THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2017/542 J.R.]

BETWEEN

SHILLELAGH QUARRIES LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

RACHEL MCCOY

(AS PERSONAL REPRESENTATIVE OF THE ESTATE

OF MICHAEL MCCOY), (DECEASED)

NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 12th day of June, 2019

The proceedings

1. In these proceedings the applicant, Shillelagh Quarries Limited, seeks an order of *certiorari* by way of judicial review quashing the decision of the respondent, An Bord Pleanála (the "Board") dated 18th May, 2017 in which the Board refused to grant the applicant leave under s.261A(24)(a) of the Planning and Development Act, 2000 (as amended) (the "2000 Act (as amended)"), to apply for substitute consent pursuant to s.177C of the 2000 Act (as amended). The applicant also seeks an order remitting its application for leave to apply for substitute consent to the Board to be determined in accordance with law.

Introductory Remarks

2. This case is the most recent of several cases which have come before the courts in relation to a quarry operated by the applicant, at Aghfarrell, Brittas, County Dublin. The applicant seeks to challenge the decision of the Board in which the Board refused to grant the applicant leave to apply to the Board for substitute consent under s. 261A(24)(a) of the 2000 Act (as amended). Substitute consent is a form of retention permission introduced into Irish law in 2011 under amendments to the Planning and Development Act, 2000 made by the Planning and Development (Amendment) Act, 2010 following the well-known decision of the Court of Justice of the European Union in *Case C-215/06 Commission v. Ireland* [2008] ECR I-04911 ("*Case C-215/06*").

3. The applicant's challenge to the Board's decision is advanced on a number of grounds but principally on the ground that the Board misinterpreted and misapplied the provisions of s. 261A(24)(a) of the 2000 Act (as amended) in refusing to hold that the quarry had *"commenced operation"* before 1st October, 1964. At the heart of the case is the correct interpretation and application of that subsection of s. 261A. However, having regard to the lengthy planning and legal history of the quarry and the numerous legal challenges and proceedings involving the quarry, it will be necessary to spend some time putting the current controversy which has led to this case in its proper context.

4. The lengthy planning and legal history of the quarry and the complications which it has thrown up have been compounded by what commentators have described as the "*exceptionally complicated [nature]*" (Niall Handy, 'Substitute Consent: The New Form of Retention Permission for EIA Development' (2011) 18 IPELJ 15) and the "*labyrinthine complexity"* (Oran Doyle, 'Elusive Quarries: A Failure of Regulation' (2011) 34(2) DULJ 180-207 at 180) of the legislative provisions relating to quarries which have been the subject of numerous amendments since 2000. In a very recent judgment of the Supreme Court, *An Taisce v. McTigue Quarries Limited & Ors* [2018] IESC 54 ("*McTigue*"), MacMenamin J. who gave the judgment of the court, pithily observed:-

> *"The Planning and Development Acts have been the subject of many judgments of this and other courts. In one, O'Connell v. The Environmental Protection Agency and Ors [2003] 1 IR 530, Fennelly J. described the legislation then as being a 'statutory maze' (at p. 533). One scholar later described the Acts in 2011 as being a 'conceptual morass' (Oran Doyle, "Elusive Quarries: A Failure of Recognition" (2011) 34(2) DULJ 180, 197-208). There have been countless further amendments since then. It is not unfair to comment that the present state of the legislation is an untidy patchwork confusing almost to the point of being impenetrable to the public. This is in an area where, of its nature, legislation is supposed to have a strong public participation aspect. Confused legislation engenders litigation which, in turn, causes delays in lawful developments, including infrastructure. The entire subject matter requires urgent codification (See, generally, Doyle op.cit.)."* (per MacMenamin J. at para. 28).

5. I echo and completely agree with those observations. If anything, the position has become even more complex and confusing by the still further amendments to the legislation and, in particular, to s. 261A of the 2000 Act (as amended), which the Supreme Court did not have to consider in *McTigue* but which do arise for consideration in this case.

Summary of Conclusions

6. For reasons which I have set out in some detail in this judgment, I have concluded that the Board did not misinterpret or misapply the provisions of s. 261A(24) of the 2000 Act (as amended) as contended by the applicant. I have concluded that on the contrary, the Board correctly interpreted and applied that provision to the applicant's application for leave to seek substituted consent in respect of the quarry.

7. I have concluded that the interpretation of those provisions adopted by the Board is much more consistent with the statutory framework and scheme of part XA and s. 261A of the 2000 Act (as amended), as well as with the specific provisions of s. 261A(24)(a)

which are directly in issue in the present case, and with the well-established case law of the High Court and Supreme Court. I have concluded that it would be most unsatisfactory if the statutory words at issue in s.261A(24) (namely, the requirements that the quarry had to have *"commenced operation"* before 1st October, 1964) were to be interpreted differently to the manner in which those or similar words, as used in other sections in the 2000 Act (as amended) and in earlier legislation have been interpreted.

8. I have further concluded that the interpretation of s. 261A(24)(a) adopted and applied by the Board is one which conforms to the views of, and the approach taken, by the CJEU in *Case C-215/06* and that the interpretation put forward by the applicant in its challenge to the Board's decision would not conform to the views expressed by the CJEU in its judgment in that case and in subsequent judgments which it has delivered in this field. Nor am I satisfied that the applicant has put forward any other valid grounds for impugning the Board's decision. Specifically, I do not accept that the Board took into account irrelevant considerations in its decision refusing the applicant's application. Nor did the Board ignore or fail to have proper regard to the findings contained in previous judgments of the High Court in relation to the quarry. On the contrary, I am satisfied that the Board was fully aware of and took into account the findings contained in those previous judgments in its decision. I have reached the conclusion that the Board correctly interpreted the statutory provisions at issue and was perfectly entitled to conclude, based on that interpretation and on the material before the Board concerning the intensification of the operations of the quarry since 1964, that the quarry did not *"commence operation"* before 1st October, 1964.

9. I am not satisfied that the Board was precluded from reaching the decision which it took by reason of the provisions of s. 261(7)(e) of the 2000 Act (as amended) as applied by the High Court (Baker J.) in *McCoy v Shillelagh Quarries Ltd*. [2015] IEHC 838 ("*McCoy*").

10. Finally, while the Board Order recording the decision of the Board on the applicant's application contains some errors, I am satisfied that these minor errors are harmless, insubstantial and inconsequential, that the Board Order makes clear what the Board was deciding and the statutory basis on which it was making its decision and, further, that the applicant was not in any way misled or prejudiced by any of those errors.

11. In those circumstances, I refuse the applicant's challenge to the Board's decision.

Background to the Board's decision

12. As noted earlier, the applicant's quarry has a very lengthy and complicated planning and legal history which it will be necessary to outline in greater detail later in this judgment. At this point, however, it is appropriate to set out the immediate background to the decision of the Board which is challenged in these proceedings.

(a) The applicant's application for leave to apply for substitute consent

13. Following the insertion into the 2000 Act (as amended) of ss. 261A(21) – (24) on 22nd July, 2015 on foot of the European Union (Environmental Impact Assessment and Habitats)(No. 2) Regulations 2015 (SI No. 320/2015) (the "2015 Regulations), on 20th November, 2015 the applicant, through its planning consultants, applied to the Board for leave to apply for substitute consent in respect of the "*existing quarry*" at Aghfarrell, Brittas, County Dublin. The application sought leave to apply for substitute consent following the commencement of ss. 261A(21) – (24) of the 2000 Act (as amended). It was claimed that the applicant was entitled to obtain leave to apply for substitute consent in respect of the quarry under those provisions in circumstances where it had brought proceedings challenging an earlier refusal by the Board to grant planning permission in respect of the quarry on foot of an application for such permission which the planning authority, South Dublin County Council (the "Council"), had directed be made by the applicant pursuant to s. 261(7) of the 2000 Act (as amended) and which had not been concluded by the relevant date in August, 2012 by which the Council had to carry out its examination and make its determination in relation to quarries under s. 261A(2).

(b) The inspector's report

14. The Board appointed an inspector to report in respect of the applicant's application. The inspector produced a comprehensive report for the Board on 7th February, 2017. Having referred in some detail to the extensive planning history of the quarry, to the application made by the applicant, to the submissions of the Council and of the Dublin Mountain Conservation and Environmental Group and of the late Michael McCoy, the inspector focused on the issue arising under s. 261A(24)(a)(i)(I) of whether the quarry "*commenced operation before 1st October, 1964*" being one of the requirements for the grant of leave to apply for substitute consent in s. 261A(24)(a) of the 2000 Act (as amended). The inspector stated (at para. 5.8 of his response) that the Board, on the basis of the findings by the High Court (Costello J.) in *Patterson v. Murphy* [1978] ILRM 85 ("*Patterson*") that some quarry operation on the site took place before 1st October, 1964, "*could decide*" that the quarry "*commenced operation before 1st October, 1964*" and that the condition to that effect in s. 261A(24)(a)(i) had been met and grant leave to the applicant to apply for substitute consent.

15. However, the inspector also stated that on the basis of other earlier decisions of the Board (in 2006) and of the High Court (Hedigan J.) in *Shillelagh Quarries Limited v. An Bord Pleanála (No.1)* [2012] IEHC 257 ("*Shillelagh (2012)*") and by the High Court (Baker J.) in *McCoy* the Board "*could also decide*" that the "*nature of the operations which occurred on the site after 1964 were of a different nature and intensity than the operations carried out before 1964 so that they were materially different in planning terms"* and that this "*would imply that the quarry that is the subject of the current application is not the same as the one that commenced operation before 1st October 1964"* and, consequently, the condition in s. 261A(24)(a)(i) was not satisfied (para. 5.9). The inspector opined that the text of the legislation "*would support either interpretation in the circumstances that are established by the planning and legal history of the site*" (para 5.9).

16. Having set out these two possible interpretations of the relevant requirement in s. 261A(24)(a)(i), the inspector stated (at para. 5.10) as follows:-

> *"Nevertheless, I would prefer the looser interpretation of s. 261A(24)(a)(i). A grant of leave to apply would not constitute a development consent in itself and would not imply that one would be granted if adverse effects were identified on the environment, on any Natura 2000 site or otherwise in relation on (sic) the proper planning and sustainable development of the area. The amendment of section 261A by the [2015 Regulations] had the clear effect of widening the scope to apply for substitute consent even when leave to do so had been refused under the previously enacted provisions. It would therefore seem unduly restrictive to interpret the new provisions with excessive rigour so as to prevent applications for substitute consent when they might be enabled by the new laws. In these circumstances, I would advise the board that the quarry on the site was in operation before 1st October 1964 for the purposes of 261A(24)(a)(i) of the act."*

17. On that basis, the inspector recommended that the Board make a determination in relation to various of the other statutory

requirements matters (which were not in issue in these proceedings), decide that the quarry "*commenced operation before 1st October 1964*" and grant leave to apply for substitute consent for the quarry.

18. Among the reasons and considerations set out by the inspector for recommending that such a determination be made by the Board were:-

> "• *The size of the quarry on the site and the effects on the environment that it is likely to have had, in particular the effect on the landscape,*
>
> • *The information on the extent of the extraction area of the quarry at various dates submitted by the applicant, the planning authority and third parties in the course of the current application,*
>
> • *The planning history of the site, in particular its registration by the planning authority under section 261 of the Planning and Development Act 2000 (as amended), the section 5 Declaration made by the board under 06S.RL2473 and its decision to refuse permission under PL06S.231371, Reg Ref SD07A/0276, and*
>
> • *The court judgments issued in relation to the quarry including [*Patterson*,* Shillelagh (2012)*, Shillelagh Quarries Ltd. v An Bord Pleanala [2013] IEHC 92 ("Shillelagh (2013)") and* McCoy*…]"*

19. For these reasons, the inspector recommended that the Board grant the applicant leave to apply for substitute consent on foot of the application made by the applicant in November 2015 (para. 7.0).

(c) The Board's decision

20. The decision of the Board on the applicant's application is recorded in the Board Order of 18th May, 2017. The Board decided to refuse to grant leave to the applicant to apply for substitute consent on foot of its application. The Board set out its reasons for refusing to grant leave under the "*Reasons and Considerations*" on p. 2 of the Board Order. The Board Order recorded that the Board had regard to:-

> "• *the report and information provided by the planning authority,*
>
> • *the submissions and observations on file,*
>
> • *the planning, enforcement, registration and legal history of the subject quarry, and*
>
> • *the report of the Inspector…"*

21. The Board was satisfied that the application came within the scope of s. 261A(21)(a) of the 2000 Act (as amended) "*by virtue of its planning and legal history*". This meant that the Board could proceed to consider the matters as set out in s. 261A(21)(c) and to make the necessary determination under that provision thereby enabling the Board to proceed to consider whether the conditions set out in s. 261A(24)(a) were satisfied. As I explain later, the Board sought to contend in its statement of opposition and in its written submissions that in fact the applicant had not satisfied all of the conditions necessary to bring its application within s. 261A(21)(a), notwithstanding the Board's earlier acceptance that it had as was recited in the inspector's report (at para. 2.2) and in the Board Order itself (on p. 2). Ultimately, the Board refined its position at the hearing and did not seek to "backtrack" on its earlier acceptance that the conditions in s. 261A(21)(a) were satisfied (notwithstanding that in truth the provisions of s. 261A(21)(a)(ii)(I) or (II) appear not to have been satisfied on the facts). In any event, having expressed its satisfaction that the application did satisfy the requirements in s. 261A(21)(a), the Board went on to make the necessary determination in relation to the quarry referred to in s. 261A(21)(c)(i), namely, that development was carried out at the quarry after 1st February, 1990 which would have required an Environmental Impact Assessment ("EIA") but that no such assessment was carried out (referring to an earlier decision of the Board in relation to the quarry in 2006).

22. Having made that determination, the Board then moved to s. 261A(24)(a), and having made the determination under s. 261A(21)(c) that subparagraph (i) of that subsection applied to the quarry, the Board also satisfied itself that the requirements in relation to registration of the quarry under s. 261 were fulfilled, as required by 261A(24)(a)(ii). It was then necessary for the Board to consider whether either of the conditions in s. 261A(24)(a)(i) was satisfied. The Board noted in its order that no planning permission had been granted in respect of the quarry (and that that was not contested by the parties) and, consequently, the requirement in s. 261A(24)(a)(i)(II) was not satisfied. It was, therefore, necessary to consider whether the alternative requirement in s. 261A(24)(a)(i)(I) was satisfied, namely, that the quarry "*commenced operation before 1st October, 1964"*. The Board decided that that requirement had not been satisfied in the case of the quarry. The Board concluded that the quarry could not be considered to have *"commenced operation"* before 1st October, 1964. In reaching that conclusion, the Board Order stated that the Board had "*particular regard to"* a number of matters, including the "*overall planning history of development of the site*" including a number of planning decisions in respect of the quarry which included a number of previous decisions or determinations of the Board itself as well as a number of judgments of the courts including those of Costello J. in *Patterson*, Hedigan J. in *Shillelagh (2012)* and *Shillelagh (2013)* and Baker J. in *McCoy*.

23. Having expressed the conclusion that the quarry could not be considered to have *"commenced operation"* before 1st October, 1964, the Board Order continued (on p. 3):-

> *"The planning status of the quarry has been confirmed by An Bord Pleanála and by the High Court on a number of occasions, whereby claims that the quarry operations were a continuation of historical activities commenced before 1964 have been consistently rejected. The Board came to the view that to grant leave to apply for substitute consent on the basis of pre-64 commencement would run contrary to the rational and orderly application of the principles of proper planning and sustainable development. Therefore the requirements of s. 261A(24)(a)(i) of the 2000 Act are not satisfied"*

24. The Board then explained in its order (at p. 4) why it was not accepting the inspector's recommendation:-

> *"In not accepting the Inspector's recommendation to grant leave to apply for substitute consent, the Board considered that the decisions of the High Court and of An Bord Pleanála all underlined the clear distinction between the historical activities on the site, and the operations that commenced and intensified from the late 1970's onwards. This distinction has been repeatedly confirmed in the High Court dating back to the judgment of Costello J. in 1978, as quoted in the*

Inspector's report (page 4). Whereas the Inspector was prepared, on balance, to take a different and more permissive view, enabling the applicant an opportunity to make a further application for substitute consent, the Board did not consider that the subject quarry could reasonably be considered to have commenced pre-1964."

25. The references to previous decisions of the Board and of the courts in relation to the quarry will become clearer when I outline the planning history of the quarry in greater detail later in this judgment. For present purposes, however, it will be seen that the Board took these into account in reaching its conclusion that it should refuse to grant leave to apply for substitute consent in respect of the quarry the subject of the applicant's application, on the essential ground that the quarry had not *"commenced operation"* before 1st October, 1964 and that the applicant had not, therefore, satisfied one of the conditions required to be met before leave could be granted under s. 261A(24) of the 2000 Act (as amended).

Applicant's challenge to Board's decision

26. The applicant obtained leave to apply for judicial review in respect of the Board's decision on 10th July, 2017. The applicant sought an order of *certiorari* quashing the Board's decision together with an order remitting the applicant's application for leave to apply for substitute consent to the Board to be determined in accordance with law.

27. The applicant was required to put the Council, Dublin Mountain Conservation Group and the representative of the late Mr. McCoy on notice of the proceedings. While Rachel McCoy, the representative of Mr. McCoy, was made a notice party to the proceedings on 24th July, 2017, she did not actively participate in the proceedings. The proceedings were entered in the Commercial List on 24th July, 2017 and directions in relation to the proceedings were made at that stage. Further directions were made on 23rd October, 2017 and 11th December, 2017.

28. The grounds for the applicant's application for judicial review in respect of the Board's decision were set out in its statement of grounds. The applicant's statement of grounds was in turn grounded on an affidavit sworn by Thomas Murphy, a director of the applicant company, on 29th June, 2017. The Board's statement of opposition was filed on 19th December, 2017. The facts stated in the statement of opposition were verified by an affidavit sworn by Chris Clarke, the secretary of the Board, on 19th December, 2017. A short replying affidavit was sworn by Mr. Murphy on behalf of the applicant on 26th February, 2018. There were no further affidavits.

29. Written submissions were exchanged between the applicant and the Board in advance of the hearing. The applicant furnished supplemental written submissions shortly before the hearing. Further supplemental submissions were furnished by the applicant and by the Board in February, 2019 at the invitation of the court, following the judgment of the Supreme Court in *McTigue* on 7th November, 2018 and the delivery of judgment by the High Court (Barrett J.) in *An Taisce v. An Bord Pleanála* [2018] IEHC 315 on 17th May, 2018. Both of those judgments were delivered after the court had reserved judgment in the present case.

(a) The applicant's claims

30. The principal issue raised by the grounds of challenge advanced by the applicant is whether the Board incorrectly interpreted and applied the provisions of s. 261A(24)(a)(i)(I) in holding, on the facts before it, that the quarry, the subject of the application for leave to apply for substitute consent, had not *"commenced operation"* before 1st October, 1964. The applicant's principal contention was that on a proper interpretation of the subsection, the Board was required to conclude on the facts that the quarry had *"commenced operation"* before 1st October, 1964 and that the Board was not entitled under the provisions of the subsection to embark on an enquiry as to whether the quarrying operations carried out on the site as at 1st October, 1964 had intensified or increased in the period since that date. The applicant's position was that once some quarrying was being carried out at the site, the subject of the application, before 1st October, 1964 (and the applicant contended that there was), that was the end of the matter and the Board, having declared itself satisfied that all the other conditions in s. 261A(24) had been satisfied, was then obliged to grant leave to the applicant to apply for substitute consent in respect of the quarry. This, it said, was the inevitable consequence of giving the words used in s. 261A(24)(a)(i) their natural and ordinary meaning (relying on cases such as *DB v. Minister for Health* [2003] 3 IR 12 ("*DB*"); *Board of Management of St. Molaga's National School v. Department of* Education [2011] 1 IR 362 ("*St. Molaga's National School*"); *Meagher v. Minister for Social Protection* [2015] 2 IR 633 ("*Meagher*"); and *Irish Life and Permanent PLC v. Dunne* [2016] 1 IR 92).

31. The applicant further submitted that the subsection was introduced as part of a remedial statutory provision which was intended to enable the owners or operators of quarries, such as the applicant, who had been unable to obtain development consent for their quarries after July 2008 and who were deemed to be carrying out unauthorised development after 15th November, 2011 to regularise their position. The applicant contended that the statutory provisions at issue and, in particular, s. 261A(24)(a), should be construed liberally and in a way which gives effect to that purpose (relying on cases such as *Bank of Ireland v. Purcell* [1989] IR 327; *McE v. Residential Institutions Redress Board* [2016] IECA 17; and *JGH v. Residential Institutions Review Committee* [2017] IESC 69). The applicant submitted that there was no warrant to interpret the provisions at issue in a restrictive or limited sense.

32. The applicant further contended that the Board, in referring in its decision, as recorded in the Board Order, to the *"rational and orderly application of the principles of proper planning and sustainable development"* took into account considerations which were irrelevant at that stage of the process and that the Board did not have any residual discretion to refuse an application at that stage on that basis. In that context, the applicant relied on cases such as *The State (Cussen) v. Brennan* [1981] IR 181; *Rawson v. Minister for Defence* [2012] IESC 26; and *O'Donovan v. Chief Superintendent of An Garda Síochána, Cork* [2005] 1 IR 407.

33. In support of these contentions, the applicant submitted that the Board ignored findings made by the High Court in *Patterson*, *Shillelagh (2012)* and *McCoy* which it contended demonstrated that the quarry had *"commenced operation"* before 1st October, 1964, albeit that the applicant accepted that the quarrying operations had intensified over time since then. The only relevant issue, as submitted by the applicant, was whether some quarrying operations had commenced operation before 1st October, 1964 and the applicant submitted that these cases clearly established that it had and that the intensification of its operations in the period since then was irrelevant.

34. The applicant advanced a number of further grounds in support of its challenge to the decision. It contended that the decision of the Board as recorded in the Board order contains errors on the face of the record in a number of respects such as by reciting the incorrect subsections of s. 261A in a number of places. It was further contended by the applicant (in a supplemental written submission furnished in advance of the hearing) that the Board was precluded from finding that the quarry had not *"commenced operation"* before 1st October, 1964 having regard to the provisions of s. 261(7)(e) of the 2000 Act (as amended) and the judgment of Baker J. in the High Court in *McCoy* which applied and gave effect to that provision in the case of the quarry. The applicant submitted that in order for s. 261(7)(e) to apply, the quarry had to have *"commenced operation"* before 1st October, 1964. Finally, the applicant contended that it was not open to the Board to make the case (as the Board sought to do in its statement of

opposition and in its written submissions) that the applicant had not satisfied all of the requirements contained in s. 261A(21)(a) in circumstances where the Board had previously accepted, including in the Board Order itself, that all of those requirements had been satisfied and had, on the basis that they were satisfied, proceeded to make the required determination under s. 261A(21)(c).

(b) The Board's response

35. In response, the Board rejected the applicant's principal contention in relation to the interpretation of s. 261A(24)(a) and its application to the facts. It contended that the interpretation of the subsection advanced by the applicant was clearly incorrect having regard to the scheme and purpose of s. 261A and part XA of the 2000 Act (as amended) as well as the wording of s. 261A(24)(a)(i)(I) itself and having regard to previous judgments of the courts. The Board submitted that those judgments have considered the concept of the commencement of a "*development*" in the context of a quarry before 1st October, 1964 and the concept of the commencement of the operation of a quarry before that date and required a comparison to be made between what was being done as of that date with what was being done at the time of the assessment (relying, in this context, on the decision of the Supreme Court in *Waterford County Council v. John A Wood Limited* [1999] 1 IR 556 ("Waterford"); and the judgments of the High Court in *Patterson*, *Shillelagh (2012)* and *McCoy*; as well as the judgments of Charleton J. in the High Court in *An Taisce v. Ireland & Ors* [2010] IEHC 415 ("*An Taisce (2010)*") and *McGrath Limestone Works Limited v. An Bord Pleanála & Ors* [2014] IEHC 382 ("*McGrath Limestone"*)). The Board further contended that the interpretation it adopted was correct having regard to the European context within which the entitlement to apply for leave to seek substitute consent or to apply for substitute consent for a quarry must be considered (relying, in particular, on the judgments of the CJEU in *Case C-215/06* and *Joined Cases C-196/16 and C-197/16 Comune di Corridonia and Others v Provincia di Macerata and Provincia di Macerata Settore 10 – Ambiente ("Joined Cases C-196/16 and C-197/16")* and the judgment of the Supreme Court in *Sweetman v. An Bord Pleanála* [2018] IESC 1 ("*Sweetman"*)). The Board submitted that it would have been an incorrect interpretation of the requirement that the quarry have *"commenced operation"* before 1st October, 1964 merely to have looked to see whether any quarrying had been carried out at the site as at that date and that if there had been, that that would be sufficient in order to satisfy the requirement that the quarry had *"commenced operation"* before 1st October, 1964. The Board contended that s. 261A(24)(a)(i)(I) required a comparison to be carried out between the nature and extent of the quarrying activity carried out as of 1st October, 1964 and the quarrying activity being undertaken as of the date of the assessment at the time of the application for leave to apply for substitute consent in respect of the quarry with such a comparison being required to be conducted in accordance with the various tests outlined in cases such as *Patterson, Waterford, An Taisce (2010)* and *McGrath Limestone.* Otherwise, the quarry, the subject of the application for leave to seek substitute consent, would not properly be found to have *"commenced operation"* before 1st October, 1964.

36. The Board highlighted the requirement to ensure that the particular provision opening a *"gateway"* to obtain leave to apply for substitute consent in respect of a quarry is interpreted in a manner which respects the decision of the CJEU in *Case C-215/06* and the subsequent jurisprudence of the CJEU that an opportunity to apply for substitute consent must not afford a person the opportunity to "*circumvent the community rules*" and that it should "*remain the exception*". The Board maintained that there was an obligation upon it and on the courts to interpret national law adopted for the purpose of implementing a Directive in the light of the wording and purpose of the Directive as interpreted by the CJEU (relying on a number of cases including *Case 79/83 Dorit Harz v Deutsche Tradax GmbH* [1984] ECR 1921; *Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR I-01891; *Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentación SA* [1990] ECR 1-04135 ("*Marleasing*"); and *Albatross Feeds v. Minister for Agriculture and Foods* [2007] 1 IR 221). The Board rejected the applicant's contention that s. 261A(24) was a remedial provision which should be interpreted liberally. On the contrary, the Board contended that s. 261A(24) is an exception to an important principle of European law and that the subsection should be interpreted in a way that respects the exceptional nature of the entitlement to apply for leave to seek substitute consent.

37. The Board also relied on the extensive planning and legal history of the quarry and on the findings made by the High Court in *Patterson*, *Shillelagh (2012)* and *McCoy* and on various previous decisions and determinations of the Board in relation to the quarry including, in particular, (a) the decision of the Board dated 24th December, 2010 refusing the applicant's application for permission for the continuance of the use of the quarry, existing ancillary facilities, an extension of the existing quarry extraction area, the provision of a wheel wash and hydrocarbon inceptor and landscaping and restoration at the quarry, on the basis that the Board was not satisfied that the existing quarrying operations conducted on the site commenced before 1st October, 1964 (that was the decision which was unsuccessfully challenged by the applicant in *Shillelagh (2012)* and in respect of which a certificate to appeal was refused in *Shillelagh (2013)*); (b) the decision by the Board on the same date (24th December, 2010) pursuant to s. 5 of the 2000 Act (as amended) that the intensification of the use of the quarry including the use of explosives or blasting at the quarry site was development and not exempted development (the "s. 5 determination") which was not challenged by the applicant and by which the High Court (Baker J.) found she was bound in *McCoy*; and (c) the decision of the Board dated 17th December, 2014 refusing an earlier application by the applicant for leave to apply for substitute consent in respect of the quarry (under the provisions of the 2000 Act which predated the insertion and commencement of s. 261A(24)) on the basis that the applicant had not established "*exceptional grounds*" under s. 177D of the 2000 Act (as amended) for various reasons one of which was that the Board did not consider that the applicant "*could reasonably have had a belief that the development was not unauthorised*". While an application for leave to seek judicial review in respect of that decision was filed in the Central Office, no application was made to court within time. While an application was brought by the applicant to extend time for such an application to be made, it was refused and an appeal was sought to be brought to the Supreme Court which was in turn transferred to the Court of Appeal, where it awaits hearing.

38. The Board rejected the applicant's contention that the Board took into account irrelevant considerations and submitted that it was entitled to have regard to the "*rational and orderly application of the principles of proper planning and sustainable development*" in reaching its interpretation of the versions of s. 261A(24)(a)(i) and that, in the alternative, its reference in the Board Order to the application of those principles was superfluous in circumstances where the Board had concluded that the quarry had not *"commenced operation"* before 1st October, 1964. The Board submitted, therefore, that it had not taken into account any irrelevant considerations.

39. On the question of the errors in the Board Order, the Board submitted that the errors were immaterial and insubstantial and caused no prejudice to the applicant in circumstances where it was clear from the Board Order itself, the basis on which the applicant made its application and the basis on which the Board decided that application. The Board relied on the judgment of the High Court (O'Neill J.) in *KK v. Taaffe* [2009] IEHC 243 ("*KK*") in support of that submission. The Board contended that on no basis could the minor errors in the Board Order give rise to an entitlement to an order of *certiorari* as sought by the applicant.

40. Finally, notwithstanding what was said in the statement of opposition and in the Board's written submissions, it was confirmed on behalf of the Board in its oral submissions at the hearing that the Board was not maintaining its contention that as a matter of discretion, if the applicant were to succeed on any of its grounds of challenge, the court should refuse to remit the applicant's application to be considered by the Board on the basis that the applicant had not in fact satisfied all of the requirements of s. 261A(21)(a) (notwithstanding that the Board had accepted that the applicant had satisfied those requirements and had recorded that

fact in the Board Order itself). This was so notwithstanding that it appeared to be the case that as a matter of fact the applicant had not satisfied the requirements contained in s. 261A(21)(a)(ii)(I) or (II). It was belatedly accepted by the Board that it was not open to the Board to mount a collateral attack on that aspect of its own decision or to row back or backtrack on what it had previously decided. As I explain later in my judgment, having regard to the conclusions which I have reached in relation to the other aspects of the applicant's claim, it is ultimately unnecessary for me to express any concluded view on this aspect of the case. It simply does not arise having regard to the other conclusions I have reached.

41. Before turning to consider the relevant legislative provisions and the grounds of challenge advanced by the applicant, it is appropriate that I say something about the planning and legal history of the quarry.

Planning and legal history of the quarry

42. As appears from the inspector's report and from the Board Order setting out the Board's decision to refuse the applicant's application for leave to apply for substitute consent, both the inspector and the Board referred in some detail to the extensive planning history of the quarry which can be seen in the previous decisions and determinations of the Board and in the judgments of the courts concerning the quarry.

(a) Patterson

43. A useful starting point is the judgment of Costello J. in *Patterson* in 1978. This judgement contains a number of important findings which were considered and applied by the inspector in making his recommendation to the Board and by the Board in reaching its decision on the applicant's application. The proceedings at issue in *Patterson* were an application under s. 27 of the Local Government (Planning and Development) Act, 1976 (the "1976 Act") (the "s. 27 proceedings") and nuisance proceedings. The plaintiffs (a famous musical couple) were the owners and occupiers of a house beside the quarry. They alleged acts of nuisance from the adjoining quarry and that the quarry constituted an unauthorised development. In response to the s. 27 proceedings, the respondents contended that no permission under the Local Government (Planning and Development) Act, 1963 (the "1963 Act") was necessary as the "*present development*" had been commenced before the "*appointed day*", 1st October, 1964. The respondents admitted that no planning permission of any sort had been obtained in respect of the quarry but that such permission was not necessary as the development had commenced before 1st October, 1964. Costello J. approached his consideration of that aspect of the s. 27 proceedings by seeking to ascertain "*exactly what operations were carried out in the quarry field prior to the appointed day*" and then comparing that to the "*present day operations*" (p. 104).

44. On the evidence, Costello J. made the following findings. Before 1st October, 1964, Mr. Murphy Sr. had "*for some years drawn shale from the quarry field*". As far as back as 1946, explosives were used to dislodge the material. Apart from the one occasion mentioned in the evidence, no explosives were used in the field until 1974. There was definite evidence that in 1949 shale from the quarry was used for the foundations of a public house and that in 1962 shale was taken from the field to be used in foundations for a roadway at a factory. A worker employed by Mr. Murphy Sr. between 1962 and 1964 gave evidence, which was accepted by Costello J., that during that period he used a loading shovel in the quarry field from time to time to scrape off loose rock and to load it into lorries. However, Costello J. found that on the evidence the operations being carried out prior to 1964 were "*primitive and haphazard*". He concluded that the operations which were then being carried out amounted to "*development*" as that term was defined in the 1963 Act and that such "*development*" consisted of the loosening of shale with picks and bars, the scraping of portions of surface of the field with a mechanical shovel and the loading of the shale into lorries with the help of a mechanical shovel. Costello J. found that those operations were carried out "*intermittently and on a small scale*". He concluded that the "*present operations*" (as of 1977/1978) differed materially from those carried on prior to 1st October, 1964. He reached that conclusion having regard to the object of the "present operations", the method of production and the scale of operations. He held that the object of the operations in 1978 was to produce a different product to that being produced in 1964 in that the four-inch stone being produced in 1978 was different to shale and was used for a different purpose in the building industry and fetched a different price. The method of construction was different in 1978 to that which obtained in and before 1964 in that the raw material/rock for the end product was in 1978 being obtained by means of blasting which was done on a regular basis involving large crushing and screening plant being used to produce stones of the correct dimension and considerable ancillary equipment and a considerable labour force. The scale of operations in 1978 was a "*substantial one*" and bore no relationship to the scale of operations carried on prior to 1st October, 1964.

45. Costello J. stated that if the scale of operations had "*so intensified as to render contemporary operations materially different from those carried on before the appointed day, this fact can be taken into account in considering whether what is presently being done commenced prior to 1st October, 1964*" (p. 105).

46. Costello J. continued:-

> "*If present-day 'development' differs materially from the 'development' being carried on prior to the 1st October 1964 I do not think that it can be said that it was commenced prior to the appointed day. This is the situation in the present case. The development, I am now considering was in fact, not commenced until the summer of last year. Thus, it was and is development which requires permission under Part IV of the 1963 Act…*" (pp. 105-106).

47. Costello J. made an order in the s. 27 proceedings prohibiting the development. Ultimately, the proceedings between the parties (together with certain subsequent proceedings) were settled in May 1999 and the order made by Costello J. was vacated on 22nd June, 1999. I should say that the applicant sought, in replying submissions, to distinguish the present case from *Patterson* by contending that that case was concerned with whether "*development*" had "*commenced*" before 1st October, 1964 and not whether the "*quarry*", as that word is defined in s. 2 of the 2000 Act (as amended), had *"commenced operation"* before that date. However, I do not accept that the conclusions drawn by Costello J. in *Patterson* are not relevant to the position under s. 261 or 261A of the 2000 Act (as amended) as appears from the judgment of Charleton J. in the High Court in *An Taisce (2010).* I return to this point later.

(b) Enforcement proceedings

48. The Council's predecessor brought enforcement proceedings in relation to the quarry in 1991. However, those proceedings were struck out by the District Court in 1992 apparently on the basis that the court accepted evidence that quarrying activities on the lands had commenced prior to 1st October, 1964.

(c) The s.261(7) application

49. Following the introduction of the new system of control and registration for quarries under s. 261 of the 2000 Act the quarry was registered by the Council in April 2005. Following registration, the Council served a notice on the applicant pursuant to s. 261(7)(a) of

the 2000 Act (as amended) on 18th April, 2006 directing the applicant to apply for planning permission and to submit an environmental impact statement to the Council in respect of the quarry. I observe here that the Council is required to serve such a notice under s. 261(7)(a) where the "*continued operation*" of a quarry, which has an extracted area of greater than five hectares or is situated on a European site or other protected area and which "*commenced operation"* before 1st October, 1964, would be likely to have significant effects on the environment. The applicant submitted an application for planning permission and an environmental impact statement to the Council on 18th April, 2007 on foot of the notice served by the Council under s. 261(7)(a). The application sought permission for (*inter alia*) the continuance of use of the existing quarry and for an extension of the existing quarry extraction area by 4.2 hectares, which would have given a total extraction area of 15.5 hectares within an overall application area of 28.1 hectares. Permission was also sought for other elements.

50. On 23rd September, 2008, the Council granted planning permission on foot of that application subject to conditions (ref. SD07A/0276). That decision was appealed to the Board on behalf of the Dublin Mountain Conservation and Environmental Group by the late Mr. McCoy. The applicant also appealed in relation to the conditions imposed by the Council.

51. On appeal, the Board refused permission for the proposed development in a decision dated 24th December, 2010 (ref. PL 06S.231371). The Board appointed an inspector in respect of the appeals. The inspector prepared a report dated 20th July, 2010 in which he recommended that permission be refused for the proposed development for a number of recommended reasons. The Board accepted the inspector's recommendation and refused permission for the proposed development. In its decision, the Board concluded that, on the basis of the submissions made, the planning history of the site, the judgment of Costello J. in *Patterson* and the available area photography, it was not satisfied that the "*existing quarrying operations presently conducted on site, commenced prior to the appointed day, namely, 1st October 1964, nor are they authorised by a grant of planning permission*". On that basis, the Board decided that it was precluded from granting permission in respect of the proposed development. In other words, the Board decided for the purposes of s. 261(7)(a)(ii) that the quarry, the subject of the application, had not "*commenced operations before 1st October, 1964*" as required by that subsection. The Board went on to find that having regard to various matters including the planning history of the site, the judgment in *Patterson*, the nature, scale and extent of activities carried out on the site, the provisions of s. 261 of the 2000 Act (as amended) and the judgment of the CJEU in *Case C-215/06*, the proposed development the subject of the application was of a class which required an EIA in accordance with the requirements of Directive 85/337/EEC (as amended)(the "EIA Directive"), that it included a significant element of retention permission and that the Board was, therefore, precluded from granting planning permission in respect of the proposed development.

(d) Judgment in Shillelagh (2012)

52. The decision of the Board of 24th December, 2010 (ref. PL06S.231371) was challenged by the applicant in judicial review proceedings which were heard and determined by Hedigan J. in a judgment delivered on 27th June, 2012 in *Shillelagh (2012)*. It is appropriate here to refer to some of the findings made and conclusions drawn by Hedigan J. in that judgment. The applicant had claimed that the Board erred in determining that the existing quarrying operations which were then being conducted on the site constituted unauthorised development. However, at para. 6.3 of the judgment, Hedigan J. accepted the Board's submission that there was a "*difference in planning terms between quarrying activity which may have commenced prior to the 1st October, 1964 but which has [been] carried on without an intensification and quarrying activity which may have similarly commenced, but which has since that time, intensified so as not to benefit from any exemptions by reason of its pre-1st October, 1964 origins*" (para 6.30, p.16). In that regard, Hedigan J. adopted what was said on this issue by Charleton J. in the High Court in *An Taisce 2010* and concluded that "*…intensification can amount to a change of use thus requiring a planning application*" (at para. 6.3).

53. Having referred to the findings of Costello J. in *Patterson*, Hedigan J. noted that there had been a fifteen-fold intensification of operations at the quarry since the 1970's and that the quarry by that stage covered 48.5 hectares, had an extraction rate of 500,000 tonnes and involved 200 vehicles movements per day which, the court stated, was "*very different from the primitive operation that was carried on pre-1964"* (para. 6.4, p. 18).

54. Having then referred to the inspector's report in respect of the appeals, Hedigan J. stated that there was "*compelling evidence before the Board upon which it could reach the conclusion that although the quarry had commenced prior to the 1st October 1964 there was intensification of use such that there was no entitlement to an exemption*" (para. 6.5, p. 18). Later in his judgment, Hedigan J. stated (at para. 6.6, pp. 18-20) that the Board had determined that the "*existing quarrying operations did not commence prior to the 1st October 1964 in any sense which attracts the pre-1st October 1964 status as otherwise-than-unauthorised"*. He further stated that the Board had determined that the quarry "*does not benefit from any pre-1st October 1964 status*" and that it is "*not a quarry that commenced operation before 1 October 1964 in any sense which renders it exempted development*" (para. 6.6, p. 20). Finally, in summarising his conclusions in *Shillelagh (2012)*, Hedigan J. stated (at para. 6.7):-

> *"To summarize, firstly I do not accept the argument that once the planning authority determined that the quarry commenced prior to the period to 1st October 1964, it was not open to the Board to go behind that determination when considering the consequential planning application. The mere registration of a quarry does not establish a pre-1964 use. In fact not only is the Board entitled to look at the planning status of the quarry, it is obliged to carry out its own assessment of the planning status of the quarry.*
>
> *Secondly, I am satisfied that there was evidence before [the Board] upon which it could reach the conclusion that the quarry operations intensified since 1964. This fact was the clear finding of Costello J. in* Patterson*…. Such an intensification amounted to a change of use disentitling the applicants to an exemption on the basis of pre 1964 status. Thirdly, it seems to me that the Board was entitled to conclude that the permission sought included a significant element of retention permission, and to take account of the* case C-215/06*…*
>
> *… I am not satisfied that the applicant has shown that there are substantial grounds for contending that the decision concerned ought to be quashed. Leave is therefore denied."*

As noted earlier, Hedigan J. refused to grant a certificate to appeal to the applicant in a judgment delivered on 5th March, 2013 in *Shillelagh (2013)*.

55. In her judgment in a subsequent application brought by the late Mr. *McCoy* and the Council pursuant to s. 160 of the 2000 Act (as amended) in *McCoy*, Baker J. noted that the Board had refused permission for the proposed development at the quarry on 24th December, 2010 and that Hedigan J. had refused to grant leave to seek judicial review in respect of that decision in *Shillelagh (2012)* and refused a certificate to appeal in *Shillelagh (2013)*. Baker J. held that the decision of the Board refusing planning permission "*stands and is not open to challenge*" (*McCoy*, para 20, p. 9). Later, Baker J., having referred to the Board's decision refusing to grant planning permission in its decision of 24th December, 2010, stated that the quarry activity was not authorised by any grant of

permission and, therefore, s. 261(7)(e) applied. Under s. 261(7)(e), the "*continued operation of a quarry in respect of which the owner or occupier has been refused permission in respect of an application for permission made on foot of a notification under paragraph (a) shall be an unauthorised development"*. Baker J. held, therefore, that as a consequence of the refusal of permission by the Board (which refusal was not quashed by the High Court), the continued operation of the quarry was unauthorised development having regard to the provisions of s. 261(7)(e). Baker J. repeated that conclusion at para. 45 (p.17). At para. 46, she stated that:-

> "*The quarry has an area of approximately 28 hectares, far in excess of the statutory threshold of 5 hectares [in s. 261(7)(a)] 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."* (*McCoy*, para. 46, p. 17)

56. As noted earlier, it is contended by the applicant that the conclusion by Baker J. that s. 261(7)(e) applied and had the effect that the development at the quarry as it then stood was unauthorised development in some way precluded the Board in the present case from finding that the quarry had not *"commenced operation"* before 1st October, 1964. As I explain later, that contention completely ignores the fact that in its decision dated 24th December, 2010 the Board expressly found that the "*existing quarrying operations presently conducted on site*" had not commenced prior to 1st October, 1964. The High Court (Hedigan J.) dismissed the applicant's challenge to that decision in *Shillelagh (2012)*. In my view, there is nothing in the judgment of Baker J. in *McCoy* which has the effect of reversing the conclusion reached by the Board in its decision of 24th December, 2010 and the decision of Hedigan J. refusing the applicant's challenge to that decision. I address this issue further later in my judgment.

(e) The s.5 determination

57. On the same date as the Board made its decision which was the subject of the challenge in *Shillelagh (2012)* (24th December, 2010), the Board made the s. 5 determination. The Dublin Mountain Conservation and Environmental Group had requested a declaration from the Council on a question which had arisen as to whether the intensification of the use of the quarry, including the use of explosives for blasting, the laying of material for a new road and a new entrance, were or were not development or were or were not exempted development. The Council did not issue the declaration requested within the statutory period and the issue was referred to the Board for determination under s. 5 of the 2000 Act (as amended) (ref. 06S.RL.2473).

58. Again, the Board appointed an inspector who produced a report dated 30th July, 2010 for the assistance of the Board. In his report, the inspector referred to the planning history of the quarry and referred in particular to the judgment of Costello J. in *Patterson*. The inspector was the same inspector as had been appointed by the Board for the purposes of the appeals from the decision of the Council to grant permission subject to conditions, the inspector referred to the report which he had prepared in respect of those appeals and in which he had concluded that the operations then being conducted at the quarry constituted a material and unauthorised intensification of works and the making of material change in the use of the land. The inspector stated (at p. 6 of his report) that the existing quarry was "*a significant operation in terms of its overall scale, extent and means of production"* and that "*whilst it would seem that the subject lands were previously used on an intermittent basis for the extraction of shale on a small scale using somewhat primitive methods, it is clear that the existing quarry is a much more sophisticated operation using a variety of plant machinery in addition to regular blasting to produce various stone products on a much larger scale*". On that basis, the inspector was of the view that the then existing operation bore little resemblance to the pre-1964 development carried out on the site. The inspector referred to the findings in *Patterson* and stated:-

> *"Considering the nature and scale of the operations presently being conducted from the site, it would seem that these exceed even those conducted c. 1977 and are far removed from the pre-1964 operation. It is my opinion that the existing operation on the site is development which is materially different to the pre-1964 development both by reason of the nature and intensity of the works and the making of a material change in the use of the land…Having concluded that the existing operation is development which does not have the benefit of pre-1964 status, and in the absence of any grant of planning permission authorising same, in my opinion, the existing quarry operation constitutes unauthorised development through the material intensification of works. I am also of the opinion that the extent of the quarry has been extended beyond the confines of that area originally quarried and that there has been a material change in the use of lands*". (p. 6)

59. The inspector continued:-

> *"Furthermore, in my opinion, aerial photography obtained from the OSi would tend to support the proposition that the existing quarrying operation significantly intensified both in terms of the extent and depth of the workings during the 10 year period between 1995 and 2005*". (p. 6)

60. The inspector then referred to blasting and noted that, in his judgment in *Patterson*, Costello J. had recorded that:-

> *"[A]s long ago as 1946 explosives were used to dislodge the material, but apart from this one occasion no explosives were ever used in the 'quarry field' until 1974. Accordingly, the reintroduction of blasting activities in 2000 could also be interpreted as an intensification of operations.*
>
> *On the basis of the foregoing, it is my opinion that the intensification of the use of the quarry through both an intensification of works and the making of a material change in the use of the lands through an extension of the quarry area constitutes development which is not exempted development".*
>
> (p. 6)

61. The inspector recommended that the Board conclude that the intensification of the use of the quarry was development and was not exempted development and made various other recommendations to the Board.

62. The Board accepted the inspector's recommendation in its s. 5 determination dated 24th December, 2010. In its decision, the Board again referred to the planning history of the site and to *Patterson*. The Board concluded that the intensification of the use of the quarry, including the use of explosives for blasting, constituted the carrying out of operations which were materially different to the development carried out on the lands before 1st October, 1964 "*by reason of the nature and intensity of the operations*

amounting to the making of a material change in the use of the land". The Board concluded that the change of use was considered to be a material change of use which constituted development which was not exempted development and which did not have the benefit of any permission authorising the development. Therefore, the Board decided, in the exercise of powers conferred on it under s. 5 of the 2000 Act (as amended), that the intensification of the use of the quarry, including the use of explosives for blasting, at the quarry amounted to development which was not exempted development.

63. As noted by Baker J. in her judgment in the High Court in *McCoy*, the s. 5 determination made by the Board was not challenged by the applicant. At para. 44 of her judgment in *McCoy*, Baker J. held that she was bound by the s. 5 determination made by the Board 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"*
>
> (*McCoy*, para. 44, p. 16).

64. Baker J. concluded that the unavoidable consequence of the s. 5 determination as well as the provisions of s. 261(7)(e) was that the development was, as a matter of law, an unauthorised development. The Court of Appeal ultimately dismissed an appeal from the judgment and orders made by Baker J. on 9th May, 2017 albeit that the Court of Appeal allowed a short period of time to enable the applicant to wind down its operations. Following the dismissal of its appeal by the Court of Appeal, quarrying activities ceased at the quarry on 23rd May, 2017.

(f) Applicant's previous application for leave to apply for substitute consent

65. The applicant made a prior application for leave to apply for substitute consent in respect of the quarry before the application which led to the decision of the Board which is challenged in these proceedings. In January 2013, the applicant made an application for substitute consent under another *"gateway"* under which substitute consent could be granted by the Board, namely, s. 177D of the 2000 Act (as amended). I observe here that this application was made before ss. 261A(21) - (24) were inserted into the 2000 Act (as amended) in July 2015. Although the Board's decision on that application was made pursuant to s. 177D, the application itself was made under s. 177C of the 2000 Act (as amended). Under that provision (which commenced on 21st September, 2011), a person who had carried out a development of the type specified in s. 177C(2) or the owner or occupier of land could apply to the Board for leave to apply for substitute consent in respect of the development (where no notice had been given by the planning authority under s. 177B). That provision applied to a development which was carried out where an EIA, a determination as to whether such an assessment was required or an appropriate assessment ("AA") was required and in respect of which there was some defect in the permission granted by reason of the absence or inadequacy of either or both such assessments or some other error (which was not relied upon by the applicant in its application) or where the applicant was of the opinion that *"exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent*" (s. 177C(2)(b)). It was this latter provision that the applicant relied on. Under s. 177D, the Board could only grant leave to apply for substitute consent in respect of an application under s. 177C where it was satisfied that an EIA was required, or a determination as to whether such an assessment was required or an AA was required in respect of the development and where it was further satisfied (*inter alia*) that *"exceptional circumstances"* existed. Section 177D(2) set out the matters to which the Board was required to have regard in considering whether such *"exceptional circumstances"* existed. They included whether the applicant for leave to apply for substitute consent "*had or could reasonably have had a belief that the development was not unauthorised*" (s. 177D(2)(b)). Section 177D(4) provided that the Board was required to decide whether to grant leave to apply for substitute consent or to refuse to grant such leave.

66. In a decision dated 17th February, 2014, and made pursuant to s. 177D(4), the Board refused to grant leave to the applicant to apply for substitute consent in respect of the quarry. The Board considered that an environmental impact statement was required in respect of the development and held that *"exceptional circumstances"* did not exist such that it would be appropriate to permit regularisation of the development by permitting an application for substitute consent to be made. The Board, therefore, decided to refuse to grant the applicant leave to apply for substitute consent. In reaching the conclusion that *"exceptional circumstances"* did not exist, the Board had regard to a number of matters (as it was required to do under s. 177D(2)). The Board did not consider that the applicant could reasonably have had a belief that the development was not unauthorised. Further, the Board considered that:-

> -The regularisation of the development would circumvent the purpose and objectives of the EIA Directive;
>
> - The ability to carry out an environmental impact assessment and for the public to participate in such assessment had been impaired;
>
> - The development had and was having significant effects on the environment, in particular, by reason of the significant adverse visual and landscape impact of the quarry; and
>
> - The adverse effects on the environment could not be remediated to any great extent.

67. The Board further had regard to the overall planning history of the development at the quarry and the judgments in *Patterson*, *Shillelagh (2012)* and *Shillelagh (2013)*. Further, the Board noted that the planning status of the quarry had already been "*clearly determined"* by Hedigan J. in *Shillelagh (2012)* and that the Council intended dealing with the quarry by means of the enforcement procedure contained in s. 154 of the 2000 Act (as amended). As noted earlier, an application for leave to apply for judicial review of the Board's 2014 decision was filed in the Central Office of the High Court (and was given Record No. 2014/234 JR). However, an application was never made to the court on an ex parte basis as required by ss. 50(6) and 50A(2)(a) of the 2000 Act (as amended). An application was subsequently made by the applicant to amend the proceedings which included an application for an extension of time for making the required application. However, that application was heard and refused by the High Court on 31st July, 2014. A notice of appeal from that decision to the Supreme Court was filed on the same date (and was given Record No. 365/2004). The appeal was transferred by the Supreme Court to the Court of Appeal and awaits a hearing by that court.

(g) The present application for leave to apply for substitute consent

68. Following the insertion of ss. 261A(21) – (24) of the 2000 Act (as amended) on 22nd July, 2015 pursuant to the 2015 Regulations, the applicant made a further application to the Board for leave to apply for substitute consent. That is the application which led to the decision of the Board which is challenged in these proceedings. This time, the applicant relied on a new "*gateway*" provided for under these new provisions of the 2000 Act (as amended). In order to be entitled successfully to avail of that new *"gateway"*, one of

the matters which the Board had to be satisfied of was that the quarry had *"commenced operation"* before 1st October, 1964 (s. 261A(24)(a)(i)(I)). As we have seen, the Board concluded that the quarry did not *"commence operation"* before the required date. It relied in that context on the overall planning history of development on the site including the various decisions and determinations of the Board referred to above and the judgments in *Patterson*, *Shillelagh (2012)*, *Shillelagh (2013)* and *McCoy*. The Board did not consider that the quarry could reasonably be considered to have commenced operation before 1st October, 1964.

(h) Observations in relation to planning and legal history

69. From the above account of the planning and legal history of the quarry, it can be seen that: there is no existing planning permission for the quarry; planning permission was refused for the quarry by the Board in December 2010 and a challenge to that decision was rejected by the High Court in 2012 with a certificate to appeal being refused in 2013; the Board decided in its s. 5 determination in December 2010 that the intensification of the use of the quarry including the use of explosives constituted the carrying out of operations which were materially different to the development carried out on the lands before 1st October, 1964 by reason of the nature and intensity of the operations which amounted to a material change in the use of the land which constituted development which was not exempted development and that s. 5 determination was not challenged by the applicant; the High Court has held that it is bound by the decision of the Board in December 2010 refusing planning permission for the quarry and by the s. 5 determination (the judgment of Baker J. in *McCoy*); the Board refused to grant leave to apply for substitute consent on the grounds of alleged *"exceptional circumstances"*, and concluded that *"exceptional circumstances"* did not exist for reasons including that the Board did not consider that the applicant could reasonably have had a belief that the development was not unauthorised and considered that the regularisation of the development would circumvent the purpose and objectives of the EIA Directive.

70. It is against that lengthy and complicated background that the legal issues raised by the applicant in these proceedings must be considered.

The issues requiring decision
71. It will be necessary for me to decide the following issues:-

> (1) Whether the Board correctly interpreted and applied the provisions of s. 261A(24)(a)(i)(I) in reaching its conclusion that the quarry did not *"commence operation"* before 1st October, 1964 and whether it was entitled to reach the conclusion that it did on the basis of the material before it. It will also be necessary to consider the related issues as to whether the Board took into account irrelevant considerations in reaching its decision and whether the Board ignored the findings made in *McCoy* and the other prior judgments in relation to the quarry.
>
> (2) Whether the Board was precluded by reason of the judgment of Baker J. in the High Court in *McCoy* on the application of s. 261(7)(e) of the 2000 Act (as amended) from concluding that the quarry had not *"commenced operation"* before 1st October, 1964.
>
> (3) Whether the errors contained in the Board Order recording the decision of the Board are such as to require the decision of the Board to be quashed.
>
> (4) Whether, if the applicant succeeds on any of the above issues and persuades the court that the decision of the Board should be quashed, whether the Board is entitled to backtrack or row back on its prior acceptance that all of the provisions of s. 261A(21)(a) were satisfied in the case of the applicant's applications.

72. I will deal with each of these issues in turn.

(1) Interpretation and application of s. 261A(24)(a)(i) of 2000 Act (as amended)
73. I have summarised earlier in this judgment the respective contentions of the applicant and of the Board on the proper interpretation of the requirement that "*the quarry*" must have "commenced operation" before 1st October, 1964 in order to avail of the *"gateway"* provided for in s. 261A(24) to obtain leave to apply for substitute consent in respect of the quarry. In considering this question and in coming to my conclusion on the proper interpretation of the relevant subsection, I will first set out in a little more detail the most directly relevant statutory provisions at issue in the proceedings. I will then say something about how those provisions fit into the overall scheme of the 2000 Act (as amended) in relation to quarries and discuss the relevance of *Case C-215/06* and the subsequent judgments of the CJEU in this area. I will also consider how the words *"commenced operation"* and similar words in connection with a quarry has been interpreted previously by the Irish Courts.

(a) Interpretation of s.261A(24)(a)(i)

74. Sections 261A(21) and (24) were inserted into the 2000 Act (as amended) by the 2015 Regulations with effect from 22nd July, 2015. They are the two statutory provisions most directly relevant to these proceedings. It is appropriate, therefore, that I set out the most directly relevant parts of those provisions.

75. Section 261A(21) provides as follows:-

"261A -

> *(21)(a) Paragraph (c) applies to a quarry where—*
>
> *(i) at the expiry of the time period set out in paragraph (a) of section 261A(2) for the making of a determination under that paragraph either of the following applied:*
>
> *(I) the decision of a planning authority in relation to an application for permission for that quarry required under section 261(7)(a) was under appeal to the Board under section 37;*
>
> *(II) legal proceedings in relation to a decision of a planning authority under section 34 or a determination of the Board on an appeal under section 37 in relation to an application for permission for that quarry required under section 261(7)(a) had not yet been concluded,*
>
> *(ii)(I) an application under section 177C in respect of that quarry is being considered by the Board on the date on which this subsection comes into operation, or*
>
> *(II) an application under section 177C in respect of that quarry is made after the date on which this subsection comes into operation, and*

(iii) no notice has been issued in respect of the quarry under subsection (3)(a), (4)(a) or (5)(a) of section 261A prior to the date on which this subsection comes into operation.

(b) …

(c) The Board shall make a determination in relation to a quarry to which this

paragraph applies as to whether—

(i) development was carried out at that quarry after 1 February 1990 which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment or a determination as to whether an environmental impact assessment was required, but that such an assessment or determination was not carried out or made, or

(ii) development was carried out at that quarry after 26 February 1997, which development would have required, having regard to the Habitats Directive, an appropriate assessment, but that such an assessment was not carried out.

(d) Paragraph (c) applies to a quarry notwithstanding that an application has

previously been made in respect of the quarry under section 177C."

76. Section 261A(24) provides as follows:-

"261A

(24)(a) Where the Board makes a determination under paragraph (c) of subsection (21) that subparagraph (i) or (ii) or both, if applicable, of that paragraph apply in relation to a quarry and the Board also decides that—

(i) either

(I) the quarry commenced operation before 1 October 1964, or

(II) permission was granted in respect of the quarry under Part III of this Act or Part IV of the Act of 1963, and

(ii) if applicable, the requirements in relation to registration under section 261 were fulfilled,

the Board shall grant leave to apply for substitute consent in respect of the application under section 177C.

(b) …

(c) …" (emphasis added)

77. In its decision in the present case, the Board accepted and so found that the various requirements in s. 261A(21)(a)(i), (ii) and (iii) were complied with. There is no doubt that s. 261A(21)(a)(i)(II) was satisfied, in that as of 23rd August, 2012 (being the relevant date in that subparagraph having regard to the Christmas holiday period moratorium provided for in s. 251) the applicant's challenge to the Board's decision of 24th December, 2010 refusing permission in respect of the quarry had not been concluded. While leave to challenge that decision was refused by Hedigan J. in April 2012 in his judgment in *Shillelagh (2012)*, the applicant's application for a certificate to appeal was still pending and was not finally determined until March 2013, when Hedigan J. delivered his judgment in *Shillelagh (2013)* refusing to grant a certificate.

78. While the Board accepted in its decision that the matters referred to in s. 261A(21)(a)(ii) were satisfied, it is difficult to see how on the facts that was so. As of the date on which the Board made the determination which it had to make in s. 261A(21)(c) in order for the applicant to be entitled to proceed to the next stage of the *"gateway"* provided for in s. 261A(24), no application under s. 177C in respect of the quarry had been made after the subsection came into operation (i.e. after 22nd July, 2015). Similarly, no application under s. 177C in respect of the quarry was being considered by the Board on the date on which the subsection came into operation. The previous application made by the applicant for leave to seek substitute consent had been refused by the Board in February, 2014, before s. 261A(21) came into operation. Reading s. 261A(21)(a)(ii)(II) and s. 261A(21)(c) together, the relevant application under s. 177C in respect of the quarry must surely have had to be made after the date on which the subsection came into operation and before the Board came to make its determination under subs. (21)(c). This is because the Board was only empowered to make the determination under subs. (21)(c) in circumstances where the requirements of subs. (21)(a) were satisfied. Therefore, I do not accept that the applicant is correct in stating that the application under s. 177C referred to in the subs. (21)(a)(ii)(II) could be made at any time including after the date of the determination made by the Board under subs. (21)(c). However, as the Board accepted that all of the relevant requirements of subs. (21)(a) were satisfied and so stated in its decision (on p. 2 of the Board Order), I will proceed on the basis that they were.

79. Once the requirements of s.261A(21)(a) are satisfied, then the Board can proceed to make a determination in relation to the quarry under s. 261A(21)(c). The Board did proceed to make such a determination in relation to the applicant's quarry under subs. (21)(c)(i) (at p. 2 of the Board Order). Once such a determination has been made, the Board could proceed under s. 261A(24)(a). Under that subsection, having made the required determination under subs. (21)(c)(i), the Board must then also decide on the various other matters set out in subs. (24)(a)(i) and (ii). The Board did decide that the requirements in relation to registration under s. 261 were fulfilled. That then left the Board to consider whether either of the requirements contained in subs. (24)(a)(i) were complied with. As regards the alternative requirement contained in subs. (24)(a)(i)(II), the Board decided that no planning permission had been granted in respect of the quarry (and that was not in dispute). That then left the Board to consider whether the requirement contained in subs. (24)(a)(i)(I) had been complied with, namely, whether the quarry had *"commenced operation"* before 1st October, 1964. It is in relation to that requirement that the Board found against the applicant. The Board decided that the quarry, the subject of the applicant's application had not *"commenced operation"* before that date for the reasons set out in the Board Order (on pp. 3

and 4) which have been outlined earlier.

80. The question then is whether the Board correctly interpreted s. 261A(24)(a)(i)(I) in its decision and then correctly applied that interpretation to the facts. Once a conclusion is reached on the question as to whether the Board correctly interpreted the statutory provision then the appropriateness of the application of that interpretation to the facts is primarily a question of whether the Board was entitled to reach the conclusion in which it did on the material before it and whether it is open to challenge on *O'Keefe v. An Bord Pleanála* [1993] 1 IR 39 related grounds and whether the Board took into account irrelevant considerations.

(b) Statutory framework and scheme

81. In considering whether the Board correctly interpreted the relevant statutory provision, it is necessary to refer to the statutory framework and scheme into which ss. 261A(21) – (24) were inserted with effect from 22nd July, 2015. This whole area has been the subject of extensive discussion and consideration by the Supreme Court in two very recent cases, *Sweetman* and *McTigue*. As Clarke CJ. outlined at the outset of the judgment of the Supreme Court in *Sweetman*:-

> *"1.1 The former system of retention permission given for existing developments which had been carried out without an appropriate planning permission was found to be inconsistent with European law. As a result, a new system of substituted consent was introduced. It will be necessary to say a little more about that system in due course. But in general terms there are a number of so-called 'gateways' under which a party may enter the system for the grant of a substituted consent, with a final determination being made by the first named respondent ('the Board')."* (per Clarke CJ. at para. 1.1, p. 2)

82. The substantive issue in *Sweetman* concerned the validity of a substitute consent granted by the Board. The judgment of the Supreme Court dealt with an application by the State to dismiss the proceedings on the grounds that it amounted to an impermissible collateral challenge to an earlier decision of the planning authority. However, in the course of its judgment in that case, upholding decisions of the High Court and of the Court of Appeal refusing to dismiss the proceedings, the Supreme Court outlined the circumstances in which the substitute consent regime was introduced into the 2000 Act by the 2010 Act following the judgment of the CJEU in *Case C-215/06* in which it was held that the then system of retention permission was not in compliance with the requirements of the EIA Directive. The Supreme Court quoted extensively from the judgment of the CJEU in *Case C-215/06* (see paras. 3.1-3.4, pp. 5-8). Having noted that the system of retention permission which then existed was a breach of European law and that Ireland had failed to comply with the provisions of the EIA Directive by permitting retention permission to be granted where no exceptional circumstances were proved, the Supreme Court went on to explain that the 2000 Act was amended by the 2010 Act in an effort to render Irish law consistent with the requirements of the EIA Directive, as interpreted by the CJEU in *Case C-215/06*. The 2000 Act (as amended) prohibited the granting of retention permission but allowed developers to apply for substitute consent in certain circumstances and removed the entitlement to apply for retention permission where an EIA or an AA was required (s. 34 of the 2000 Act (as amended)) (at para. 3.5, p. 8). The court then noted that it is not possible to apply for substitute consent except through certain *"gateways"*. Only one of these *"gateways"* was strictly speaking applicable in that case. However, the Supreme Court went on to make brief reference to a number of the other *"gateways" .*

83. These various *"gateways"* originally provided for by the amendments to the 2000 Act made by the 2010 Act enabled persons who had carried out certain developments or the owners or occupiers of certain lands to pass through these *"gateways"* before being eligible to apply to the Board for substitute consent. The amendments were introduced by way of Part XA of the 2000 Act (as amended). Section 177E of the 2000 Act (as amended) provided for the *"gateways"* in general terms in the following manner:-

> *"(2) An application to the Board for substitute consent shall—*
>
> > *(a) be made pursuant to a notice given under section 177B or 261A or a decision to grant leave to apply for substitute consent under section 177D…"*

I might add here that s. 261A(24) provides for an additional *"gateway"* in the case of quarries, entitling an application to be made for substitute consent on foot of leave to apply granted by the Board where the conditions provided for in s. 261A(24)(a) are satisfied.

84. In general terms, in a non-quarry specific context, as discussed by the Supreme Court in *Sweetman*, entry through these *"gateways"* depends on whether the planning authority serves a notice requiring an application for substituted consent to be made to the Board, such as under s. 177B or, in the absence of a notice, under s. 177C, where leave to apply for substitute consent can be sought from the Board and granted by the Board under s. 177D. Section 177B applies where there is a planning permission but where the development required an EIA or an AA and where an Irish Court or the CJEU has found that the permission is defective by reason of the absence of either or both of those assessments or some other inadequacy in either or both of them or some other error. Section 177B requires the planning authority in those circumstances to give a notice to the person who carried out the development or to the owner or occupier of the relevant land directing the person concerned to apply to the Board for substitute consent. As noted by the Supreme Court in *Sweetman* (at para. 3.9, pp. 8-9), s. 177C provides for two further *"gateways"* where leave to apply for substitute consent can be sought from the Board. Those *"gateways"* again apply where the development required an EIA, a determination as to whether such an assessment was required or an AA and where no such assessment was carried out or where there was some other deficiency in the assessments or some other error, whether found by an Irish Court or the CJEU or otherwise, or where the applicant for substitute consent is of the opinion that *"exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent"*. Sections 177D(1)(a) and (b) outline the circumstances in which the Board has jurisdiction to grant leave to apply for substitute consent on foot of an application made under s. 177C. In circumstances where the applicant for such leave asserts *"exceptional circumstances"*, s. 177D(2) sets out the matters to which the Board is required to have regard in considering whether such *"exceptional circumstances"* exist. It will be recalled that in the present case, the applicant sought leave to apply for substitute consent on this basis in 2013 and its application was refused in 2014 in circumstances where the Board was not satisfied that *"exceptional circumstances"* existed. For the purposes of s. 177D, if an application for substitute consent (made pursuant to a notice served by the planning authority or on foot of leave granted by the Board), the matters which the Board has to consider and to which it must have regard are set out in s. 177K. Under s. 177K(2), the Board is required to consider the *"proper planning and sustainable development of the area"* and to have regard to certain other specified matters. It is notable that in order to pass through any of the *"gateways"* referred to in s. 177B or s. 177C, there must be in existence a planning permission which is deficient in some respects either by reason of the absence of or inadequacy in an EIA or an AA or, if such a permission does not exist, there must be *"exceptional circumstances"* which must be judged by the Board by reference to the matter set out in s. 177D.

85. That is the situation in relation to the granting of substitute consent under the 2000 Act (as amended) in non-quarry specific cases. Other *"gateways"* under which substitute consent could be granted in the case of quarries were provided for in Part XVIII of

the 2000 Act (as amended), most of the provisions of which came into force on 15th November, 2011 pursuant to the 2010 Act. An additional *"gateway"* was created under ss. 261A(21) – (24) with effect from 22nd July, 2015 pursuant to the 2015 Regulations. That, of course, is the *"gateway"* with which this case is concerned. However, to understand the particular *"gateway"* at issue in this case, it is necessary briefly to consider the other *"gateways"* provided under s. 261A with effect from 15th November, 2011.

86. Under s. 261A(1) each planning authority had to determine, within a particular period, in relation to every quarry in its administrative area whether one or more of an EIA, a determination as to whether an EIA was required and an AA was required but was not carried out. Under s. 261A(1)(b), where the planning authority determined in relation to a quarry that one or more of these assessments was required but was not carried out and also decided that the quarry *"commenced operation"* prior to 1st October, 1964 or had the benefit of planning permission and complied with the requirements in relation to registration under s. 261, the planning authority was required to issue a notice requiring the owner or occupier of the quarry to submit an application to the Board for substitute consent with a remedial environmental impact statement ("EIS") or a remedial Natura impact statement ("NIS") or both. Where the planning authority determined in relation to the quarry that one or more of those assessments was required but was not carried out and that the quarry *"commenced operation"* on or after 1st October, 1964 and had no planning permission or the registration requirements were not fulfilled, the planning authority was required to issue a notice to the owner or occupier of the quarry that it intended to issue an enforcement notice requiring the cessation of the operation of the quarry (s. 261A(1)(c)). Where the planning authority determined in relation to a quarry that one or more of those assessments was required but was not carried out and that the development was carried out after 3rd July, 2008, the planning authority was required to issue a notice to the owner or occupier of the quarry that it intended to issue an enforcement notice requiring the cessation of the operation of the quarry (s. 261A(1)(d)). 3rd July, 2008 was the date of the judgment of the CJEU in *Case C-215/06*.

87. Under s. 261A(2)(a), each planning authority was required, not later than nine months after the coming into operation of s. 261A (i.e. by 23rd August, 2012, having regard to the Christmas holiday period provided for under s. 251) to examine every quarry within its administrative area and make a determination as to whether development was carried out after 1st February, 1990 which required an EIA, a determination as to whether an EIA was required but such assessment or determination was not carried out or made or whether the development was carried out after 26th February, 1997 which would have required an AA which was not carried out. Once that determination was made then other subsections in s. 261A provided for certain further *"gateways"* to apply for substitute consent. One of those *"gateways"* was provided for in s. 261A(3). Under that provision, where the relevant determination was made by the planning authority under s. 261A(2) and where the authority also decided that the quarry *"commenced operation"* before 1st October, 1964 or had planning permission and complied with the requirements in relation to registration (if applicable), the planning authority was required to issue a notice directing the owner or occupier of the quarry to apply to the Board for substitute consent in respect of the quarry under s. 177E with a remedial EIS or a remedial NIS or both, as required, within a specified period. However, that *"gateway"* was not available, having regard to the provisions of s. 261A(4), where the quarry *"commenced operation"* on or after 1st October, 1964 and did not have the benefit of planning permission or where the requirements in relation to registration (if applicable) were not complied with. In such a situation, the planning authority was required within the relevant period to issue a notice informing the owner or occupier that it intended to issue an enforcement notice in relation to the quarry requiring a cessation of the unauthorised quarrying.

88. Section 261A(5) provides that even if the quarry *"commenced operation"* before 1st October, 1964 or had planning permission and complied with the requirements in relation to registration, if development took place after 3rd July, 2008 (the date of judgment in Case C- 215/06) for which an EIA or determination as to whether an EIA was required or an AA was required, the planning authority was required to issue an enforcement notice in relation to the quarry requiring the cessation of the unauthorised quarrying. It appears, therefore, that as a result of s. 261A(1)(d) and s. 261A(5) that if development in the form of quarrying took place after 3rd July, 2008, it was not possible to apply for substitute consent and no *"gateway"* for doing so existed.

89. Where the *"gateway"* for applying for substitute consent arose under s. 261A(3), the person to whom the notice was issued under that provision was required to apply to the Board for substitute consent under s. 177E within a specified period.

90. Another *"gateway"* was provided for in s. 261A(10) in the case of a quarry which *"commenced operation"* prior to 1st October, 1964 or had the benefit of planning permission and also complied with the registration requirements under s. 261 (if applicable), where the Board set aside the decision of the planning authority to issue a notice indicating its intention to issue an enforcement notice in relation to the quarry. If that happened, the planning authority was required to issue a further notice to the owner or operator of the quarry directing that person to apply to the Board for substitute consent under s. 177E with a remedial EIS and/or remedial NIS within a specified period.

91. Another *"gateway"* was provided for under s. 261A(12) where the Board set aside the determination of the planning authority in relation to development taking place after 3rd July, 2008 in relation to a quarry which *"commenced operation"* before 1st October, 1964 or had the benefit of planning permission and also complied with the registration requirements under s. 261 (if applicable). Under that provision, if the Board set aside the relevant determination of the planning authority, the planning authority was required to issue a further notice to the owner or occupier of the quarry directing that person to apply to the Board for substitute consent under s. 177E with a remedial EIS and/or remedial NIS.

92. It can be seen, therefore, that the various additional *"gateways"* provided for under s. 261A (prior to the insertion of subss. (21) to (24)) required a determination by the planning authority (or by the Board on review) that development was carried out after 1st February, 1990 which required an EIA or a determination as to whether an EIA was required but such assessment or determination was not carried out or made and/or that a development was carried out after 26th February, 1997 which required an AA which was not carried out and also that the quarry *"commenced operation"* before 1st October, 1964 or had planning permission and complied with the requirements in relation to registration under s. 261 (if applicable). In those various situations (with the exception of development carried out after 3rd July, 2008), the planning authority was required to issue a notice requiring the owner or occupier of the quarry to apply to the Board for substitute consent. No *"gateway"* was provided in respect of a quarry which *"commenced operation"* on or after 1st October, 1964 which had no planning permission and/or which did not comply with the registration requirements.

(c) The new "gateway": s261A(24)

93. A new *"gateway"* was provided for under ss. 261A(21) – (24) following the insertion of those provisions in the 2000 Act pursuant to the 2015 Regulations. I have outlined earlier the circumstances in which the new *"gateway"* could be availed of under those provisions and it is unnecessary to repeat them here. The *"gateway"* was intended to apply to a situation where as of 23rd August, 2012 certain procedures were in train but not completed. They were that there was an appeal to the Board from a decision of a planning authority in relation to an application for permission for the quarry required under s. 261(7)(a) or there were proceedings in relation to the decision of the planning authority or a determination of the Board on appeal in relation to such an application which

had not been concluded as of the date of the commencement of the new subsections and there was an application under s. 177C for leave to apply for substitute consent in respect of the development in the specific exceptional circumstances provided for in that section which was under consideration by the Board when the new subs. (21) came into operation or an application under s. 177C was made in respect of the quarry after the new subs. (21) came into operation and no notice had been served by the planning authority under the earlier provisions of s. 261A. Assuming those initial requirements were met, the Board could then proceed to make a determination under s. 261A(21)(c) in relation to development carried out at the quarry after 1st February, 1990 and after 26th February, 1997 which required an EIA or an AA which was not carried out. As noted earlier, once the Board made that determination under subs. (21), the provisions of s. 261A(24) came into play. As I have previously explained, the only issue in relation to that subsection is whether the Board correctly interpreted the requirement that the quarry had to have *"commenced operation"* before 1st October, 1964 and then correctly apply that interpretation to the facts.

94. It is significant, in my view, that this new *"gateway"* provided for under ss. 261A(21) – (24) required the Board, in the various specific circumstances provided for in s. 261A(21), to be satisfied that the quarry *"commenced operation"* before 1st October, 1964 which was a requirement which had to be satisfied in order to pass through a number of the other *"gateways"* under s. 261A. It was also an essential requirement under s. 261(7) for a planning authority to serve a notice requiring the owner or operator of the quarry to apply for planning permission under the provisions of that section. The requirement for the Board or the planning authority, as appropriate, to decide that the relevant quarry *"commenced operation"* before 1st October, 1964 is a common feature of a number of the *"gateways"* to apply to the Board for leave to apply for substitute consent or for such consent itself or to apply for planning permission under s. 261(7).

(d) The European context

95. So much for the statutory scheme into which ss. 261A(21) – (24) were inserted in July 2015. It is important to appreciate the European context in which these provisions apply. As noted earlier, the Supreme Court has given two important judgments on the question of substitute consents and the genesis of the statutory creature of a substitute consent. Neither *Sweetman* nor *McTigue* directly addressed the particular *"gateway"* at issue in the present case. However, the extensive consideration given by the Supreme Court in both of those cases to the European context in which this new statutory creature must be viewed is extremely important, in my view, to a proper understanding of the scope of the statutory provision at issue in the present case and is, therefore, of enormous relevance to the correct interpretation of the statutory provisions at issue.

96. The starting point to a consideration of the European context is the decision of the CJEU in *Case C-215/06*. In that case, the Commission sought a declaration that Ireland had failed to fulfil its obligations under the EIA Directive. One of the grounds relied upon by the Commission was that the 2000 Act, which included measures which were intended to implement the requirements of the EIA Directive, permitted an application for retention permission to be made after a development had been executed without permission and without an EIA being carried out prior to execution of the development. In finding that Ireland had failed to fulfil its obligations under the EIA Directive on that ground, the CJEU stated as follows (at paras. 54 – 61) of the judgment:-

> *"54. As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.*
>
> *55. However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.*
>
> *56. In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.*
>
> *57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.*
>
> *58. A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.*
>
> *59. …*
>
> *60. This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.*
>
> *61. It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive."*

97. Similar findings were made by the CJEU in *Joined Cases C-196/16 and C-197/16*. In those cases, having referred to *Case C-215/06* and having noted that in accordance with the obligation on Member States to remove the unlawful consequences of a violation of EU law, competent authorities are required to take all necessary measures to remedy the omission of an EIA such as by revoking or suspending an authorisation issued in order for such an assessment to be carried out, the CJEU went on to state as follows (at paras.

37 – 43):-

> *"37. The Court has nevertheless held that EU law does not preclude national rules from allowing, in certain cases, regularization of transactions or acts which are irregular in relation to EU law…*
>
> *38. The Court has made it clear that such a possibility of regularization must be conditional on not offering the parties the opportunity to circumvent the rules of European Union law or to disapply them and remain exceptional…*
>
> *39. Accordingly, the Court has held that legislation approving a permit for regularization, which may be issued even in the absence of any exceptional circumstance, the same effects as prior planning permission does not comply with the requirements of Directive 85/337…*
>
> *40. The same applies to a legislative measure which allows, without even requiring further assessment, and outside any exceptional circumstances, that a project which should have been the subject of an environmental impact assessment, in accordance with Article 2, paragraph 1 of Directive 85/337, be considered as having been the subject of such an assessment, and that even if that measure concerns only projects whose authorization is no longer subject to a risk of a direct judicial remedy, given the expiry of the period of appeal provided for by national law…*
>
> *41. …*
>
> *42. …*
>
> *43. In the light of all the foregoing considerations, it is necessary to answer the question referred by declaring that, in the event of the omission of an environmental impact assessment of a project prescribed by Directive 85/337, Union law, first, requires Member States to remove the unlawful consequences of such failure and, secondly, does not prevent an assessment of that impact from being carried out as a regularization, after the construction and commissioning of the plant concerned, provided that:*
>
> > *– the national rules allowing such regularization do not offer those concerned the opportunity to circumvent the rules of EU law or to disapply them, and*
> >
> > *– the assessment carried out by way of regularisation is not limited to the future impact of this plant on the environment, but also takes into account the environmental impact that has taken place since its construction."*

98. As noted by the Supreme Court in *Sweetman*, the 2000 Act was amended by the 2010 Act in an attempt to make Irish law consistent with the requirements of the EIA Directive, as it was interpreted by the CJEU in *Case C-215/06*. It did so in various ways. First, s. 23(c) of the 2010 Act amended s. 34(12) of the 2000 Act such that s. 34(12) now precludes a planning authority from granting retention permission where the authority decides that if an application for permission had been made in respect of the relevant development before it was commenced, the application would have required that one or more of an EIA, a determination as to whether an EIA was required or an AA was carried out. Second, the 2010 Act (and subsequent amendments including those made by the 2015 Regulations) provided for certain *"gateways"* to provide for applications to be made to the Board for substitute consent, a new statutory creature provided for by the 2010 Act. We have already seen examples of the *"gateways"* provided for in the legislation. Some of these were discussed by the Supreme Court in *Sweetman* and *McTigue*.

99. In *Sweetman*, the Supreme Court discussed *Case C-215/06* and concisely explained the effect of that decision as follows:-

> *"7.6 …[I]t is necessary to recall the jurisprudence of the CJEU which makes clear that what is described as a system of regularisation in the environmental context is permissible but only where the system "does not offer the persons concerned the opportunity to circumvent the community rules... and that it should remain the exception". Furthermore, the CJEU has held that the previous Irish system of retention permission which, as the Court noted, could "be issued even where no exceptional circumstances are proved" was inconsistent with European law.*
>
> *7.7 Thus, the validity of any scheme for retrospective consent, such as the substitute consent process at issue on this appeal, must, if it is to be compatible with European law, be such as it does not operate as a facilitation or encouragement to circumvention of Union rules and can only operate in exceptional circumstances."* (per Clarke CJ at pp19-20).

100. Clarke CJ noted that there was a dispute in that case about the extent of the requirement for *"exceptional circumstances"* which requirement he stated "*undoubtedly exists as a matter of European law*" (at para. 7.8). However, the court did not express a view on that issue in circumstances where it was one of the issues at the heart of the substantive proceedings in *Sweetman*, which the Supreme Court was not dealing with. It is notable, however, for present purposes that the Supreme Court was satisfied that the requirement for *"exceptional circumstances"* to exist in the case of an application for substitute consent was one which "*undoubtedly exists as a matter of European law*".

101. In *McTigue*, the Supreme Court had to consider the correct interpretation of s. 177O of the 2000 Act (as amended) concerning the effect of the grant of substitute consent. MacMenamin J. delivered the judgment of the Supreme Court. In its judgment, the Supreme Court considered in some detail the European background and context to the emergence of the concept of substitute consent in Irish law. The Supreme Court noted that the section in question in that case (s. 177O) was:-

> *"…not to be seen as some remote and isolated island, but rather, as attached to an extensive and revealing legislative hinterland which lends perspective".*
>
> (para. 7)

102. That observation is particularly relevant to the present case. It is imperative when considering the correct interpretation of the phrase at issue in s. 261A(24)(a) to consider that provision in its context and in light of the "*extensive and revealing legislative hinterland"*. In *McTigue*, the Supreme Court considered *Case C-215/06* and all of the subsequent judgements of the CJEU including Joint *Cases C-196/16* and C-197/16 as well as leading academic commentary (such as Aine Ryall "*Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland*" (Hart Publishing 2009)). Having referred to the jurisprudence of the CJEU, MacMenamin J. observed (at para. 20):-

> *"The decision of the Court of Justice in [Case 215/06] had a considerable impact across many areas of Irish planning law, not least in the area of quarries. There were, it seems, a number of quarries in the State which were operating in the absence of EIAs. Some of these had received planning permissions granted by local authorities. Other quarries, such as the McTigue quarry, had never actually received any planning permission, nor had it ever been subject of an EIA."*

103. The Supreme Court discussed the introduction of the concept of substitute consent under the 2010 Act and related concepts such as the remedial EIA and the remedial NIS. The court then considered carefully the provisions of Part XA of the 2000 Act (as amended) (ss. 177A – Q) and the types of development which were intended to be covered by those provisions, emphasising the limited circumstances in which an application for substitute consent could be made and granted under those provisions. The Supreme Court described what was referred to at para. 44 of the judgment as "*pathways to regularisation*" provided for under the 2010 Act and noted the "*pathways*" or "*gateways"* in relation to quarries contained in s. 261A and the further additions to that section introduced in 2015 pursuant to the 2015 Regulations, which the Court noted did not have a bearing on the issues before it. Ultimately, the Supreme Court approached the question of the true construction of s. 177O as a matter of interpretation of national law in light of the intention of the Oireachtas in accordance with s. 5 of the Interpretation Act, 2005 (the "2005 Act") rather than interpreting the provision of national law in a manner conforming with EU law as in *Marleasing*. In doing so, the Supreme Court had regard to the overall framework and scheme of the Act (see paras. 69 and 72 of the judgment). The Court stated that the framework and scheme of the 2000 Act (as amended) and the words used in the section at issue "*are consistent only with a legislative intention to comply with the EIA Directive*" and are "*not consistent with a literal interpretation which would permit the quarry continuing in operation without appropriate conditions as to that operation for perhaps years to come"* (para. 72). Applying s. 5 of the 2005 Act, the court held that a literal interpretation of s. 177O would not reflect the plain intention of the Oireachtas as the intention can be ascertained from the Act as a whole, which was to give effect to the EIA Directive.

104. The judgment of the Supreme Court in *McTigue* is significant for present purposes as it highlights the importance of carefully considering not only the words of the section of the 2000Act (as amended) which requires to be construed but also the critical importance of the European context of the legislation and of the framework and scheme of the legislation.

105. It is, in my view, essential when approaching the proper construction of the phrase at issue in s. 261A(24)(a) of the 2000 Act (as amended) to have regard not only to the words used in the section but critically also to the European context, to the framework and scheme of the legislation and to the meaning given to the words at issue and similar words in previous decisions of the Irish Courts. I have already considered the European dimension as well as the framework and scheme of the legislation and have outlined the circumstances in which the additional *"gateway"* to applying for substitute consent was created by ss. 261A(21) – (24) of the 2000 Act (as amended) with effect from July 2015.

(e) The Board's interpretation

106. Having referred to the European context in which s. 261A, in general, and ss. 261A(21) – (24), in particular, came to be enacted, I now turn to consider how the Board construed the words at issue in s. 261A(24)(a)(i)(I), namely, the requirement that the quarry must have *"commenced operation"* before 1st October, 1964. As noted earlier, the applicant contended that the words used are clear and unambiguous and should be given their natural and ordinary meaning such that once any quarrying activities were carried out at the quarry before 1st October, 1964, that was sufficient to satisfy the statutory requirement of the quarry having *"commenced operation"* before that date. As noted earlier, the applicant relied on cases such as *DB*, *Meagher* and *St. Molaga's National School*. While the Board argued that the words used are clear and unambiguous and mean that what must have *"commenced operation"* before the relevant date is the actual quarry the subject of the application (and not a quarry of a different order), it further relied on cases such *An Taisce (2010), Patterson, Waterford* and *McGrath* to show how the courts should approach the concept of the "commencement of operation" in the context of a quarry. In doing so, the Board contended that it is clear from those cases that it is necessary to compare the nature and extent of the quarrying activity carried out as of 1st October, 1964 with the quarrying activity being undertaken at the date of the application for leave to apply for substitute consent in respect of the quarry. The Board also contended that the words used must be interpreted in a way which conforms with EU law (as required by *Marleasing* and subsequent case law of the CJEU).

(f) Previous case law

107. In my view, the words *"commenced operation"* in the context of a quarry the subject of an application for leave to apply for substitute consent are not clear, precise and unambiguous in that they could potentially be construed as being satisfied where some quarrying activities were carried out on 1st October, 1964 albeit that those activities were of a different scale to those carried out as of the date of the application for leave to apply for substitute consent. Similarly, they could potentially be interpreted as requiring that the actual quarry (with the same level and intensity of quarrying activities), the subject of the application for leave to apply for substitute consent, was in operation as of 1st October, 1964. Since either interpretation is potentially open on the words used, in my view it is necessary to consider how these words or similarly phrased words have been construed in the context of quarries by the courts. I have also concluded that it is necessary for me to consider whether the interpretation advanced by the applicant or that advanced and adopted by the Board is consistent with and conforms to EU law.

108. In considering the relevant case law, it is necessary first to note the provisions of s. 24 of the 1963 Act which was one of the provisions at issue in *Patterson* and *Waterford*. Under s. 24 of the 1963 Act, planning permission was required in respect of any development of land unless it was exempted development or development "*commenced*" before the "*appointed day*". The "*appointed day*" was 1st October, 1964. In *Patterson*, which concerned the applicant's quarry, Costello J. considered the respondents' contention that permission was not required for what was then being done at the quarry as it was argued that permission was not required for "*development*" commenced before 1st October, 1964 and that the development being carried out was in fact commenced before that date. Costello J., therefore, approached the exercise by seeking "*to ascertain exactly what operations were carried out in the quarry field prior to the appointed day*" and that "*when that has been done, they can then be compared to the present day operations*" (p. 104). As noted earlier, he considered the evidence in relation to the nature and extent of the activities carried out prior to 1st October, 1964. He concluded that the present operations (as of 1978) differed materially from those carried out prior to 1st October, 1964 for a number of reasons including the difference in the object of the present operations, the method of production and the scale of operations. Costello J. concluded that whether the court was considering "development" under either limb of the definition of that term, namely, material change of views or the carrying out of works on the land, "*…if it appears that the scale of operations is so intensified as to render contemporary operations materially different from those carried on before the appointed day, this fact can be taken into account in considering whether what is presently being done commenced prior to 1 October 1964*" (p. 105). Costello J. concluded:-

> *"If present day "development" differs materially from the "development" being carried on prior to 1 October 1964 I do not think that it can be said that it was commenced prior to the appointed day. This is the situation in the present*

case." (p. 105)

109. Twenty years or so later, in *Waterford*, the Supreme Court approached the question as to whether there had been unauthorised development in the context of a quarry where quarrying operations had been carried on as of 1st October, 1964. This was also an application under s. 27 of the 1976 Act to restrain the carrying on of quarrying operations on the ground that they amounted to unauthorised development. One of the contentions on behalf of the respondent was that as quarrying had commenced before and continued since the appointed day, there was no obligation to obtain permission for the continuation of the works even if they were to continue for many years and over a very substantial area. That was one of the arguments rejected by the Supreme Court as being "*extreme*" and as not representing a proper interpretation of s. 24 of the 1963 Act as construed within the general framework of the legislation. In delivering judgment for the Supreme Court, Murphy J. stated:-

> *"…the right to continue works commenced before the appointed day does not give to the developer an unrestricted right to engage in activities of the nature commenced before the relevant date."* (p. 561).

110. Murphy J. continued:-

> *"The exclusion from the operation of s. 24 could not be invoked so as to confer on the particular developer a licence to carry on generally the trade or occupation in which he was engaged. The section merely permits the continuation to completion of the particular works commenced before the appointed day at an identified location. In my view the answer to the question posed by the learned judge of the High Court requires the examination of all of the established facts to ascertain what was or might reasonably have been anticipated at the relevant date as having been involved in the works then taking place."* (at pp. 561-562)

111. I do not accept the applicant's contention that these cases are irrelevant as they considered the question as to whether there was unauthorised "*development*" on a quarry rather than the question as to whether the quarry had *"commenced operation"* before 1st October, 1964. They are of considerable assistance in considering whether in and in what circumstances a quarry can be said to have *"commenced operation"* which is, in my view, of considerable assistance in interpreting those words in the section at issue in the present case.

112. Of most assistance and relevance for present purposes is the judgment of Charleton J. in the High Court in *An Taisce (2010).* In that case, the Board had granted permission for the continued use of a quarry subject to certain conditions. The permission was granted under s. 261(7) of the 2000 Act (as amended). One of the pre-conditions to the grant of permission under that section by a planning authority or by the Board on appeal was that the quarry for which permission was sought to continue operation had *"commenced operation"* before 1st October, 1964 (being the very same words are used in s. 261A(24)(a)(i)). While the case itself turned on the requirement of the planning authority or the Board on appeal to have regard to the existing use of the land as a quarry (under s. 261(7)(c)), Charleton J. made clear on several occasions in the course of his judgment how to approach a consideration of whether a quarry had *"commenced operation"* before 1st October, 1964. Having referred to the registration requirement imposed by s. 261 of the 2000 Act, at para. 3 of his judgment, Charleton J. stated:-

> *"Quarrying is, of its nature, an activity that must be carried out over many years. Upon the coming into force of the planning code on the 1st October, 1964, there were many quarries which had an entitlement to continue with their operation in a* proportionate fashion. *The Oireachtas made a decision that all such quarries should be registered and, when their operation had been properly analysed by local planning authorities as to the information which must be supplied for this process, quarries might need to be further regulated beyond the restrictions that the commencement of operations prior to 1st October 1964 would have necessarily attracted. In that context,* I have referred to the continuance by a business or a quarry, on a proportionate basis, of operations *on the implementation of the first planning code. By this I mean that no quarry would have been entitled to intensify the use of its operations after that date so as that intensification of use amounted to change of use and which had an impact, proven directly or by necessary implication, on planning considerations for the area in which it is situate. A mineral extraction operation must, of its nature, expand either down into the ground or up into a mountain, in the case of mining operations, or outwards from an original area of operation in the case of a quarry or open-cast mine*." (p. 2) (emphasis added)

113. Later in his judgment, at para. 4, Charleton J. stated:-

> "*Whether intensification of use is established, as opposed to a proportionate and therefore lawful continuance of pre-planning control use, is a question for analysis based on the relevant case law*." (p. 3)

114. At para. 6, Charleton J. stated:-

> "*If a quarry commenced operation on a small scale prior to the 1st October 1964 and was then unlawfully intensified in use, as opposed to* continuing its operations in the proportionate *way to which I have previously referred, a new planning application for retention of use is appropriate. Section 261(7) is irrelevant in that situation. Where it is relevant, as with the* proportionate continuance *of use lawfully established prior to 1st October 1964, the requirement to take into account an existing use of land cannot apply in respect of an unlawful activity or an activity that has become unlawful by reason of intensification.*" (p. 10) (emphasis added).

115. Finally, at para. 12, Charleton J. referred to the fact that there had been a *"marked increase in extraction and the purchase of additional lands*" and stated that they were "*very important factors to be taken into account before the lawful use of land as a quarry can legitimately be said to be established and so taken into consideration by* [the Board] *under s. 261(7)…"*(p. 12). In that context, Charleton J. referred to Waterford.

116. Charleton J. re-emphasised and confirmed the approach set out in *An Taisce (2010)* in a subsequent judgment delivered by him in the High Court in *McGrath Limestone*. That case involved a challenge to a notice issued by the Board under s. 261A requiring an application for substitute consent to be made in respect of the quarry at issue. In a detailed judgment, Charleton J. referred back to *An Taisce* where he had referred to "*proportionate use as a shorthand for the minute analysis that properly is conducted in these cases in order to determine if there has been a pre-planning code use that has been legitimately continued…*" (p. 40).

117. These cases and the approach outlined by Charleton in *An Taisce (2010)* were approved of and followed by Baker J. in the High Court in *Hehir v. An Bord Pleanála* [2016] IEHC 104 ("*Hehir*"). One of the questions which arose in that case was whether the Board applied the correct legal test in coming to a determination that a part of the quarry at issue in the case had the benefit of an established pre-1964 user. It was not in dispute in that case that commercial quarrying activity was being carried on on part of the

site before 1st October, 1964. However, the operation was carried out in a much smaller area at that time than at the time of the case. Baker J. reviewed the authorities including *Waterford*, *An Taisce (2010), McGrath Limestone* and *Roadstone Provinces Limited v. An Bord Pleanála* [2008] IEHC 210. She succinctly summarised the position as follows (at para. 36):-

> *"It is long established in the jurisprudence that quarries which were already in operation on the appointed day had an entitlement to continue the operation provided the continued activity was 'proportionate'. The case law also evolved the concept of 'intensification', i.e. whether current activity is similar to or broadly similar to that engaged pre-1964."* (p. 11)

118. Having referred to An Taisce (2010), Baker J. continued (at para. 38):-

> *"Accordingly, the point of departure is that a quarrying activity that commenced prior to 1 October, 1964, may lawfully be continued and indeed expanded in a proportionate manner thereafter...*
>
> *As long as such activities commenced before 1 October, 1964, however, and the expansion thereof constitutes a proportionate increase in output and a natural working out of the planning unit, it does not constitute unauthorised development."* (pp. 11 – 12)

119. At para. 41, Baker J. summarised the approach to be taken as follows:-

> *"I consider that the authorities establish that in order for a planning authority to make a determination that pre-1964 user is shown, a number of questions must be addressed, viz whether the activity is the same or a comparable activity, or a proportionate continuation and whether (and this is a matter of particular consequence in a use development such as quarrying) it could be said that the activity commenced before 1964 was continued after that date or whether the present day activity is at a level or of a type that could not reasonably have been contemplated in 1964. In that context the question becomes one of whether the activity as currently carried out has intensified to such an extent that it could not reasonably be said to be the same or substantially the same activity."* (p. 13)

120. I should observe here that in *McCoy*, in which judgment was delivered a few months before *Hehir*, Baker J. touched on the contention made by the respondents in that case that the then current use of the lands at the quarry the subject of these proceedings represented a "*proportionate working out of the quarry activity commenced before the appointed date*" (para. 6, p. 2). However, having regard to the conclusion reached by the court in that case in relation to s. 261(7)(e) which the court found constrained it to treat the quarry as one which was unauthorised by operation of law, it was unnecessary to embark on a detailed consideration of that argument. Baker J. did, however, note that the evidence which was before her and which was not before Costello J. in *Patterson*, disclosed quarrying activates being carried out at the quarry in 1978 of a greater degree and over a greater area than found by Costello J. in *Patterson*. However, Baker J. commented that the findings of fact made by Costello J. were 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…"* (para. 55, p. 20). Baker J. further stated 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."*
>
> (para. 55, pp. 20-21)

121. In my view, these cases clearly demonstrate the approach which must be taken by the Board in considering whether a quarry "*commenced operation"* before 1st October, 1964. There must have been some quarry operation on the relevant site before 1st October, 1964 and that operation must have continued (and not have been abandoned) on a proportionate basis since then (to adopt the approach of Charleton J. in *An Taisce (2010)* and *McGrath Limestone* and of Baker J. in *Hehir*). Putting it a slightly different way but without changing the substance of the requirement, the current scale of the quarry operation must be what was or might reasonably have been anticipated at 1st October, 1964 as having been involved in the works taking place at that date (as explained by Murphy J. in the Supreme Court in *Waterford*). The essential focus then in considering whether the quarry *"commenced operation"* before 1st October, 1964 is to compare the nature and extent of the quarry operation carried on before that date with the quarry operation being carried on at the date of the application for leave to apply for substitute consent pursuant to s. 261A(24) and if the operation at that date was not proportionate to what was being carried on before 1st October, 1964, in the sense that it has amounted to an intensification of use amounting to change of use, the requirement that the quarry have *"commenced operation"* before 1st October, 1964 will not be satisfied.

122. I have no doubt that this is the correct approach to the interpretation of the requirement in s. 261A(24)(a)(i)(I) that the quarry must have *"commenced operation"* before 1st October, 1964 before the Board can grant leave to apply for substitute consent in respect of the quarry (in addition to the other requirements contained in ss. 261A(21) – (24)). It would, in my view, be most unsatisfactory if the phrase *"commenced operation"* in connection with the quarry (which is used in various subsections of s. 261A) were to be interpreted differently to the way in which the phrase was interpreted by Charleton J. in *An Taisce (2010)* and differently to the well-established approach taken by the courts in considering whether a particular development had "*commenced*" before the "*appointed day*", namely, 1st October, 1964. The applicant's suggested approach to the interpretation of the phrase "*commenced operation"* in the relevant subsection differs substantially from this established approach and I do not believe that it is correct. The suggestion that all that is necessary to establish is that some form of quarry operation was carried on before 1st October, 1964, notwithstanding that it may be radically different in terms of its nature and extent, is all that must be established is, in my view, similar to the type of "*extreme*" approach suggested by the respondents in *Waterford* and rejected by the Supreme Court in that case as not representing a proper interpretation of the relevant provision at issue there. I reach a similar conclusion in relation to the interpretation of the provision at issue in this case. The approach suggested by the Board is in my view consistent with the established case law of the Irish Courts.

(g) Intention of the Oireachtas

123. I am also satisfied that the interpretation of the words at issue ("*commenced operation"*) advanced by the Board is one which better gives effect to the intention of the Oireachtas as that intention can be inferred not only from the subsection at issue itself but also from the legislative framework and scheme into which s. 261A(24) was inserted in July, 2015. I have referred in some detail to that legislative framework and scheme earlier in my judgment and to the various opportunities or *"gateways"* for applying for leave to apply for substitute consent or for applying for substitute consent itself. The relatively limited and highly conditional circumstances in which such opportunities are provided by the legislation, as appears from the provisions of Part XA and from the various subsections

in s. 261A of the 2000 Act (as amended) to which I have referred would, in my view, be entirely inconsistent with the interpretation advanced by the applicant which would allow the *"gateway"* provided under s. 261A(24) to be opened to enable an application for leave to apply for substitute consent to be opened (where the other requirements are met) in circumstances where all that was necessary to be in existence before 1st October, 1964 was a quarrying operation of some kind and not such an operation comparable or proportionate to the operation in place at the time of the application. Such an interpretation would run entirely contrary to the intention of the Oireachtas carefully to specify the limited and restrictive circumstances in which leave to apply for substitute consent or substitute consent itself may be granted.

124. My conclusion in this regard is also, of course, heavily influenced by the European dimension and context discussed by the Supreme Court in *Sweetman* and *McTigue*, which I have considered earlier and to which I will briefly return shortly.

125. I should also add on this issue that I have considered the submission advanced by the applicant that s. 261A(24)(a) is a remedial statutory provision which must be construed as liberally and broadly as can fairly be done (in reliance upon cases such as *Bank of Ireland v. Purcell, McE v. Residential Institutions Redress Board* and *JGH v. Residential Institutions Review Committee*). I do not accept that such would be an appropriate approach to adopt in the context of the interpretation of the subsection at issue in the present case. The subsection was not, in my view, inserted into the 2000 Act (as amended) to provide for or to remedy a situation where a quarry may have carried out operations in 1964 and increased and intensified those operations in the period since then without the benefit of planning permission. The subsection at issue, as the Board interpreted it, correctly in my view, was intended merely to enable the owners and operators of a quarry in the very limited circumstances provided for in ss. 261A(21) – (24) to obtain leave from the Board to apply for substitute consent. The interpretation advanced by the applicant would run completely against the limited and restrictive circumstances in which leave to apply for substitute consent and substitute consent itself may be granted as appears from the framework and scheme of the legislation as seen in Part XA and in the other subsections in s. 261A of the 2000 Act (as amended). I do not accept, therefore, that the words at issue should be construed as if they were contained in a remedial statutory provision as submitted by the applicant.

(h) The Barras principle

126. I have also considered the further argument advanced by the Board in support of its interpretation of the statutory provision at issue. The Board argued that it must be assumed that the intention of the Oireachtas in using the words *"commenced operation"* before 1st October, 1964 in the subsection at issue was that they should be given the same meaning as those or similar words were given by the courts in the previous cases to which I have referred (such as *An Taisce (2010)*). The Board urged me to apply what has been termed the "*Barras*" principle (so named after the decision of the House of Lords in *Barras v. Aberdeen Steam Trawling and Fishing Company Limited* [1933] AC 402). The applicant contended that there was no basis for the application of the *Barras* principle as the previous case law did not deal with the words at issue in the same context in which they are used in s. 261A(24)(a). The applicant submitted that the case law dealt with the "*commencement*" of a "*development*" as opposed to the "*commencement*" of "*operation*" of a quarry.

127. I can deal relatively briefly with this point. The *Barras* principle has been stated by the Supreme Court to be merely a presumption and not a rule of interpretation. It was considered by the Supreme Court in *Clinton*. In that case, the Supreme Court was concerned with the interpretation of the form of words used in s. 50(4)(f) of the 2000 Act in relation to the requirement to obtain leave to appeal from a decision of the High Court to the Supreme Court in the cases covered by that provision and the circumstances in which such a certificate may be granted. It was argued that the form of words used in the statutory provision at issue in that case had been used many times prior to the 2000 Act and had been the subject of a substantial body of case law in which those words were interpreted. In the course of her judgement in the Supreme Court, Denham J. stated:-

> *"In construing s. 50(4)(f) of the Planning and Development Act, 2000 I am satisfied that we are bound to assume that the intent of the Oireachtas, in using wording identical to s. 29 of the Courts of Justice Act, 1924 and identical to the Act of 1992, did not intend that it be construed differently. Any construction of s. 50(4)(f) must be made in light of the decided case law. It is not a situation where the Court is construing the words de novo."* (para. 25, p. 283)

128. Denham J. continued:-

> "*The words in issue in the statute have been used previously in many statutes. There is extensive relevant case law. It is not a situation where a court is being asked to consider the words in a vacuum…*" (para. 27, p. 284)

129. In his judgment, Fennelly J. commented as follows:-

> *"It was in this context that the applicant submitted that the Oireachtas must be presumed to have enacted the legislation in the knowledge of the legal and judicial history of the wording and with the intention, or at least on the assumption, that it would be accorded the same meaning. The proposition is thus expressed in Bennion, Statutory Interpretation, (Fourth Ed., 2002 at p. 511):*
>
> > *'Under the* Barras *principle… where an Act uses a form of words with a previous legal history, this may be relevant in interpretation. The question is always whether or not Parliament intended to use the term in the sense given by this earlier history.'*
>
> *It is true that Henchy J. in his judgment in Inspector of Taxes v. Kiernan [1981] IR 117 at p. 123 said that the principle must be subject to considerable qualification. It does not give automatic blessing to erroneous interpretations. However, in the present circumstances, there is powerful evidence that the Oireachtas adopted a provision for which there was well established, authoritative and consistent interpretation."* (paras. 62 – 63, p. 295)

130. The *Barras* principle was considered again recently by the Supreme Court in *MAK v. The Minister for Justice and Equality* [2018] IESC 18. In that case, the Supreme Court was considering s. 3(1) of the Immigration Act, 1999 (as amended) and regulations made under that section. One of the questions considered by the Supreme Court was the extent to which the *Barras* principle could be relied upon in the case in circumstances where the regulations at issue (Immigration Act, 1999 (Deportation) Regulations, 2005 (SI No. 55 of 2005)) were in essentially identical terms to an earlier form of regulations (Immigration Act, 1999 (Deportation Regulations, 1999 (SI No. 319 of 1999)) which had been considered previously by the Supreme Court in *FP v. Minister for Justice* [2002] 1 IR 164 ("*FP*"). In delivering the judgment of the Supreme Court in MAK,, O'Donnell J. observed that:-

> "*The re-enactment may therefore be seen as an endorsement of the interpretation given by the courts to the previous section, or at a minimum a clear intention that it should be interpreted or understood in the same way. This is known*

sometimes as the Barras principle…" (para. 14)

131. O'Donnell J. then considered *Clinton* and, in particular, the judgment of Fennelly J. in that case. He commented in relation to the *Barras* principle as follows:-

> *"Some of the earlier statements of this principle contained in the text books and the decided cases suggested that this is a rule of interpretation. It seems clear however that the better view, as indeed expressed in Clinton, is that it is merely a presumption."* (para. 16)

132. Then, having referred to the most recent statement of the principle in *Bennion on Statutory Interpretation* (London: Lexis Nexis, Seventh Ed., 2017) at s. 26.4 (p. 596), O'Donnell J. noted:-

> "*This is at most a presumption the strength of which will vary according to the context: there is no rigid rule that words must be given the same meaning that they have been given in an earlier Act. The question in the end is always whether parliament intended the term to be given the meaning it had been given previously…*" (para. 16)

133. O'Donnell J. reiterated that the principle that the court will infer that parliament intended the re-enacted provision to bear the meaning which the case law had previously established was "*at best a presumption and a guide to interpretation rather than an iron rule*" (para. 16). He further described it as being an "*interpretative approach rather than a binding rule*" (para. 17) and referred to a number of earlier decisions of the High Court which had reached the same conclusion. Ultimately, the Supreme Court concluded that it had not been shown that the earlier decision of the Supreme Court in *FP* was clearly wrong or that it should be overruled. Consequently, the Court applied the approach taken in the earlier case and upheld the decision of the High Court refusing leave to seek judicial review.

134. Approaching the application of the *Barras* principle as I am required to do, and noting that it is merely a presumption and a guide to interpretation, I have concluded that while recognising its limitations, it has been of some (albeit not decisive) assistance to me in considering the correct interpretation of the words *"commenced operation"* in the context of a quarry in s. 261A(24)(a) of the 2000 Act (as amended). I have concluded that it would be very unsatisfactory that the words used in the subsection at issue should be given a different meaning to that given by Charleton J. in *An Taisce (2010)* to identical words contained in s. 261(7). Applying the *Barras* principle, with all of the caveats and limitations to that principle as discussed by the Supreme Court in *MAK*, I am satisfied that there is, at best, a presumption that when enacting s. 261A(24)(c), the Oireachtas intended that the words used in the subsection at issue should bear the same meaning as they have been given previously by the High Court. However, that is merely a presumption and could be rebutted. As I have concluded that the interpretation of the words advanced by the Board is in any event the correct one in light of the framework and scheme of the legislation, the presumption has not been rebutted in the present case. I reject the applicant's submission that the principle has no application in the present case on the grounds that the statutory words considered in the earlier cases were different. The words the subject of Charleton J.'s observations in *An Taisce (2010),* were the same as those in the subsection at issue in this case. While the other cases referred to the consideration as to whether a "*development*" had "*commenced*" before the appointed date, I am satisfied that they are of some assistance in ascertaining the correct interpretation to be given to the words in the subsection at issue here. I should stress, however, that I have reached the same conclusion irrespective of the application of the *Barras* principle and the presumption inherent in that principle. It is by no means decisive in the conclusions which I have reached.

(i) Conformity with European law

135. I am also satisfied that the interpretation of the words in the subsection at issue advanced by the applicant would not be compatible with EU law. In reaching that conclusion, I have been heavily influenced by the judgments of the CJEU in Case 215/06 and *Joined Cases C-196/16 and C-197/16* which I have considered earlier and by the extensive consideration given to those cases by the Supreme Court in *Sweetman* and *McTigue*. While it is unnecessary to rehearse in any detail what I have said previously about those cases, I do wish to draw attention again to the observations of the Supreme Court in *Sweetman* in relation to the circumstances in which it was necessary for the State to provide for the concept of substitute consent in circumstances where the former system of retention permission was found to be contrary to EU law. The Supreme Court stressed that the jurisprudence of the CJEU made clear that *"a system of regularisation in the environmental context is permissible*" but that such a system must not "*offer the persons concerned the opportunity to circumvent the community rules… and that it should remain the exception"* (per Clarke CJ at para. 7.6, p. 19, quoting from para. 57 of the judgment of the CJEU in *Case C-215/06*). The Supreme Court further noted that the CJEU had also held in *Case C-215/06* that the former system in Ireland in which retention permission could be granted "e*ven where no exceptional circumstances are proved*" was inconsistent with EU law (para. 7.6, pp. 19-20, quoting from para. 61 of the judgment of the CJEU in *Case C-215/06*). In those circumstances, the Supreme Court stated:-

> "*Thus, the validity of any scheme for retrospective consent, such as the substitute consent process at issue on this appeal, must, if it is to be compatible with European law, be such as it does not operate as a facilitation or encouragement to circumvention of Union rules and can only operate in exceptional circumstances*." (per Clarke CJ at para. 7.7, p. 20).

136. To similar effect in its consideration of the jurisprudence in the CJEU in *Case C-215/06* and in subsequent cases is the judgment of the Supreme Court in *McTigue* in which the Court again stressed that EU law requires that an entitlement to obtain substitute consent will only arise where there are *"exceptional circumstances"* (see, for example, per MacMenamin J. at para. 44). While the Supreme Court concluded in that case that the issue before it could be determined as a matter of the interpretation of national law having regard to the provisions of s. 5 of the Interpretation Act, 2005, the Court held that:-

> *"In interpreting s. 177O, and the [2010 Act] as a whole, a court should have regard to the overall framework and scheme of the Act. (cf. the recent judgment of O'Malley J., for this Court, in Cronin (Readymix) Ltd. v. An Bord Pleanála and Ors. [2017] IESC 36; [2017] 2 I.R. 658, para. 47). What does that framework and scheme tell the reader? The words are consistent only with a legislative intention to comply with the EIA Directive. It is not consistent with a literal interpretation which would permit the quarry continuing in operation without appropriate conditions as to that operation for perhaps years to come. The Interpretation Act, 2005 makes clear the approach a court should adopt…* [the Court then went on to consider the provisions of s. 5 of the 2005 Act]" (paras. 72 and 73)

137. The Supreme Court concluded that the intention of the Oireachtas as evident from the 2010 Act was to give effect to the EIA Directive and the Habitats Directive and that the wording of s. 177O was consistent with that intention which was also manifest by reference to the legislative framework in Part XA of the 2000 Act (as amended). The Court held that the literal interpretation argued for in that case would not be consistent with the intention of the Oireachtas to "*carve out*" some "*exceptional legislative regime for a*

category of noncompliant quarries" (per MacMenamin J. at para. 76).

(j) Conclusions on proper interpretation

138. I am satisfied that whether by applying the interpretation of s. 261A(24)(c) as a matter of national law by approaching the interpretation under s. 5 of the 2005 Act and seeking to identify and give effect of the intention of the Oireachtas, as the Supreme Court did in *McTigue*, or by approaching the interpretation of the provision at issue in a manner which conforms with EU law and, in particular, with the requirements of the EIA Directive as interpreted and applied by the CJEU in *Case C-215/06* and in the subsequent jurisprudence of that Court (as required by cases such as *Marleasing*), the interpretation of the provision put forward by the Board is clearly correct. An interpretation of the provision which would allow the Board to find that a quarry had *"commenced operation"* before 1st October, 1964 in circumstances where only limited quarry operations were carried on before that date and where those quarry operations intensified and increased in the period up to the date of the application for substitute consent would, in my view, run completely counter to the intention of the Oireachtas as ascertained from the framework and scheme of the legislation, and, in particular, the amendments to the 2000 Act introduced by the 2010 Act and thereafter (the intention of which was to give effect to EU law). Such an interpretation would also run completely counter to the requirements of EU law in terms of the EIA Directive as interpreted by the CJEU in *Case C-215/06*. The interpretation which was advocated by the applicant would, in my view, fail properly to reflect the requirement for the existence of *"exceptional circumstances"* in order to enable an applicant to apply for substitute consent under the statutory provision at issue and would also afford such an applicant the opportunity to circumvent Community rules by carrying on significantly intensified quarry operations without planning permission and without having those operations subjected to an EIA or a screening for EIA under the EIA Directive or an AA under the Habitats Directive. I do not accept that an interpretation of s. 261A(24)(c)(a) which could have that effect would be consistent either with the intention of the Oireachtas as judged from the section and from the framework and scheme of the legislation or with the requirements of EU law and, in particular, the EIA Directive, as interpreted and applied by the CJEU in *Case C-215/06* and in the subsequent case law of that Court.

139. In those circumstances, I have concluded that the interpretation of s. 261A(24)(a)(i)(I) advanced and applied by the Board in the decision challenged in these proceedings is correct and that the interpretation advanced by the applicant is not.

(k) Application of interpretation by the Board: irrationality

140. It is now necessary to consider how the Board applied the interpretation which it adopted of the section to the facts before it. I can deal very briefly with that issue. The applicant originally contended that the decision of the Board was irrational in that it had allegedly determined that the applicant had failed to respond to a request for further information. While that case was made in the applicant's initial written submission, it was accepted at the hearing that the applicant was not making any such case. It was confirmed that the case on rationality being advanced by the applicant was that set out at para. 64 of its written submissions. In essence, the applicant focused on the Board's conclusion that, while quarrying activities did commence before 1964, quarrying operations had materially intensified since then. The applicant argued that it did not follow from this that the quarry did not *"commence operation"* before 1st October, 1964. It was further contended that the evidence before the Board demonstrated that quarrying operations had commenced before 1st October, 1964 and that there was no evidential basis for a conclusion to the contrary.

141. It seems to me, however, that the applicant's case on rationality is in substance a reformulated version of its contention that the Board incorrectly interpreted the provisions of the subsection at issue, in finding that, on the material before it (which was listed on pp. 2 and 3 of the Board order), the quarry could not be considered to have *"commenced operation"* before 1st October, 1964. I have concluded that the Board was correct in its interpretation of s. 261A(a)(i)(I), in that it was required to assess the question as to whether the quarry had *"commenced operation"* before the relevant date by comparing the operation at that date with the operation which was being carried on at the time of the application and to approach that assessment by considering whether the operation carried out at the time of the application was a proportionate continuation of what was being carried on as of 1st October, 1964 or whether there had been an intensification of use amounting to a material change of use since then.

142. The assessment by the Board of the material before it in giving effect to that interpretation must be judged in accordance with the test in *O'Keeffe v. An Bord Pleanála* and in subsequent cases in order to determine whether the Board's decision was irrational. The burden of establishing that rests with the applicant (see, for example, *McGrath Limestone* at paras. 8.0 and 8.1, pp. 34-35 and the cases referred to there). Having concluded that the Board correctly interpreted the provision, in my view the applicant has singularly failed to establish that the Board's decision was irrational. I have referred earlier to the extensive material considered by the Board in coming to its conclusion that the quarry could not be considered to have *"commenced operation"* before 1st October, 1964. As outlined earlier, the material considered included the report and information provided by the Council, the submissions and observations made, the planning and legal history of the quarry, the inspector's report and the various previous decisions of the Council and of the Board as well as the judgments in *Patterson*, *Shillelagh (2012)*, *Shillelagh (2013)* and *McCoy*. As appears from my earlier consideration of those previous decisions and the previous judgments of the court, I have no doubt that there was ample material before the Board to enable it to form the conclusion that the quarry had not *"commenced operation"* before 1st October, 1964. Of particular relevance in this regard are the two decisions made by the Board in December, 2010 (including the s.5 determination) and the decision made by the Board in February, 2014 refusing leave to the applicant to apply for substitute consent in respect of the quarry in the absence of any *"exceptional circumstances"* which would permit such leave to be granted. In my view, there was more than sufficient evidence before the Board to support the conclusion which the Board reached, namely, that the quarry could not be considered to have *"commenced operation"* before 1st October, 1964 and to support its endorsement of the consistent rejection in the earlier decisions of claims by the applicant that the quarry operations being carried on were a *"continuation of historical activities commenced before 1964"* (p. 3 of the Board Order).

143. Having concluded that the Board correctly interpreted s. 261A(24)(a)(i)(I), the Board was required to consider whether the quarrying operations had materially intensified since 1st October, 1964. There was ample material before it to conclude that they had. That material was clearly identified on pp. 2 and 3 of the Board Order. Further, notwithstanding that there was evidence before the Board that some quarrying operations (albeit of an entirely different order to those carried on as of the date of the application) commenced before 1st October, 1964, that was not determinative of the issue under the section, as the Board was required to compare the quarrying operations commenced before 1st October, 1964 with those being carried on as of the date of the application and was perfectly entitled, on the material before it, to conclude that the current operations are not a continuation of the operations commenced before October 1964. The Board had ample material before it to reach that conclusion. Consequently, I reject the applicant's claim that the decision of the Board was irrational.

(l) Irrelevant considerations

144. A separate but related complaint made by the applicant in relation to the decision is that the Board took into account irrelevant

considerations in reaching its decision. One of the irrelevant considerations which the applicant alleged the Board took into account was the intensification of the use of the quarry since its inception. That issue is inextricably linked to the interpretation issue and I have already dealt with it in that context. I do not accept that the intensification of the use of the quarry since its inception was an irrelevant consideration. It was a consideration which the Board was required to take into account in considering whether, on the correct interpretation of s. 261A(24)(a)(i)(I), the quarry had *"commenced operation"* before 1st October, 1964.

145. The second irrelevant consideration alleged by the applicant was that, in deciding whether to grant leave to apply for substitute consent under s. 261A(24)(a), the Board was not entitled to have regard to matters or considerations not provided for in the section. In particular, the applicant contended that the Board was not entitled to have regard to "*the rational and orderly application of the principles of proper planning and sustainable development*". The applicant contended that the Board clearly had regard to such impermissible considerations as they are expressly referred to in the Board Order where it is stated that the Board came to the view that to grant leave to apply for substitute consent on the basis of pre-1964 commencement of the quarry would run contrary to "*the rational and orderly application*" of those principles. The applicant argued that the Board does not have a freestanding or residual discretion under the section. The applicant relied on *State (Cussen) v. Brennan* [1981] IR 181 and *O'Donovan v. Chief Superintendent of An Garda Síochána, Cork* [2005] 1 IR 407 in support of that contention.

146. In response, the Board submitted that in forming its view as to the correct interpretation of s. 261A(24)(a)(i)(I), it was entitled to consider whether the interpretation advanced by the applicant would be consistent with the "*rational and orderly application of the principles of proper planning and sustainable development*". In other words, the Board was calling in aid those principles to assist it in reaching its view on the correct interpretation of the subsection at issue. Alternatively, the Board argued that once it was established that the Board was required to interpret the subsection in the manner for which it was contending (and I have concluded that the Board was correct in its interpretation), and that the Board proceeded to assess the application in accordance with that interpretation, the further statement by the Board in the Board Order that to grant leave for substitute consent as requested by the applicant would run contrary to the "*rational and orderly application*" of the principles of proper planning and sustainable development was superfluous and added nothing to the decision since the Board was compelled on the correct interpretation of the provision to do precisely what it did and refuse to grant the leave sought. It was further submitted that, on the basis of *McCoy*, it was impermissible to engage in an exercise of determining the weight which may have been given by the Board to the rational and orderly application of those principles in the context of its decision in light of the conclusion which the Board had reached on the correct interpretation of the subsection.

147. I have reached the conclusion that the applicant is not entitled to succeed on this ground either. The applicant is correct in its submission that s. 261A(24)(a) does not expressly entitle the Board to take into account the "*rational and orderly application of the principles of proper planning and sustainable development*". That is not one of the considerations to which the Board is required to have regard under ss. 261A(21) – (24) when deciding on an application for leave to apply for substitute consent. The Board is, of course, required to consider the "*the proper planning and sustainable development of the area"* in making its decision on an application for substitute consent under s. 177K of the 2000 Act (as amended). The Board would only get to consider the application for substitute consent in the event that it granted leave to apply for substitute consent under ss. 261A(21) – (24). Does the fact that the Board Order makes reference to the view of the Board that to grant leave to apply for substitute consent on the basis of quarrying operations commenced before 1st October, 1964 would run contrary to the "*rational and orderly application of the principles of proper planning and sustainable development"* invalidate the Board's decision?

148. In my view, it does not for a number of reasons. First, I have concluded that the Board correctly interpreted the subsection in that the interpretation which it put on the subsection was one which best reflects the intention of the Oireachtas in light of the framework and scheme of the legislation, is consistent with previous case law of the Superior Courts and is compatible with EU law. Once the Board reached its conclusion on the correct interpretation of the statutory provision, it was then obliged to apply that interpretation to the facts. I have already noted the material on which the Board relied in reaching its conclusion that the facts did not support the contention that the applicant was merely continuing quarrying operations commenced before 1st October, 1964. In my view, it was open to the Board in interpreting the provision at issue to consider whether its interpretation of the provision would lead to a situation where the grant of leave to apply for substitute consent would conflict with the rational and orderly application of the principles of proper planning and sustainable development. Equally, in my view, it was open to the Board, having interpreted the subsection, to assess the material before it by reference to that interpretation and to consider whether, on the basis of the material before it and giving effect to the interpretation reached by it, the grant of leave to apply for substitute consent would run contrary to the principles referred to. Second, in the alternative, I agree that the words the subject of the applicant's complaint are probably superfluous in that the Board was, in my view, obliged (for the reasons I have already mentioned) to come to the view it did in relation to the interpretation of the statutory provision and was perfectly entitled on the material before it to conclude that the quarry operations being carried on at the time of the application for leave to apply for substitute consent were not merely a proportionate continuation of the quarrying operation carried on on 1st October, 1964. To the extent that the Board Order refers to the further consideration by the Board that the grant of leave would run contrary to the rational and orderly application of the principles referred to, it seems to me that they are, superfluous. Thirdly, in my view, for the reasons outlined by Baker J. at para. 58 (p. 22) of her judgment in *McCoy*, it would be a difficult and, in any event, an impermissible exercise for the court to seek to isolate the influence of the Board's view as to the rational and orderly application of the principles referred to in the context of the Board's decision as a whole to find, on the basis of its interpretation of the relevant statutory provision, that the quarry had not *"commenced operation"* before 1st October, 1964. Finally, I would, in any event, in the exercise of my discretion refuse to grant relief to the applicant on the basis of this ground of challenge in circumstances where I am completely satisfied that the Board correctly interpreted the statutory provision and was perfectly entitled on the basis of the material before it to reach the conclusion that it did that the quarry did not *"commence operation"* before 1st October, 1964.

(m) Findings in previous judgments

149. The next complaint made by the applicant which may be considered under this heading is the complaint that, in reaching the decision it did that the quarry had not *"commenced operation"* before 1st October, 1964, the Board ignored findings made by the High Court in a number of the earlier judgments in relation to the quarry such as *Patterson*, *McCoy* and *Shillelagh (2012)*. This argument was advanced at paras. 53-59 of the applicant's original written submissions. The applicant referred to some of the conclusions on the evidence reached by Costello J. in *Patterson* and by Baker J. in *McCoy* to the effect that quarrying operations were carried out at the quarry before 1st October, 1964 and to the conclusion of Hedigan J. in *Shillelagh (2012)* that there was "*compelling evidence*" before the Board on which it could reach the conclusion that, although the quarry had "*commenced*" prior to 1st October, 1964, there had been "*intensification of use*" such that the applicant was not entitled to permission under s. 261(7).

150. In response, it was submitted on behalf of the Board that the Board did not ignore findings contained in these judgments and, in particular, did not ignore the conclusions reached by Baker J. in *McCoy* on the evidence which was before her and which was not before Costello J. in *Patterson* in terms of the level and extent of quarrying operations which were being carried on at the quarry in

1977/1978.

151. I have concluded that there is no basis for the applicant's complaint under this heading. I referred earlier in some detail to the findings made in *Patterson*, *McCoy* and *Shillelagh (2012)*. I also referred in detail to the planning history in respect of the quarry. It is clear that the Board was well aware of that planning history and of the judgments in those cases. The planning history is expressly referred to in the Board Order. As are the judgments in *Patterson*, *Shillelagh (2012)*, *Shillelagh (2013)* and *McCoy*. It is evident that the planning history of the quarry and those judgments were before the Board and were taken into account by the Board in reaching its conclusion that the quarry could not be considered to have *"commenced operation"* before 1st October, 1964. As I have indicated earlier, that is a conclusion which the Board was perfectly entitled to make on the material before it. While the applicant relies on certain parts of the judgment of Baker J. in *McCoy* to demonstrate that there was evidence that the extent of the quarrying being carried on before 1964 and again in 1972 and in 1977/1978 was considerably greater than that found by Costello J. in *Patterson*, Baker J. went on to state as follows:-

> *"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…"* (At para. 55, pp. 20-21)

152. Baker J. held that an argument as to the relevance or applicability of the weight to be given to *Patterson* was one which ought properly to have been brought to the Board or by way of judicial review of the Board's decision of December 2010 and that it was too late to make that argument having regard to the provisions of s. 261(7)(e). The applicant did unsuccessfully seek to judicially review that decision (in *Shillelagh (2012)*) and did not seek to judicially review the s.5 determination. It is undoubtedly the case that there was considerably more evidence before Baker J. than was available to Costello J. when he decided *Patterson* in 1978. However, Baker J. concluded (albeit *obiter* in light of her earlier holding in relation to the effect of s. 261(7)(e)) that there was a significant difference between the scale of the operations in the period relevant to that case and the scale of those operations in 1977/1978 with an incremental increase in quarrying resulting in the significant change in the burden on the surrounding landscape to which she referred. I am not persuaded that there is anything in *McCoy* which can assist the applicant in demonstrating that the Board erred in reaching the conclusion which it reached on the applicant's application. If anything, the conclusions reached by Baker J. in *McCoy* fundamentally undermine the applicant's case. In any event, it is evident that the judgment in *McCoy* was before the Board and was taken into account by it.

153. I do not see how there is anything in the judgments of Hedigan J. in *Shillelagh (2012)* and *Shillelagh (2013)* which assists the applicant. As noted earlier, in his judgment in *Shillelagh (2012)*, Hedigan J. stated that there was "*compelling evidence before the Board upon which it could reach the conclusion that although the Quarry had commenced prior to the 1st October, 1964 there was intensification of use such that there was no entitlement to an exemption*" (at para. 6.5). Later, he concluded that there was evidence before the Board upon which it could reach the conclusion that the quarry operations intensified since October, 1964 and that such intensification amounted to a change of use disentitling the applicant to obtain permission under the statutory provision at issue in that case (s. 261(7)). These conclusions also significantly undermine the applicant's case.

154. Finally, the essential point made by the applicant in relation to these earlier judgments is that the judgments contain findings that the quarry commenced operations before 1st October, 1964 albeit that the use of the lands as a quarry intensified overtime since then. The applicant suggested that the Board was only entitled to consider the first of these questions, namely, the commencement of the operation of the quarry and not the second, namely, the intensification of use over time. As I have indicated earlier, I do not accept that that submission is correct. Both questions are relevant in the correct interpretation and application of s. 261A(24)(a) of the 2000 Act (as amended). Accordingly, there is no basis for the applicant's complaint under this heading.

(2) Judgment of Baker J. in *McCoy*: Section 261(7)(e) of the 2000 Act

155. In a supplemental written submission, the applicant argued that the Board was precluded from reaching the conclusion that the quarry had not *"commenced operation"* before 1st October, 1964 having regard to the judgment of Baker J. in *McCoy* and, in particular, her finding in that case that the quarry operations being carried on at the quarry as of 2013, 2014 and 2015 were deemed to be unauthorised by virtue of s. 261(7)(e) of the 2000 Act (as amended).

156. The applicant's argument was that the Council had served a notice on the applicant on 18th April, 2006 under s. 261(7) requiring the applicant to submit an application for planning permission and an EIS to the Council in respect of the quarry. The applicant noted that under s. 261(7)(a)(ii), such a notice could only be served in respect of a quarry that had *"commenced operation"* before 1st October, 1964. The applicant submitted, therefore, that the Council had already determined the issue concerning the commencement of the operation of the quarry the subject of these proceedings. The applicant further submitted that the Council's determination had the imprimatur of the High Court. In that regard, the applicant relied on a number of passages from the judgment of Baker J. in *McCoy* and in particular paras. 37, 45, 46 and 57. The applicant contended that these passages demonstrated that Baker J. was satisfied that the quarry had *"commenced operation"* before 1st October, 1964. The basis for this contention appears to be that Baker J. considered herself to be bound by the provisions of s. 261(7)(e) which provides that:-

> *"(e) Notwithstanding any other provision 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 on foot of a notification under paragraph (a) shall be unauthorised development."*

The applicant pointed out that the notice had been served under s. 261(7)(a) and could only have been served where the quarry had *"commenced operation"* before 1st October, 1964. The application for permission made on foot of that notice was granted by the Council but refused by the Board and Baker J. held that the consequence of this refusal by the Board was that the ongoing quarrying activities at the quarry were deemed to be unauthorised by virtue of s. 261(7)(e). The applicant contended that Baker J. could not have reached that conclusion if the quarry had not *"commenced operation"* before 1st October, 1964.

157. While this ground was not directly raised in the statement of grounds or in the affidavits, no objection was made by the Board to the applicant relying upon it. As the ground arose from the judgment of Baker J. in *McCoy* and as that judgment was explicitly relied upon by the applicant in its statement of grounds (albeit not for the point now under consideration), I am prepared to deal with it. I would not, however, wish to give the impression that the court will readily overlook the requirements under O. 84, r. 20(3) RSC or the principles set out by the Supreme Court in *AP v. Director of Public Prosecutions* [2011] 1 IR 729 which have been endorsed by the High Court in a planning context in a number of cases including *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 54 (Haughton J.) and *Kelly v. An Bord Pleanála* [2019] IEHC 84 (Barniville J.). However, in the absence of objection by the Board, and in light of the fact

that it was clear from the pleaded case that the applicant would be relying on the judgment in *McCoy*, I was prepared to entertain the argument on this issue.

158. However, I am satisfied that this ground of complaint is unsustainable. While the applicant is correct in noting that, in order for a planning authority to be entitled to serve a notice under s. 261(7)(a) requiring the owner or operator of a quarry to apply for planning permission and to submit an environmental impact statement, the authority must have concluded that the quarry *"commenced operation"* before 1st October, 1964, that does not have the legal effect for which the applicant contends. The Council clearly reached that conclusion in the present case and served a notice under that section on the applicant on 18th April, 2006. The Council then proceeded to grant permission on foot of an application subsequently submitted by the applicant following service of that notice. However, the applicant completely ignores the fact that permission was refused by the Board on appeal in one of the two decisions taken by the Board in relation to the quarry on 24th December, 2010. The Board expressly concluded in its decision that the Board was not satisfied that the "*existing quarrying operations presently conducted on site, commenced prior to the appointed day, namely, 1st October, 1964*" and on that basis the Board decided that it was precluded from granting permission on foot of the application. The Board decided, therefore, that the quarry had not *"commenced operation"* before 1st October, 1964.

159. It was that decision of the Board that was challenged by the applicant in judicial review proceedings which were dismissed by Hedigan J. in June, 2012 in *Shillelagh (2012)* for the reasons outlined earlier. In the course of his judgment, Hedigan J. expressly rejected the contention that, once the planning authority had determined that the quarry commenced operation before 1st October, 1964, it was not open to the Board to go behind that determination. As also noted earlier, Hedigan J. found that there was evidence before the Board on which it could reach the conclusion that the quarry operations had intensified since 1964. The High Court, therefore, rejected the challenge to the Board's decision which had reversed the planning authority's finding that the quarry had *"commenced operation"* before 1st October, 1964. Leave to appeal to the Court of Appeal was refused by Hedigan J. in *Shillelagh (2013)*.

160. To refer only to the service by the Council of the notice on 18th April, 2006 in support of its contention that the planning authority had determined the issue in the applicant's favour without referring to the decision of the Board on appeal or the subsequent unsuccessful judicial review challenge in the High Court in respect of the Board's decision, at the very least presents an incomplete picture of the true factual position and significantly undermines the case advanced by the applicant under this heading.

161. Furthermore, there is, in my view, nothing in the judgment of Baker J. in *McCoy* which supports the proposition that Baker J. was satisfied that the quarry had in fact *"commenced operation"* before 1st October, 1964. None of the paragraphs of the judgment relied upon by the applicant could, in my view, reasonably support that contention. All that Baker J. decided in respect of that part of the case made in *McCoy* was that under s. 261(7)(e), where the owner or occupier of a quarry has been refused permission in respect of an application for permission made on foot of a notice issued under s261(7) (a) (as was the case in relation to this quarry), the continued operation of the quarry was deemed to be unauthorised development. Baker J. was merely applying that provision. She was not making any finding of fact or of law that the quarry had *"commenced operation"* within the meaning of that term in s. 261(7)(a). Accordingly, I also reject this ground of complaint advanced by the applicant.

(3) Errors in the Board order

162. The applicant contended that the Board Order, recording the decision of the Board should be quashed on the basis that it contains errors on its face. A number of alleged errors were relied upon in the statement of grounds. The errors relied upon are:-

> (1) On the first page of the Board Order, it is stated that the application for leave to apply for substitute consent was made pursuant to s. 261A(20)(a) of the 2000 Act (as amended). The applicant contends that the application for leave to apply for substitute consent was in fact made pursuant to s. 261A(24)(a) and not s. 261A(20)(a).
>
> (2) Under the heading "*Decision*" on p. 1 of the Board Order, it is stated that the Board was refusing leave to apply for substitute consent pursuant to s. 261(21)(c) of the 2000 Act (as amended). The applicant contends that that particular subsection did not empower the Board to refuse leave to apply for substitute consent and that the Board had actually determined that the requirements of s. 261A(21)(c) applied to the quarry.
>
> (3) The Board Order refers to the fact that the inspector was prepared to take a different view to that taken by the Board and to allow the applicant *"an opportunity to make a further application for substitute consent"* (p 4 of the Board Order). The applicant contends that it had not in fact previously made or been granted leave to make an application for substitute consent so the reference to a "*further*" such application was incorrect.
>
> (4) The Board Order records (on p. 4) that operations had "*commenced and intensified from the late 1970's onwards*" and that that amounted to a collateral attack on the judgment of Baker J. in *McCoy*.

163. I have already dealt with the alleged error referred to at (4) above in my consideration of the judgment of Baker J. in *McCoy*. For completeness, however, I should say that I do not accept that the Board Order and the decision of the Board recorded in it amounts to a collateral attack on, or an unlawful repudiation of the judgment of Baker J. in *McCoy* or on the findings of Baker J. in relation to the quarry.

164. As regards the other alleged errors, the Board contended that the errors were immaterial and inconsequential and that it was clear to the applicant the statutory basis on which it had taken the impugned decision. The Board submitted that on no analysis could the alleged errors afford a basis for invalidating the Board's decision. In that regard, the Board relied on the judgment of the High Court in *KK v. Taaffe* [2009] IEHC 243 (O'Neill J.)("*KK*"). The applicant sought to distinguish the present case from KK.

165. In terms of the approach which the Court should take in considering whether an error on the face of an order or decision should lead to that decision being invalidated, the distinguished authors of Hogan and Morgan *Administrative Law in Ireland* (4th ed., Round Hall, 2010) cite *KK* in support of the proposition that:-

> *"…relief may be withheld on what amounts to de minimis grounds where an erroneous description of the statutory powers was 'inconsequential' and where the orders on their face displayed 'with sufficient – if not impeccable – clarity… all essential features for validity'. Nevertheless, where an administrative decision affecting private rights fails to show jurisdiction on its face, it will normally be quashed…"* (para. 10.171, p. 502)

166. In *KK*, a District Judge made an order authorising the detention of a sum of cash for a period of three months. The order was made under s. 38(2) of the Criminal Justice Act, 1994 (the "1994 Act"). A second order was later made by another District Judge extending the first order for a further three months. The applicant sought an order of *certiorari* quashing the two decisions made. A

number of alleged errors in the orders were identified by the applicant. The applicant submitted that the first order did not state what power was relied upon in order to give jurisdiction to make the order, in contrast to the terms of the second order. The top of the first order had a heading referring to "*Criminal Justice Act, 1994, s. 38 (as amended by s. 20, Proceeds of Crime (Amendment) Act, 2005))",* but did not identify the particular subsection of s. 38 under which the court was acting. The second contained a recital paragraph indicating the statutory provisions under which the order was made. However, the recital paragraph incorrectly recited that the first order had been made pursuant to s. 38(1) of the 1994 Act instead of s. 38(2). The High Court (O'Neill J.) refused to quash the orders on the basis of these errors. The court held (at para. 4.14) that, although the first order did not have a recital paragraph such as that contained in the second order, the fact that the first order had a heading with the relevant legislative provision under which the order was being made, made the jurisdiction which the District Court was exercising "*sufficiently clear*". The court further held that the error in the second order incorrectly citing that the first order, authorising the detention of the cash, was made pursuant to s. 38(1) of the 1994 Act instead of s. 38(2) was "*inconsequential*" and did not invalidate the second order in light of the fact that that order then went on to apply the specific requirements for making an order under s. 38(2). The court concluded in relation to the various errors present in both orders as follows:-

> "*However, I am satisfied that none of these so-called infelicities are so grave so as to detract from the reality that the provisions of s. 38(2) of the Act of 1994 were correctly followed in making both orders and that both orders on their face with sufficient if not impeccable clarity display all essential features for validity*." (para. 4.17, p. 17)

167. For completeness, I should add that a similar conclusion was reached by Hogan J. in the High Court in *G(B) v. District Judge Murphy and Others* [2011] IEHC 359. One of the grounds on which Hogan J. refused to quash the orders at issue, which provided for a return for trial, notwithstanding that there were a number of errors in each order was that all of the parties "*perfectly understood*" the relevant ruling of the District Judge and that there was an opportunity to have the errors rectified under the slip rule. The court concluded that:-

> "*No real disadvantage accrued to the applicant or his legal advisors by reason of these errors. Even if, therefore, these errors can be justly characterised as being errors on the face of the record (as distinct from some form of harmless or insubstantial error), I do not think that any useful would be served by quashing the orders in question given the absence of any real prejudice to the applicant…*" (para. 21).

168. The Court of Appeal has refused to quash convictions based on errors in the description of the offence in the orders. In *Ahearn v. Judge Brady and the DPP* and *Joyce v. Judge McNamara and the DP*P [2014] IEHC 448, the High Court (Birmingham J.) had refused to quash the orders at issue on the grounds that the error could reasonably be described as "*harmless and insubstantial*" and that no one had been "*prejudiced or misled*" by the particular recitals which had been omitted (paras. 22 and 25). The Court of Appeal upheld that decision noting that no one could have been misled or prejudiced in any way by the omission of the reference to the statutory ingredient in question. A similar conclusion was reached by the Court of Appeal in *O'Brien v. Judge Coughlan and the DPP* [2015] IECA 245.

169. I will apply these principles and, in particular, those set out by O'Neill J. in *KK* in considering this ground of challenge advanced by the applicant.

170. As regards the error referred to at (1) above, namely, the reference on p. 1 of the order to the application for leave to apply for substitute consent being made pursuant to s. 261A(20)(a) of the 2000 Act (as amended), the Board accepted that the reference to s. 261A(20)(a) was not correct. However, this error is, in my view, minor, inconsequential and of no substance. The error was contained in an introductory part of the Board Order and was intended to indicate the particular section under which the applicant's application was made. It is clear from the subsequent provisions of the Board Order that the Board considered the applicant's application under the provisions of ss. 261A(21) – (24) of the 2000 Act (as amended). There can have been no doubt about that. Indeed, having regard to the general observations made by the Supreme Court in *McTigue* to which I have referred at the outset of this judgment, it is easy to see how technical errors such as this in referring to subsections of legislation drafted in this patchwork fashion and subject to numerous amendments may have arisen. In any event, since it was the applicant which made the application for leave to apply for substitute consent, neither it nor its advisors were in any way prejudiced or misled by this error. It certainly affords no basis on which the decision of the Board as recorded in the Board Order should be quashed.

171. As regards the error referred to at (2) above, it was accepted by the Board that the reference to leave to apply for subsitute consent being refused pursuant to s. 261A(21)(c) of the 2000 Act (as amended) was mistaken in that the refusal was not "*pursuant to*" that section. In fact, the Board expressly noted (on p. 2 of the Board order) that the requirements of s. 261A(21)(c) were satisfied. In any event, I accept that the Board Order makes clear that the applicant's decision was considered by the Board in accordance with the provisions of ss. 261A(21) – (24) of the 2000 Act (as amended). It is further clear from the Board Order that the Board decided that leave to apply for substitute consent should not be granted having regard to the failure by the applicant to satisfy the requirements of s. 261A(24)(a)(i). Again, the Board Order can have left the applicant in no doubt about that. I am satisfied, therefore, that this error is minor, inconsequential and of no substance and did not in any way prejudice or mislead the applicant or its advisors.

172. As regards the error referred to at (3) above, the applicant is correct in that the Board Order did contain an error in referring to the applicant being given an opportunity to make a "*further application for substitute consent*". The applicant had not previously made an application for substitute consent but had previously made an application for leave to apply for substitute consent. This error is again understandable having regard to the manner in which the legislation has been amended on a patchwork and piecemeal basis so as to provide for *"gateways"* for applying for leave to apply for substitute consent and for applying for substitute consent itself. Nonetheless, it is clear from the material referred to on pp. 2 and 3 of the Board order and, in particular, the reference to the previous decision of the Board refusing to grant leave to the applicant to apply for substitute consent, that the Board was well aware of the fact that the applicant had previously applied only for leave to apply for substitute consent and not for substitute consent itself (as none of the relevant *"gateways"* had been opened for the applicant). I am again satisfied that this error is minor, inconsequential and of no substance and did not in any way mislead or prejudice the applicant or its advisors.

173. In conclusion, therefore, I am not satisfied that any of the errors in the Board Order relied upon by the applicant are of any substance. On the contrary, they are all insubstantial and inconsequential. Further, none of the errors misled or prejudiced the applicant or its advisors in any way and it was not asserted by the applicant that they did. Accordingly, these alleged errors do not provide any basis on which the decision of the Board as recorded in the Board Order could be quashed. I would in any event exercise my discretion to refuse to grant relief to the applicant on the basis of these errors.

(4) Board's argument in relation to s. 261A(21)(a)

174. As explained earlier, it was initially contended by the Board in its statement of opposition and in its written submissions that even

if the court were to find in favour of the applicant in relation to any of its grounds of challenge, the court should in the exercise of its discretion refuse to remit the applicant's application to the Board on the basis that the applicant had not in fact satisfied all of the requirements set out in s. 261A(21)(a) of the 2000 Act (as amended). This was notwithstanding that the inspector had expressly noted in his report that the Board accepted that the applicant had satisfied those requirements and the Board Order itself expressly stated that the Board was satisfied that the requirements of s. 261A(21)(a) were complied with. Understandably, the applicant argued in its supplemental written submissions and at the hearing that it was not open to the Board to launch a collateral attack on its decision in that context or to row back or backtrack in relation to what it had previously decided in relation to compliance with the requirements in s. 261A(21)(a). As I noted earlier, it would only be necessary to deal with this contention advanced by the Board if the applicant had succeeded on any of its grounds of challenge. Since the applicant has not succeeded on any of its grounds of challenge, it is unnecessary for me to deal with this issue in any detail. I do note, however, that the Board correctly, albeit belatedly, accepted that it was not open to it to row back from or to backtrack on what it had previously decided in that respect, notwithstanding that as a matter of fact the applicant may not have demonstrated compliance with all of the requirements in s. 261A(21)(a). The Board's counsel confirmed in his replying submissions at the hearing that the Board would not be relying on this point as a reason for the court to exercise its discretion to refuse to grant relief to the applicant.

175. Having regard to the conclusions which I have reached in relation to the grounds of challenge advanced by the applicant, and having regard to the fact that the Board in any event accepted that it would not be seeking to rely on this point as a reason for the court, in the exercise of its discretion, to refuse to remit the applicant's application back to the Board for reconsideration, it is unnecessary for me to express any conclusion on this issue. It simply does not arise at this stage. If it did arise, however, I would be very reluctant to permit the Board to argue for a position which directly contradicted what was said by it in its decision. I would be particularly reluctant to do so in circumstances where there was no explanation by the Board on affidavit as to how it was that it reached the decision it did in relation to compliance with the requirements of s. 261A(21)(a) but subsequently sought to advance a case to the contrary in its opposition papers and in its written submissions. I would have been very reluctant to permit the Board to pursue that point. The issue does not, however, now arise.

Conclusions

176. In summary, I have concluded that the Board did not misinterpret or misapply the provisions of s. 261A(24) of the 2000 Act (as amended) in refusing to grant leave to the applicant to apply for substitute consent in respect of the quarry. On the contrary, I have concluded that the Board correctly interpreted and applied those provisions to the applicant's application. I have reached that conclusion based on what I have found to be the correct interpretation of the provision in the context of the framework and scheme of the legislation as well as the well-established case law of the superior courts. I have concluded that it would be most unsatisfactory if the words *"commenced operation"* in the context of a quarry used in s. 261A(24)(a)(i) were to be interpreted differently to the way in which those words and similar statutory phrases in the 1963 Act and in the 2000 Act (as amended) have been interpreted. I have further concluded that the interpretation adopted by the Board is compatible with and conforms to the views and approach taken by the CJEU in *Case C-215/06* and in its subsequent jurisprudence and that the interpretation advanced by the applicant would not be compatible with or conform to EU law.

177. I have also rejected the applicant's contention that the Board took into account irrelevant considerations in reaching its decision and have rejected the other various grounds of challenge mounted by the applicant to the Board's decision. I have concluded that the Board was fully aware of and took into account the findings contained in previous decisions of the High Court in relation to the quarry. I have concluded that the Board was not prevented from reaching the decision it took by reason of the provisions of s. 261(7)(e) of the 2000 Act (as amended) as applied by Baker J. in the High Court in *McCoy*. Finally, I have also concluded that while the Board Order recording the decision of the Board contains some typographical errors, they are minor, harmless, insubstantial and inconsequential and did not in any way mislead or prejudice the applicant or its advisors. The Board Order made clear what the Board was deciding and the statutory basis on which that decision was made.

178. In those circumstances, I refuse the applicant's application for judicial review in respect of the Board's decision and dismiss the proceedings.

179. Finally, I wish to record my thanks to the solicitors and counsel for the parties for the detailed and helpful written and oral submissions both before and after the conclusion of the hearing of these proceedings. I am very grateful to them for the considerable assistance which I have derived from those submissions.