Neutral Citation: [2016] IEHC 9

THE HIGH COURT

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 – 2011 AND IN THE MATTER OF AN APPLICATION OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

[2013 No.218 M.C.A.]

BETWEEN

MICHAEL MCCOY AND SOUTH DUBLIN COUNTY COUNCIL

APPLICANTS

AND

SHILLELAGH QUARRIES LIMITED, JOHN MURPHY, DECLAN MURPHY, THOMAS MURPHY, SANDRA MURPHY AND (BY ORDER OF THE COURT) MICHAEL MURPHY

RESPONDENTS

AND

JOAN MURPHY

NOTICE PARTY

SUBSTANTIVE JUDGMENT of Ms. Justice Baker delivered on the 16th day of October, 2015

1. The first applicant brings these proceedings pursuant to s. 160 of the Planning and Development Act 2000, as amended (hereinafter "the Act") for orders in respect of the operation of a quarry by the respondents at Aughafarrell, Brittas, Co. Dublin. Orders are sought that the respondents cease what is argued is the unauthorised user and/or unauthorised developments of the lands as a quarry. Certain other orders for reinstatement are sought.

2. The proceedings were instituted by a notice of motion dated 29th July, 2013 and South Dublin County Council was joined on its own application as second applicant by order made on 1st May, 2014.

3. Joan Murphy was originally named as the sixth respondent and by order made on 10th October, 2015 she was substituted by Michael Murphy as fifth respondent and added as a notice party. This occurred in the context of the assurance by Ms. Murphy of her interest in the subject lands to Michael Murphy.

4. Shillelagh Quarries Limited is a limited liability company incorporated in the State which operates a quarrying business from the subject lands. The second, third, fourth, fifth and sixth respondents are the owners of the lands comprised in Folio 3636 Co. Wicklow and the notice party is a former registered owner of these lands.

5. The respondents and the notice party were all represented by the same solicitors and counsel. The first and second named applicants were separately represented although each of them, to some extent, adopted the submissions of the other for the purposes of the proceedings.

6. The respondents claim that the works and activity carried on by them had commenced prior to the appointed day under the planning code, 1st October, 1964, and that there is no unauthorised development within the meaning of the Act. The respondents accept that they are not authorised by any grant of planning permission or development consent to carry on the business of a quarry from the lands, but claim that the use of the lands represents a proportionate working out of the quarry activity commenced before the appointed date.

7. The respondents also contend that the claim for an order is time barred and/or by way of a separate plea that the applicants were guilty of prolonged and unexplained delay, such that I ought to refuse the relief in the exercise of my discretion.

8. The claim is made under s. 160 of the Act, the statutory successor of the old s. 27 of the Local Government (Planning and Development) Act 1963 (hereinafter "the Act of 1963") and it is accepted by counsel for all parties that the court retains a discretion to refuse relief under the statutory provisions, and the extent of that discretion is one matter that comes for consideration in this judgment.

9. There is a considerable body of European law on the protection of the environment and in particular, recent judgments of the Court of Justice of the European Union raise the question of whether the refusal of relief by the court in the exercise of this discretion had directly or indirectly the effect of circumventing the EU rules. That question also comes to be considered in this judgment.

Background facts

10. The applicant lives with his family approximately 1km from the quarry site at Shillelagh. He is a member of the Dublin Mountain Conservation Group which has as its stated role and objectives the preservation of the amenity, heritage and environment of the Dublin mountain area. His standing to bring these proceedings is not in issue and he has been active in his opposition, and in the making of legal challenges, to the operation of this quarry for a number of years. It should be noted also that through the Dublin Mountain Conservation Group he participated in judicial review proceedings already brought by Shillelagh Quarries Limited and also made a reference under s. 5 of the Act to An Bord Pleanála (the "Board") seeking a declaration as to the status of the quarry.

11. It is also not disputed that quarrying activity has taken place at the subject site since before the appointed date of 1st October, 1964, but what is in issue is whether the present works and user development are a continuation of, or a wholly different development from, that then in place. The quarry was the subject matter of one of the most quoted and well known planning judgments of the Irish High Court, the judgment of *Patterson v. Murphy* [1978] ILRM 85 in which Costello J. held that as of the date

of his judgment, the activities being carried on at the quarry were an intensification of use such that the activity no longer enjoyed the benefit of pre-1964 status, and amounted to a material change of use. The judgment of Costello J. will come to be considered later in this judgment. That litigation was inter personam and ultimately the order of Costello J. was vacated by order of the High Court made in 1999 after a compromise was reached between the parties. The quarrying activity on the site recommenced, or continued at the levels prior to the making of the injunction and that user has continued up to the present date.

The conduct of the case
12. As is provided in the Act the proceedings were brought by way of notice of motion grounded on affidavit, but certain affidavit evidence was cross examined following the service of notice to cross examine by both the first applicant and the respondent. The evidence was heard over a number of days and lengthy legal submissions were heard.

13. Because of the complexity of the case in the course of case management directions were made for the service of points of claim and points of defence. It is convenient to summarise these as follows:

1. The Claim

a) The applicants claim that the activity carried on the site is development, that it requires and does not have planning permission and that it is unauthorised,

b) that the s. 5 reference by which the Board decided that the operation was unauthorised is binding,

c) that the operation was intensified to such an extent from that in being before the 1st October, 1964 as to amount to a material change of use,

d) that the material change of use was an abandonment of previous use,

e) that *Patterson v. Murphy* establishes that an unauthorised development has occurred,

f) that the respondents may not challenge the decisions of the Board made on the 24th December, 2010, and

g) that the activity is a "gross and inappropriate non compliance" with the planning code such that it should be restrained.

2. The defence

a) The respondents admit that they had no planning permission, but deny any intensification or material change of use,

b) deny in those circumstances that the operation is unauthorised,

c) plead that the claim is time barred, and deny abandonment,

d) that the judgment of Costello J. in *Patterson v. Murphy* ought not to guide my determination in that that Costello J. did not have before him accurate evidence as to pre-1964 user, that the quarry in operation in 1964 was not a "primitive horse and cart" class of operation and that commercial activity had commenced prior to 1964. It is argued in that regard that I am not bound by the findings of fact by Costello J. in *Patterson v. Murphy* either because they were *obiter dicta* in the said judgment or that the findings of fact do not operate as an *estoppel per rem judicatem* because there is no coincidence of parties, and

e) that the judicial review proceedings in *Shillelagh Quarries v. An Bord Pleanála* does not make any determinations of fact or law that determines the question before me and that it was decided under a wholly different class of action where the court's function is quite different.

Section 160 of the Act
14. Section 160 of the Act creates a statutory power in the court to grant an injunction in relation to unauthorised development. The jurisdiction is broad and the court may require by order that a person do or not do or cease to do anything that the court considers necessary and the amended s. 160(1) provides:

"—(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject."

15. Quarries enjoy a unique position in Irish planning laws for a number of reasons, and the uniqueness is now reflected further in that by virtue of s. 160(6)(aa) there is no time limit for the bringing of a so-called "planning injunction" in the case of an unauthorised quarry development. This subsection was added by s. 29 of the Environment (Miscellaneous Provisions) Act 2011 and now reads as follows:

"29. — Subsection (6) of section 160 of the Act of 2000 is amended by inserting the following paragraphs after paragraph (a):

"(aa) Notwithstanding paragraph (a) an application to the High Court or Circuit Court for an order under this section may

be made at any time in respect of unauthorised quarry development or unauthorised peat extraction development in the following circumstances:

(i) where no permission for the development has been granted under Part III and the development commenced not more than 7 years prior to the date on which this paragraph comes into operation;

(ii) where permission for the development has been granted under Part III and, as respects the permission—

(I) the appropriate period (within the meaning of section 40), or

(II) the appropriate period as extended under section 42 or 42A,

expired not more than 7 years prior to the date on which this paragraph comes into operation."

16. The relevant date is November 2004, the commencement date of the subsection having been fixed by S.I. No. 583 of 2011 The subsection continues:

> *"(ab) Notwithstanding paragraph (a) or (aa), an application to the High Court or Circuit Court may be made at any time for an order under this section to cease unauthorised quarry development or unauthorised peat extraction development."*

17. Thus the amended subsection provides that an application to the court for a planning injunction may be made at any time in respect of an unauthorised quarry development provided that development commenced after November 2004. Section 160(6)(ab) provides that an application to the court that an unauthorised quarry development should cease may be made at any time, and is not confined merely to works which commenced after November 2004. In this application the applicants seek both an order that the development cease and an order for the carrying out of certain positive acts of reinstatement. Different considerations with regard to time apply with regard to the applications under subs (aa) and subs (ab), and I return in more detail to these below.

The statutory framework: Sections 261 and 261A of the Act of 2000, as amended

18. Before outlining the evidence, I briefly consider the legal framework in which the proceedings were brought and defended. Quarrying activity has been the subject matter of a very large number of reasoned judgments of the High Court and Supreme Court and there are significant legislative provisions specific to quarries.

19. The first respondent applied, as it was mandated to do, for registration of the quarry pursuant to s. 261 of the Act, and it is well established that registration per se does not render a previously unauthorised quarrying activity lawful. This is clear from a number of judgments, notably Charleton J. in *McGrath Limestone Works Ltd. v. An Bord Pleanála & Ors*. [2014] IEHC 382 where he said that registration for the purpose of s. 261:-

"…in this context, means no more than putting details in a register."

20. In accordance with s. 261 of the Act an application to register the quarry was made in 2005 and the County Council pursuant to its powers in s. 261(7) required that the respondents make application for planning permission and prepare an Environmental Impact Statement (EIS). The planning permission was granted by the County Council but refused on appeal to the Board on 24th December, 2010. The judicial review against that decision came before Hedigan J. and in a judgment delivered in a telescoped hearing on 27th June, 2012 in *Shillelagh Quarries Limited v. An Bord Pleanála* [2012] IEHC 257 he refused to grant leave to seek judicial review and in a separate judgment [2013] IEHC 92 refused a certificate to appeal. Thus the decision of the Board refusing planning permission stands and is not open to challenge.

21. Proceedings under s. 160 require the court to establish certain matters of fact and law, including the question of the status of the quarry and the type of activity there employed. The court hearing an application under this section will also have to consider a question that does not come to be considered on a registration application under s. 261, namely whether the current activity is sufficiently similar to pre-1964 activity as to not amount to an unlawful intensification, or to use shorthand, to enjoy the benefit of pre-1964 user such that planning permission is not required.

22. The statutory landscape, however, is legally complex as a result of the Environment (Miscellaneous Provisions) Act 2011, by which the applicants argue that this quarry is unauthorised, irrespective of its pre-1964 status. The Board made a decision on 24th December, 2010, refusing planning permission for the continued use of the quarry. The applicants claim, *inter alia*, that as a result of this decision which was not appealed, and in respect of which Hedigan J. refused leave to seek judicial review in *Shillelagh Quarries Limited v. An Bord Pleanála*, the status of the quarry is clear as a matter of law, and that the works and use now carried on are unauthorised.

23. Thus the applicants claim that the quarry is unauthorised both as a matter of fact and as a matter of law. In that context it is argued in particular that the decision of the Board on the 24th December, 2010 was a decision on the facts and was made following the report of the inspector appointed by the Board who expressed a view that the existing operation bore little resemblance to pre-1964 user. The Board decided that the present operation was materially different from that in operation pre-1964, and that as no planning permission existed the development was wholly unauthorised.

Topography

24. The quarry is located approximately 2.5 kilometres to the east of Brittas village on the north facing slope of Butter Mountain which stands at 465 metres and within the townland of Aghfarrel. It lies on the southern side of a narrow valley between Butter Mountain to the south and Knockannavea to the north. The valley is drained by the Brittas River which flows southwards to the Poulaphouca reservoir and it is also connected to the Camac river catchment to the north via a constructed watercourse. The quarry entrance is located on the L4382 Wicklow County local road. Traffic accessing the quarry from the Brittas direction uses the R114 which links Brittas village to Bohernabreena to the east. There are a number of residential properties along the R114.

25. The existing quarry excavation covers a total area surface of 3.27 hectares extending from the 325m OD line to 425m OD and the existing quarry floor lies at 320m OD. The quarry is visible over a wide area of a rounded mountain area with a heath and woodland character. The quarry is visible from the public road only in a relatively narrow window.

26. Two Special Areas of Conservation (SAC) are located nearby, the Wicklow mountain SAC to the east, and the Glenasmole Valley SAC to the southeast, in each case at a distance of approximately 1.5 kilometres. At Gortlum two kilometres to the east there is a

feeding ground for greylag geese, a protected special bird species.

Recent planning history
27. Planning permission was refused by the Board on the 24th December, 2010 for the continuation of the quarry work and for ancillary facilities and works development, overburden, storage areas etc. Permission for the extension of the quarry within the registered area was also refused: this refusal bears An Bord Pleanála reference number PL06s. 231371.

28. The reason for the refusal bears repeating:

(a) The planning history of the site

(b) The High Court judgment in *Patterson v. Murphy*

(c) The nature and scale of the activities carried out on the site

(d) The provisions of s. 261 of the Act of 2000 as amended

(e) A determination that the Board was not satisfied that the existing quarry in operation presently conducted on site commenced prior to the appointed day

(f) The judgment of the European Court of Justice in case C-215/2006 Commission v. Ireland, which held that the Irish statutory regime providing for retention permissions did not comply with community law.

29. Furthermore on a s. 5 reference determined on 24th December, 2010 the works and activities on the site were held to be a development and not an exempted development, and this finding and determination has not been challenged.

30. An application for substitute consent under s. 177 of the Act was also refused by the local authority on 14th January, 2014.

31. A second application under s. 5 commenced on 18th September, 2013 but was dismissed by the local authority on 7th February, 2014.

32. The local authority served a warning letter on 9th October, 2013 but the activities on site continued notwithstanding. The issue of delay is a matter raised in defence by the respondent, as the County Council served an enforcement notice as long ago as 18th May, 1998, and a second notice on 2nd June, 2004 but no action arose as a result of these notices. It also should be noted in the context of the argument of delay that the first applicant has being making representations with regard to what he alleges to be unauthorised user since 2007 or thereabouts.

The effects of section 261(7)(1)(e): the first ground of claim
33. The applicants make the argument that the activity in the quarry lands is or is deemed to be unauthorised development arising from a number of different legal factors, described by counsel for the first applicant as "locks". It is argued that each one of these identified and separate analyses result in a decision binding on me that the development is unauthorised and that in those circumstances the orders sought should be made. Furthermore it is asserted that s. 160(6)(aa) as inserted by s. 29 of the Environment (Miscellaneous Provisions) Act 2011 now means that there is no time limit with respect to an application under s. 160 to restrain quarrying activity.

34. Section 261(7) provides that the planning authority may require certain quarries which commenced operation before 1st October, 1964 and, *inter alia*, where the extracted area is greater than 5 hectares, to apply for planning permission and to submit an EIS. The local authority in reliance on this section directed the respondents to apply for planning permission and to submit an EIS which was duly done. In the events, the local authority granted planning permission but the decision to grant permission was overturned on appeal by the Board. Counsel for the applicant argues that the effect of the refusal of planning permission is by virtue of s. 261(7)(e) that the development is unauthorised by operation of law. That subsection provides as follows:-

> *"Notwithstanding any of the provisions of this Act, the continued operation of a quarry in respect of which the owner or operator has been refused permission in respect of an application for permission made in foot of the notification under paragraph (a) shall be unauthorised development."*

35. Counsel argues in that context that the respondents have no defence on the merits to the s. 160 application, as there is a determination by a competent authority which, having regard to the subsection, means that the development is unauthorised and ought to be directed to cease under s. 160.

36. In the course of this case while the evidence was initially on affidavit only, certain of the witnesses were cross examined following the service of notice to cross examine. The planning expert called on behalf of the respondents Mr. Joseph Bonner accepted in the course of cross examination that the effect of s. 261(7)(e) was that the development was unauthorised, and he also accepted in the course of cross examination that no argument could be made that the Planning Authority was not competent to require a planning application, that an EIS was required. The decision of the Board was the subject of a judicial review in respect of which Hedigan J. refused the relief sought, and as a result the decision of the Board stands.

37. The subject quarry is in excess of the threshold of 5 hectares and the local authority was competent to require it to submit an application for planning permission under s. 261(7). Shillelagh Quarries lodged an application for planning permission on 18th April, 2007 and South Dublin County Council issued a notification of a decision to grant permission for the development on 23rd September, 2008, subject to 40 numbered conditions. The Board refused planning permission by its decision of 24th December, 2010 for a number of reasons as outlined above. Thus, the quarry activity is not authorised by any grant of permission and s. 261(7)(e) applies.

The Section 5 reference: the second ground
38. Section 5 of the Act allows for the determination by An Bord Pleanála of the lawfulness of works or activity. The decision of the Board is final and binding subject only to the possibility of a judicial review by the High Court under s. 50 of the Act.

39. The nature of the jurisdiction under s. 5 was considered by the Supreme Court in *Grianán an Aileach Interpreted Eccentric Company Ltd v Donegal County Council* [2004] IESC 41 where the Supreme Court considered that it was not appropriate to ask the court to consider matters already determined by either the planning authority or the Board under s. 5. The Supreme Court accepted that there was required to be an element of deference by the courts to the decision reached under s. 5, a statutory mechanism

providing a procedure which the Oireachtas clearly considered to be an appropriate way to engage with questions of planning compliance. A similar approach was taken by Hogan J. in *Wicklow County Council v Fortune* (No. 3) [2013] IEHC 397 where he made the following observation with regard to the force and effect of the decision in *Grianán an Aileach Interpreted Eccentric Company Ltd v Donegal County Council*: .

> *"This decision must be taken impliedly to preclude the High Court from dealing with this matter in enforcement proceedings in these precise circumstances where a s. 5 application for a certificate of exemption has been refused and has not been quashed in judicial review proceedings."*

Hogan J. was dealing with circumstances where the local authority had already refused to grant a declaration under s. 5 that the user of the defendant's land was exempted, and inter alia explained the reason for this as the desire that there not be *"in existence two contradictory official determinations"* of the question of whether a development was exempt and that this created a "real potential for confusion and uncertainty".

Discussion
40. I equally consider myself bound by the decision in *Grianán an Aileach Interpreted Eccentric Company Ltd v Donegal County Council* that the jurisdiction vested in An Bord Pleanála was as described by Keane J. *"an exclusive jurisdiction".* Hedigan J. in the recent decision of *Electricity Supply Board & Anor v. Killross Properties Ltd* [2014] IEHC 635 followed the Supreme Court decision in *Grianán an Aileach Interpreted Eccentric Company Ltd v Donegal County Council* and found that the Board having made a determination, the court in s. 160 proceedings did not require to engage further with an analysis of whether the development in question was authorised.

41. I am persuaded too by the observation of Henchy J. in *Tormey v Ireland* [1985] 1 IR 289 that

> *"The jurisdiction to try thus vested by the constitution in court, tribunals persons or bodies other than the High Court must be taken to be capable of being exercised, at least in certain incidents, to the exclusion of the High Court, for the allocation of jurisdiction would otherwise be overlapping and unworkable."*

42. In that case the Supreme Court also relied on the seminal judgment of Finlay C.J. in *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 where he said:

> *"Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters".*

43. The High Court is not then competent to determine the lawfulness of the quarry operation as a decision has already been made that it is not authorised by the body in whom is placed by statute the responsibility for making that determination. Indeed the question before me is precisely that identified in the last paragraph of the judgment of Keane J. in *Grianán an Aileach Interpreted Eccentric Company Ltd v Donegal County Council*, namely that the court is being asked in enforcement proceedings to require that the development works in the subject quarries cease, and the court ought not *"find itself having to determine whether"* that operation constitutes development which requires permission, when that determination has already been made by the competent authority.

44. Accordingly I consider myself bound by the determination of the Board made under s. 5 that the activity currently been carried on in this quarry is a development which has been intensified to such an extent as to amount to a material change of use, and as no proceedings have been brought to challenge the validity of this decision, the development is unauthorised as a matter of law.

Decision on the effect of the two determinations by the Board
45. Thus, the two determinations by the Board, the determination under s. 5 that the activity had intensified to such an extent as to amount to material change of use, and the decision under s. 261(7) to refuse the planning permission have what I regard to be an unavoidable consequence, namely that the development in question is as a matter of law unauthorised development, and that the Oireachtas intended by s. 5 and by s. 261(7)(e) to so characterise it.

46. The quarry has an area of approximately 28 hectares, far in excess of the statutory threshold of 5 hectares and it was in operation in 2004, the relevant temporal cut off. The quarrying did as a result require development consent and none has been made. Thus s. 261(7)(e) is applicable and as a consequence that section is a form of statutory determination in respect of the unauthorised nature of the development. This arises as a result of European law, both because of the size of the quarry, and because its operation comes within the Environmental Impact Assessment Directive, but also as a result of the decision of the European Court in the *Commission v. Ireland*, C-215/06. Once the requirements of s. 261(7)(e) are satisfied, the activity is by statute deemed to be unauthorised.

Decision in Patterson v. Murphy: the third ground
47. The quarry the subject matter of this application was the subject of a private law planning injunction under s. 27 of the Act of 1963, the precursor to s. 160, in respect of which Costello J. gave judgment. The findings of the court on 4th May, 1975 were that there had been an intensification of user after the appointed day, and in particular, and in the context of the evidence that he heard, that the activity on the site in 1977 and 1978 were such that there was as a matter of fact an intensification of pre-1964 works of development such that there was a material change of use in respect to which permission did not exist.

48. The respondent adduced evidence which he argues shows that the evidence before Costello J. painted an incomplete picture of the true facts, and in particular of the excavation at the quarry site at the time was more extensive than the activity identified by Costello J. and in respect of which he gave the decision. This evidence was called by the respondents to advance their argument that there was in fact and in law no estoppel whether *per rem judicatem* or by an issue estoppel, not merely on the broad legal ground that the determination by Costello J. was a determination between different parties, none of whom are now before the Court, nor also merely on account of the fact that the judgment of Costello J. was granted in a nuisance or private law action and not primarily, or at all, under the then equivalent of s. 160 of the Act, the old s. 27 of the Act of 1963. It is argued that because better and more complete evidence is available now by virtue in particular of aerial photographs, and other evidence not reasonably available in 1977, when the case was heard, as to the precise size of the quarry operation at that time, that the decision does not bind me.

49. Costello J. came to his determination *inter alia* having found that the scale and type of activity, including traffic movements on

site, the increase in the staff on site, the frequency of blasting and the type of stone produced were all such that they were of a different quality and nature from that which operated in the quarry pre-1964, and took the view that the quarry operation in being before 1964 was "quite primitive" and was more an operation which involved "pick axes and shovels". The evidence that I heard showed that some mechanical equipment was used on the site before 1964, and that the area of extraction was considerably greater than that identified to Costello J., approximately 25 square yards, and evidence from aerial photographs shows that in 1972 1.4 hectares can be estimated as the area of extraction from an aerial photograph, and by 1978 2.9 hectares was being extracted. The difference between the calculation relied on by Costello J. of 25 square yards, and the estimated area of extraction evident from the 1972 aerial photograph is a factor of 690, and the evidence, and the argument of the respondents is that the activity in 1977 was neither haphazard nor intermittent.

50. Counsel for the respondent *inter alia* argues that the Board's decision placed undue emphasis on, or gave undue weight, to the decision of the High Court in *Patterson v. Murphy*. In particular, counsel argued that, were one to look at the question before Costello J. in the light of recent jurisprudence in planning matters, then the sequential two-stage approach identified in a number of judgments culminating in the judgment of Finlay Geoghegan J. in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210, that the Board ought to have first determined the factual question as to the user pre-1963 and that found at the time of the hearing, and then come to consider the second factor namely whether there were planning considerations including matters such as the burden on the infrastructure, the relevant development plan and other planning matters, that mean that the development is a change of use which is material in planning terms.

51. Counsel argues also that in that context the decision of *Patterson v. Murphy* is of less precedential or evidential value in this case, and indeed ought to have been treated with a degree of caution by the Board in its determination.

Discussion
52. I accept the argument of counsel for the respondent that the applicable test in planning matters has now been refined, and I also accept that the question of whether there has been an intensification of user or activity is one that, properly speaking, at this juncture, ought to be considered in the context of the available evidence of current use which can then be compared to the use in pre-1964, taking also into consideration the approach of Finlay Geoghegan J. in *Roadstone Provinces Ltd. v. An Bord Pleanála* that the court must analyse not merely the object, method and scale of the operation at the two relevant periods of time, but must consider questions such as whether the quarry in question comprised of one ore seam, whether the activity was what has been called a "phased and reasonable working out of" a single ore body and other factors now identified in the case law.

53. The evidence I have heard from Mr. Tim Paul, Planning Consultant called on behalf of the respondent, was that current works are such a phased and reasonable working out of an ore body, and his evidence was that this was carried out at a rate of between 5 and 8 % annually. I accept also that the aerial photograph from 1972 does point to a degree of activity which is not one capable of being carried out with "picks and shovels" and that the disturbed ground shown in that aerial photograph most probably arose as a result of quarrying or mining activity of a scale which was not haphazard and non-commercial. The internal County Council records which I accept were not before Costello J. also identifies the footprint of the quarrying activities as being far in excess of the 25 square yard area in respect of which Costello J. delivered his judgment.

54. Furthermore I accept what counsel for the respondent has said, namely that the injunction granted by Costello J. was to restrain blasting and the production of four-inch shale and that the injunctive element of the decision did not go further than that.

55. However it seems to me that some assistance could be taken by me from the decision of Costello J. in that his findings of fact are of such a degree of weight and so carefully considered as to amount to a very useful snap-shot of what was occurring in the late seventies on this site, and that taken with the other factors such as the difference between the scale of the operation now and the scale in 1977, suggests to me that there has been an incremental increase in the quarrying activity on this site which has resulted in a significant change in the burden on the surrounding landscape. I accept the evidence that I have heard from the experts called on behalf of the applicants that the minor roads on which the heavy traffic now travels to service this quarry are wholly unsuitable for the burden they are now asked to bear.

Discussion
56. However, the extensive argument and evidence heard by me in regard to the decision of *Patterson v. Murphy* seem to me to have been overtaken by the statutory enactment of a provision which has rendered the current development unauthorised by operation of law. Thus it seems to me that an argument as to the relevance or applicability of, or the weight to be given to, *Patterson v. Murphy* was more properly one to bring before the Board, or by way of a judicial review of the Board's decision.

57. The argument therefore, it seems to me, comes too late, as I am constrained by the provisions of s. 261(7)(e) to treat this quarry as one which is unauthorised by operation of law. Thus while the decision of *Patterson v. Murphy* might arguably be said to have been given undue weight, or to have incorrectly been relied on by the Board in refusing planning permission, the fact that planning permission has been refused means that the argument made by counsel for the respondent with regard to *Patterson v. Murphy*, and its force, effect or correctness as the case may be, come too late to influence my decision. The alternative approach would in my view involve me in taking an impermissible approach, namely to make a determination that planning permission is not required because current use is not an intensification or a materially different activity from that employed on the operative date.

58. Further, I consider that it is not possible for me to conduct an analysis of the decision of the Board by which it refused planning permission to ascertain the weight that was given to the determination of Costello J. in *Patterson v. Murphy* in the final decision of the Board. There is no means by which I can isolate the influence of that finding which, while it is identified as one of the reasons on which the Board relied, is not identified as having been given a particular weight in that determination. Thus were I to accept the argument of the respondents that the decision in *Patterson v. Murphy* does not bind me, or their alternative argument that the Board placed undue weight on the decision of Patterson v. Murphy in its final determination or determinations, I would be engaging in an exercise which is both difficult, and, in my view, impermissible. It is difficult because there is no evidence before me by which I could make a judgement with regard to the weight given to the decision of Costello J. by the Board in its decisions. It is impermissible because were I to engage in that exercise I would be seeking to displace the decision of the Board which, having regard to the authorities outlined above, and to the general statutory and common law imperative that mandates deference be shown to the expert body, it is not open to me to replace my finding on the question of intensification with the finding of the Board which became merged in its final decisions.

59. Thus I consider that the argument of the respondent that *Patterson v. Murphy* does not bind me is misplaced.

Discretion
60. Having found that the current activities being carried out on the quarry are unauthorised and that the applicant has, as a result,

met the test in s. 160 of the Act, I turn now to consider the argument made by the respondents, namely that I ought in my discretion refuse to grant the relief sought.

61. The factors that are to influence my discretion have been considered in the authorities, and the principles that guide a court of equity are a starting point.

62. In *Avenue Properties Ltd. v. Farrell Builders Ltd.* [1982] ILRM 21 Barrington J. stated:

> *"It seems to me therefore that the High Court in exercising its discretion under s. 27 should be influenced, in some measure, by the factors which would influence a Court of Equity in deciding to grant or withhold an injunction."*

63. That the discretion is in some way constrained by the Planning Acts has been rejected as an incorrect approach by Blayney J. in *White v. McInerney Construction Ltd.* [1995] 1 ILRM 374:

> *"Counsel for the appellant contended that the court was bound to exercise its discretion in a particular way, namely, in order to ensure compliance with the Planning Acts and accordingly an injunction ought to have been granted stopping the development until all the conditions which were to be performed before development commenced had been complied with. Counsel did not, however, refer the court to any authority which supported this restriction on the exercise of the court's discretion and I am satisfied that it would be wholly inconsistent with the wider discretion given to the court under s. 27."*

64. However a certain difference in approach is evident in the Supreme Court decision in *Morris v Garvey* [1983] 1 IR 319 where Henchy J. stated in respect of s. 27(2):

> *"…the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the Permission as granted, against the environmental and ecological rights and amenities of the public, present and future. . . It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is necessary to ensure that the development is carried out in conformity with the Permission."*

65. This paragraph was quoted with approval by Clarke J. in *Cork County Council v. Slattery Precast Concrete Ltd.* [2008] IEHC 291:

> *"It is agreed that the court retains a discretion as to what should be the appropriate course of action to adopt in circumstances where it is established that there has been an unauthorised development. The discretion is to be sparingly exercised. See Henchy J. in Morris v. Garvey [1982] ILRM 177. In practice there have been some cases where the court has delayed, rather than refrained from, making an order so as to afford a party an opportunity to regularise the situation relating to an unauthorised development by giving a reasonable opportunity to the party concerned to make a retention application. Section 162(3) of the 2000 Act makes clear that a retention application does not operate as a stay. The precise circumstances in which a court should, therefore, exercise its discretion in such cases does require some consideration. Obviously it is no part of the function of a court to grant planning permissions or, indeed, to pre-empt the decision of the relevant planning authorities (including the Board) as to what matters ought be the subject of planning permission. On the other hand there may well be cases where it might appear that making an order requiring, for example, the demolition of a building or a portion of a building in circumstances where there was every reason to believe that there was good chance that retention permission would be obtained (for example where there was a minor technical failure to comply with a planning permission) might be disproportionate. At the same time the starting point has to involve a recognition that unauthorised development is unlawful and that a court should be slow to tacitly accept the unauthorised nature of a development by giving any undue leeway to the party who has been guilty of the unauthorised development in the first place."*

66. Thus I consider that the court has discretion, that it must be exercised sparingly, that the imperative of Community law must be respected in the exercise of discretion, and that the court should have as its starting point the fact that a development is unauthorised and that it may not by the exercise of its discretion "tacitly accept" the breach to adopt the terminology of Clarke J. in *Cork County Council v. Slattery Precast Concrete Ltd.*

The factors in the exercise of discretion

67. In *Leen v Aer Rianta* [2003] 4 IR 394, McKechnie J. identified the following factors as relevant to the exercise of discretion:

> *"(a) the conduct, position and personal circumstances of the applicant;*
>
> *(b) the question of delay and acquiescence;*
>
> *(c) the conduct, position and personal circumstances of the respondent;*
>
> *(d) the public interest, to include:-*
>
> *(i) as part of that interest, the business, commercial and tourist activities conducted at the airport and in the wider general area and*
>
> *(ii) as members of the public, those who derived any employment benefit, either directly or indirectly, from the airport's overall operation as well as persons in the wider community and those who availed of or utilised the respondent's facilities."*

68. Certain of these factors appear to me to be relevant.

The circumstances of the respondents

69. First the conduct, position and personal circumstances of the respondent is an identified factor and comes into play. The corporate respondent is the quarry operator and has continued to operate a significant commercial activity from the subject site, and continued to do so notwithstanding a refusal to grant planning permission by the Board in 2010.

70. It seems to me that the exercise of my discretion as a court hearing a s. 160 application when the environmental questions have already been determined in favour of the applicants, this factor must weigh heavily in my decision. The quarry is a commercial quarry which has continued notwithstanding the determination of An Bord Pleanála in 2010 and the continuation of the quarry activity has ignored the two decisions of the Board Pleanála, the body charged with determining the lawful nature of its activity. I accept that the quarry owners complied with the requirement to register under s. 261 and no particular adverse comment may be made with regard to their compliance. However, I consider that the failure of the quarry owners to cease operation in the light of the determination of the Board is a factor which must influence my decision to grant an injunction. Put simply, the owners of this quarry have show by their behaviour that they will not cease the operation of the quarrying activity absent a court order that they should do so. This is very often the basis on which a court will grant an injunction, namely that the person seeking such injunctive relief apprehends that the respondent to their application will continue to engage in the impugned activity unless restrained by the court. It is a factor engaged in this case.

The public interest

71. Another factor is the public interest, and in *Leen v Aer Rianta* the court identified as relevant the members of the public who derived an employment benefit from the operation. I have heard no evidence of the precise number of people who might be expected to be affected economically were this quarry operation to close but I can extrapolate that there will be several, and the knock-on effect on other business enterprises might also be a factor of note. One must weigh against that the environmental damage being caused by the quarrying activity.

72. However the overriding public interest seems to me to have been determined, both at national and Community level, by virtue of the unique and particularly onerous obligations on quarry activities which are now in play, and in that regard the fact that the Oireachtas has chosen to remove any time limit on the bringing of an application for a planning injunction is a reflection of that concern, as is the entire procedure for registration provided by the 2004 Act itself. Allied to this is the fact that there are sensitive environmental sites in the very near vicinity, and it seems to me that the public interest is a factor which must sway my discretion.

73. The quarry is in an area of particular environmental sensitivity in the Wicklow Mountains, it is close to but not part of European sites, it is operating close to the maximum height at which the 350m contour line in respect of which the local authority in its development plan has determined there is to be no development of this nature. I have heard extensive evidence of the works being carried out of and the potential and actual environmental impact. I accept what is argued by counsel for the respondent namely that the evidence does not point to an immediate or potential damage to the aquifer, and I have also heard evidence that the bird habitat sought to be protected by the neighbouring SAC is not overly adversely affected in that the birds have shown a remarkable ability to modulate their behaviour and to adapt to environmental change. The visual impact is visible in a relatively small window, but I consider that the quarrying work has created a discordant landscape in an area of exception public amenity.

74. However I consider that the likelihood further damage to the environment has been shown, and that the public interest in the observance of environmental legislation and of determinations made by the competent authorities is a weighty imperative that guides me.

Delay

75. Delay has been recognised as a ground on which relief may be refused and in *Morris v. Garvey* the Supreme Court accepted that what it called "acquiescence over a long period" could be a ground on which to refuse relief.

76. As regards any delay argued against the first applicant, it seems to me that no operative delay exists. The evidence is that works recommenced in the quarry in 1998 or 1999, and Mr. McCoy as a private citizen was entitled to assume that the local authority would, as the public protector of the environment, and as the body responsible for ensuring compliance with environmental legislation, ensure that the planning codes were not breached. Indeed, as an active environmental campaigner in the area, he must have known that the Council did send a warning letter on 18th May 1998 and a second notice on 2nd June 2004. He as a private citizen, and bearing in mind the considerable financial risk that he might have faced had he brought proceedings in his personal capacity, he in my view acted reasonably in awaiting further response from the County Council.

77. Once the quarry became registered and the quarry owners were mandated to seek planning permission Mr. McCoy again in my view acted reasonably in awaiting the decision of that planning permission. He engaged fully with that planning application and with the s. 5 reference. He cannot in my view be found liable for any, not to mention any culpable, delay in failing to bring these proceedings.

78. As regards the local authority however, no satisfactory explanation has been offered with regard to the delay between 1997 and the late application to be joined to the proceedings. It must recalled in that context that the County Council came to be joined in these proceedings in May 2014, and the proceedings had already come close to trial at that stage. The delay of the local authority is culpable.

79. However delay as such is not sufficient as a defence to injunctive relief in this case, and I am not satisfied that the respondents have shown any prejudice as a result of that delay. Indeed the opposite might well be said to be the case and the respondents have, by virtue of the delay on the part of the local authority in pursuing enforcement proceedings, had the benefit of the commercial activity on this site through a particularly busy period in Irish economic life when the demand for the quarry materials would have been high. Thus, the respondents have gained that benefit and cannot be said to be prejudiced or to have taken any irrevocable act as a result of the failure on the part of the local authority to take steps with due expedition.

80. Section 160(6) creates a general statutory time limit of seven years in respect of a planning injunction, but that particular time limit is not, as a result of the amendment made in 2011, applicable in the case of an application for the cessation of unauthorised quarrying development or peat extraction development. I consider also that my discretion must be influenced by the fact that the Oireachtas has taken a particular view with regard to the time limit for the commencement of a planning injunction in respect of quarries, and indeed the particular and uniquely onerous obligation on a quarry to register arises in respect of a quarry where the activity commenced before the appointed date, long outside the seven year time limit. Quarries and peat extraction have been given a unique position in the planning code, and that unique position gives the planning authorities, and ultimately the courts, a wider power of enforcement than that applicable to any other area of development. In that context, then, the argument of delay has less force.

81. It might be said that the continued work on the quarry has now made it more difficult to engage the restorative works sought to be done with a view to restoring the quarry face. I will deal further with this question below.

Other factors

82. A further factor in my exercise of my discretion is that were I to refuse injunctive relief I would be failing to recognise the fact that the respondents have ignored two determinations which had the practical and legal consequence that the activity in which they were engaged was unlawful in terms of Irish and European law.

83. It is not merely the matter of the protection of the landscape, and the role of the court in determining whether a landscape is exposed to an environmental hazard, but the exercise, having regard to the statutory provisions, seems to me to be one where my discretion is limited and ought to be sparingly used, as any other approach would involve a failure of the court to recognise the statutory imperative, and a failure of the court to recognise the decision of the Oireachtas to determine that the operation of this quarry is unlawful.

84. I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.

85. Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some of only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the environmental legislation, and allow the development to continue when it is unauthorised under Irish and when Irish law arises as a result of the obligations of Ireland and Community law.

Remedial works
86. Counsel for the respondent makes the argument that the jurisdiction of the court under s. 160 does not extend to an entitlement on the part of the court to order restoration works. He argues that as s. 160(6)(ab) of the Act as inserted by the Act of 2011 removes the time bar in respect to applications for orders that an unauthorised development cease, but that in cases where s. 160(6)(ab) does not apply that no application may be made outside the general seven year time limit for a mandatory or positive order requiring reinstatement. He is correct in this, and, as the facts unequivocally point to the works having commenced far outside that seven-year time limit, the application for mandatory relief is time barred.

Decision
87. Accordingly I consider that an order is to be made directing the cessation of operations at the quarry. I appreciate that a period of time will be required for the current operations to be wound down and I will hear counsel as to an appropriate stay on the order. The appropriate form of the orders will therefore stand over until further argument.