Replanting Order is that the Minister is alleged to have failed to have regard to the fact that Mr. Brian Mahoney in his statement and report of 19th February, 2019 in which he recommended, *inter alia*, that the Minister make a Replanting Order, did not to have regard to the fact that the licence had been suspended in September 2018 but reinstated on 30th October, 2018.

79. This submission fails to get off the ground in circumstances where Ann Cunningham, the official in the Minister's Department who made the Replanting Order, has averred that she did, in fact, have regard to the September 2018 suspension of its licence and its reinstatement in October 2018, before deciding to make the Replanting Order.

80. The more fundamental ground of challenge to the lawfulness of the Replanting Order is the contention that the Minister failed to allow the Applicant to make her case against a proposed Replanting Order, or to allow for a challenge to same once made (e.g. by appeal). As the Applicant's written submissions pithily put it:

"The Applicant has not been afforded any opportunity to be heard on and/or to present her case against the making of the Order, whether prior to its being made or subsequently".

81. This, it was submitted, stood in stark contrast to the position that obtains when a Minister issues a decision to revoke a licence, where there is a statutory right of appeal; there is no statutory right of appeal of any form against the making of a Replanting Order.

82. In support of her contention that the Minister acted unlawfully in respect of the Replanting Order, the Applicant relies on a well-known line of authority including *State (Hoolahan) v. Minister for Social Welfare* [1986] IEHC 41, and *Hourigan v. Kelly* (unreported, High Court, Egan J., 26 April, 1991), a firearms certificate revocation challenge. Counsel for the Applicant emphasises the *dictum* of Egan J. in that latter case that:

"Even though there is no provision for a hearing, an opportunity should have been given on the principle of audi alteram partem which would have permitted the Applicant to reply to the matters alleged against him".

83. The Applicant further relies on dicta of McCarthy J. in *State (Irish Pharmaceutical Union) v. EAT* [1987] ILRM 36 to similar effect, i.e.:

"the fundamental requirement of justice that a person or property should not be at risk without the party charged being given an adequate opportunity of meeting the claim as identified and pursued. If the proceeding derived from statute, in the absence of any set or fixed procedures, the relevant statutory authority must create and carry out the necessary procedures."

84. These *dicta* encapsulate the well-established principles of *audi alteram partem* to the effect that the subject matter of a decision with potentially significant adverse consequences must be notified of the nature of the case against him, to allow him to prepare a defence and be given sufficient time to prepare that defence and an opportunity to make that defence before the decision-maker. The scope of the procedures to be afforded will be influenced by the availability of an alternative mechanism to protect the interests of the affected party (such as, e.g., an appeal).
85. The Minister seeks to make the case here that the Applicant was fully aware of the Department's concerns and must be taken to have known that a consequence of non-compliance with the conditions of her tree felling licence was a potential Replanting Order. However, as we have seen, the Replanting Order here was not based on revocation of the licence but rather the separate statutory ground of serious damage to trees.
86. A Replanting Order is one (as exemplified by the facts here) that can entail significant financial consequences for the subject of the Order. Failure to comply with the terms of a Replanting Order can ground criminal proceedings (such criminal proceedings in fact having been instituted by the Minister in this case). Where the Minister believes that there is a basis for the making of a Replanting Order and intends to make such an order, in my view fair procedures require the Minister to give the subject of the intended Replanting Order an opportunity to make submissions on the intended Replanting Order before it is made.
87. The Minister submits that the Applicant was, as a result of the furnishing of same pursuant to an FOI request, in fact in possession of Mr. Mahoney's internal statement and report (which recommended the making of a Replanting Order) prior to the Order being made on 26th March, 2019 and that there was no want of fair procedures when looking at the process as a whole.
88. While any unfairness that might otherwise have flowed from the Minister's failure to notify an intention to make a Replanting Order is ameliorated in this case by the fact that, as it happened, the Applicant was aware shortly in advance of the decision, through the provision of Mr. Mahoney's internal statement and report on a FOI request, that the

making of a Replanting Order against the Applicant had been recommended to the Minister, I do not believe that it will always be a good answer for a statutory decision-maker making a decision against which there is no right of appeal (whether under statute or otherwise) to say, in answer to a claim that a decision was made without notice to an applicant and without the applicant having an opportunity to address the potential making of that decision, that the Applicant can get the relevant pre-decision material through FOI. It cannot place an undue burden on the Minister when contemplating the making of a Replanting Order to provide notice of the proposed decision to the subject matter of the decision and to give that person an opportunity to make submissions in relation to same.

89. In that context, I will briefly address one further argument of the Minister, based on the fact that s.17(4) of the 2014 Act allows the Minister to amend a Replanting Order. I do not see that it is an answer to an allegation that there has been a breach of fair procedures by, e.g., the Minister failing to bring to the attention of a party that she had grounds for believing that there was serious damage to trees and that she was contemplating making a Replanting Order, to say that a Replanting Order can be amended subsequent to its grant; the subject of a Replanting Order should, in general, be made aware of the basis of an intended Replanting Order and be given an opportunity to address the substance of same in advance of an Order being made, particularly given the immediate consequences for the addressee of a Replanting Order in terms of complying (or indeed, failing to comply) with same.

Conclusion

90. In the circumstances, the Court refuses the relief sought by the Applicant.