Neutral Citation [2016] IEHC 620

THE HIGH COURT

[2015 No: 302MCA]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS, 2000-2011 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000

BETWEEN

AN TAISCE – THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND

McTIGUE QUARRIES LIMITED & GARY McTIGUE AND CAROLINE McTIGUE

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Overview

1. The respondents operate a quarry in County Galway. The total quarry area is about 12.1 hectares, with the extracted area comprising about 8.6 hectares. The quarrying involves a number of processes and activities. These include the blasting, crushing and grading of rock. There are also truck movements in and out of the quarry. It appears not to be disputed that the quarry is in an area of scenic beauty and some environmental significance.

2. Back in 2010, significant changes to planning law as it relates to quarries were effected by way of the Planning and Development (Amendment) Act 2010. The changes were necessary because of the decision of the Court of Justice in *Commission of the European Communities v. Ireland*(Case C-215/06). Among the changes made were the establishment of a substitute consent process whereby the legal position of quarry developments that had been done without an environmental impact assessment (EIA), screening for an EIA, or appropriate assessment (AA) could apply for a 'substitute consent'.The key provision in this regard was a new s.261A of the Planning and Development Act 2000, as inserted by the Act of 2010. Notably, for reasons that will be identified later below, a substitute consent regularised what was done previous to the consent, and allowed the undertaking of certain remedial measures after the consent, but, save as regards the taking of those remedial measures, it did not allow for continuing or future development of a quarry; such continuing or future development required separate planning permission to be obtained following the issuance of the substitute consent. (That, at least, was the sequencing before certain further amendments were made to the planning code last year. Those amendments post-date the events in issue in this application and so, are of limited interest for the purpose of the within proceedings).

3. In the present case, An Taisce maintains that the respondents have obtained a substitute consent but have engaged in continuing development that is unauthorised. As a result, An Taisce has come to court seeking injunctive relief pursuant to s.160 of the Act of 2000. The granting of such relief is a discretionary remedy.

II. What is the Effect of a Substitute Consent at Law?

4. Section 177O ("*Enforcement*") of the Planning and Development Act 2000 provides as follows:

> *"(1) A grant of substitute consent shall have effect as if it were a permission granted under section 34 of the Act and where a development is being carried out in compliance with a substitute consent or any condition to which the consent is subject it shall be deemed to be authorised development.*
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> *(2) Where a development has not been or is being carried out in compliance with a grant of substitute consent or any condition to which the substitute consent is subject it shall, notwithstanding any other provision in this Act, be unauthorised development."*

5. At first glance, a reading of s.177O(1) would suggest that the grant of a substitute consent, such as that issued by An Bord Pleanála on 5th January, 2015, is to be treated as if it were a grant of permission under s.34. A substitute consent is not a permission granted under s.34. However, the Oireachtas has given the same effect to both, and clearly intends that, for all intents and purposes, a consent, insofar as it applies, is to have the same effect as a permission.

6. Of course, it is dangerous to read any statutory provision without regard to the wider context in which it was enacted. A literal reading of one statutory provision may make perfect sense as a stand-alone reading of that provision but no sense when one has regard to the wider picture pertaining. And s.177O is something of an example *par excellence* in this regard. The literal reading of s.177O referred to above makes perfect sense if one reads s.177O in isolation. But it makes no sense when one has regard to the wider picture pertaining.

7. As An Taisce has noted, and as the court indicated in its overview, the substitute consent process was established, following the decision of the Court of Justice in Case C-215/06, to allow the retrospective regularisation of a quarrying development which had been carried out in the absence of an EIA, screening for an EIA, or AA, as applicable. A substitute consent application was required to be accompanied by a remedial EIA or a remedial Natura Impact Statement (where applicable). Such remedial statement was required to include a statement of the significant effects, if any, on the environment (which either had occurred or were occurring or which could reasonably be expected to occur because the relevant development was carried out). The effect of a substitute consent, An Taisce contends, was that where remedial measures were identified in the course of the application process, these and these alone, thanks to s.177O(1), could be done prospectively without falling foul of the planning code, unless of course there was a breach of s.177O(2).

8. In support of its reading of s.177O, An Taisce points to s.177K(2)(d) of the Act of 2000, as inserted by S. 57 of the Act of 2010 (and as applicable when the substitute consent at issue in these proceedings was granted), and s.177K(2)(d) as since amended by reg.6(b) of the European Union (Environmental Impact Assessment and Habitats) (No. 2) Regulations 2015. As enacted, s.177K(2)(d) required An Bord Pleanála, when making its decision in relation to an application for substitute consent to consider, *inter alia, "the significant effects on the environment, or on a European site, which have occurred or which are occurring or could reasonably be*

expected to occur **because the development concerned was carried out**". (Emphasis added). As amended, s.177K(2)(d) requires An Bord Pleanála to consider, *inter alia*, *"the significant effects on the environment, or on a European site, which have occurred or which are occurring or could reasonably be expected to occur because* **the development concerned was or is proposed to be carried out**". (Emphasis added). The change in wording, An Taisce contends, makes clear that prospective authorisation of a development was only contemplated in the legislation, as extant, after the substitute consent in issue in these proceedings was granted.

9. The court accepts that this last contention is the correct reading of matters. However, in fairness, the argument might perhaps be made that Government simply decided to make express in the amended s.177K(2)(d) what it already considered was apparent in s.177K(2)(d), as enacted. And one does enter rather odd territory in seeking to construe the meaning of legislation by reference to legislation that did not exist when either the legislation that one is seeking to construe was enacted, or when a particular action (here the granting of the substitute consent) was done. Much more persuasive, therefore, to the court's mind, is An Taisce's correct contention that s.177O must be interpreted in the light of Ireland's obligations under European law. After all, the substitute consent procedure arose out of the State's obligation to comply with European law, in particular the problems identified by the Court of Justice in Case C-215/06. In that judgment, the Court of Justice observed, *inter alia*, as follows:

> *"…Findings of the Court*
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> *49 Member States must implement Directive 85/337 as amended in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effects (see, to that effect, Case C 287/98 Linster [2004] ECR I 723, paragraph 52, and Case C 486/04 Commission v Italy [2006] ECR I 11025, paragraph 36).*
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> *50 Further, development consent, under Article 1(2) of Directive 85/337 as amended, is the decision of the competent authority or authorities which entitles the developer to proceed with the project.*
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> *51 Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.*
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> *52 That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case by case examination, they are likely to have significant effects on the environment.*
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> *53 A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.*
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> *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.*
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> *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.*
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> *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.*
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> *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.*
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> *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."*

10. Having regard to the above-quoted findings, it does not appear to this Court that it can sustainably be argued, consistent with European law, as identified by the Court of Justice, that a substitute consent, such as the one at issue in the within proceedings, could authorise works that would require an EIA, without such an EIA being undertaken in advance of the works being carried out. Put plainly, a substitute consent regularises what was done previous to the consent, and allows the undertaking of certain remedial measures after the consent, but does not otherwise allow continuing or future development of a quarry: such continuing or future development requires separate planning permission. So when the respondents contend, as they have contended, that (a) the substitute consent is not retrospective or historical only, and (b) a development that complies with a substitute consent is deemed (in every respect) to be authorised development, it appears to the court that contention (a) is misdirected and both contentions are, with respect, wrong. Contention (a) is misdirected because that is not what An Taisce has argued. And both contentions are wrong because, for the reasons identified in this judgment, the court has found that the more nuanced interpretation offered by An Taisce is the correct interpretation of statute when one looks beyond the wording of s.177O to the legal back-drop to that provision, most

notably to Case C-215/06, and the deficiencies in Irish law which that judgment identified and which the relevant provisions of the Act of 2010 were intended to cure.

11. Notably, in the present case, no evaluation or examination of future works (as opposed to remedial or restorative works) has been undertaken, none of the assessments required under s.172 or s.177S and s.177T of the Act of 2000 are recorded as having been undertaken on the works now being carried out, and current and future site-development is not regulated by any conditions. The only conditions in the substitute consent relate to remedial or restorative works. There are none of the conditions that one would expect in a permission for a prospective quarry development, *e.g.*, as to ultimate quarry depth, opening hours, blasting, emissions limits or extraction rate limits. Indeed the court is left with the abiding impression that these are matters that would have been addressed in any permission that might have issued pursuant to any such s.34 application as followed the issuance of the substitute consent. In short, An Taisce appears to the court to be correct in its assertion that the respondents, through their ongoing acts of excavation, are presently engaging in "*unauthorised development*" within the meaning of section 2(1) of the Act of 2000 [1]. Given this finding, it does not appear to the court to be necessary to consider whether the respondents have acted in breach of the substitute consent, though it does not see on the evidence before it that they have. The only question arising for the court therefore is whether to grant the injunctive relief sought.

[1] "*Unauthorised development*" is defined in s.2(1) of the Act of 2000 as meaning "*in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use*". The word "*development*", as defined in s.2(1) includes "*the carrying out of any works on, in, over or under land*". And the word "*works*", also defined in s.2(1), includes "*any act or operation of…excavation*".

III. Section 160 proceedings

12. AnTaisce has brought these proceedings pursuant to s.160 of the Act of 2000. So far as relevant to the within proceedings, s.160 provides as follows:

> *"(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court… may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*
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> > *(a) that the unauthorised development is not carried out or continued;*
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> > *(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
> >
> > *(c) that any development is carried out in conformity with –*
> >
> > > *(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject…*
>
> *(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature….*
>
> *(6)…*
>
> > *(ab) Notwithstanding paragraph (a) or (aa) an application to the High Court…may be made at any time for an order under this section to cease unauthorised quarry development…*
> >
> > *(b) Notwithstanding paragraph (a), an application for an order under this section may be made at any time in respect of any condition to which the development is subject concerning the ongoing use of land."*

13. The respondents maintain that the complaints made in these proceedings 'engage' three prior decisions of the planning authorities and represent an impermissible attempt to impeach those decisions through the medium of s.160. Those three decisions are (1) a decision by Galway County Council of 27th April, 2007, to register the quarry pursuant to s.261 of the Act of 2000, (2) a decision of the planning authority on 3rd August, 2012, that the quarry commenced operation prior to 1st October, 1964, and was therefore eligible to apply for substitute consent, and (3) a decision of An BordPleanála of 5th January, 2015, pursuant to s.261A, to grant a substitute consent. It is not clear to the court, from the argument before it, how assiduously An Taisce contends that the quarry that is the subject of the within application did not commence in operation prior to 1st October, 1964. Equally, however, it does not appear to the court that the true purport of the within proceedings is concerned with the substitute consent process that was undertaken or which resulted in the just-mentioned decisions. The true purport and focus of these proceedings is that the respondents, it is alleged by An Taisce and accepted by the court, are engaged in activities which are not covered by the substitute consent. So the substitute consent process and all that goes with it sit to one side. This application is concerned with continuing development that sits outside the scope of the substitute consent. Of course, one cannot tell what is outside the scope of the substitute consent without having regard to what is within its scope. However, if the respondents are contending, and the court does not understand them to contend, that even this limited exercise is impermissible, then they are, with respect, mistaken. Such an approach would have the effect that no section 160 application could be brought in respect of a development thought to be within the scope of a planning permission or substitute consent, no matter how genuinely a party believed the contrary to present, and that would be absurd. Nor does the court consider that the involvement of An Taisce or any connected person in the process that yielded the substitute consent precludes An Taisce from later contending in a s.160 application, and as it contends here, that there are elements of ongoing development that are not caught by the substitute consent and which represent, in the circumstances presenting, unauthorised development.

IV. Some Case-Law Applicable to Section 160 Proceedings

14. Section 160 has been construed on numerous occasions by the Superior Courts and the respondents contend that the below-mentioned propositions of principle can be identified in the relevant case-law. The court accepts propositions 1 to 3, as identified by the respondents, to be established law. For the reasons given below, the court does not accept that principles 4 and 5, as posited by the respondents, are correct as a matter of law.

Proposition #1

Section 160 must be strictly construed.

15. That this is so follows from the observation of Denham J. in *Mahon v. Butler* [1997] 3 I.R. 369, at 376 that "*The planning code should be construed strictly. Actions can and do have grave financial and social repercussions.*"

Proposition #2

The applicant bears the onus of proof in a s.160 application.

16. That this is so is apparent, *inter alia*, from the judgment of the Supreme Court in *Fingal County Council v. Kennedy* [2015] IESC 72.

Proposition #3

An applicant must adduce evidence to discharge the said onus of proof.

17. That this is so follows from the observation of Hedigan J. in *Smyth v. Dan Morrissey Ireland Ltd* (Unreported, High Court, 25th January, 2012), at para.6.3, that *"It seems to me that in circumstances where the applicant wishes to alter the status quo…it is for the applicant to adduce evidence proving that what he asserts is true…".*

Proposition #4

Any assertion on affidavit which is not contradicted is deemed to have been established on the balance of probabilities.

18. In this regard, the court has been referred to the decision of O'Donovan J. in *Ryan v. Roadstone* [2006] IEHC 53. However, the court does not see that this case is authority for what, in truth, would seem a quite unusual principle. Although the court's attention was not drawn to the specific element of the Ryan judgment that is considered to be authority for this fourth principle, it seems likely that it is derived from O'Donovan J.'s second conclusion under the heading "*Conclusions*" that "*In the light of the uncontroverted assertion by Patrick Martin that the Western Quarry permission was not operational at any material time hereto, I am not persuaded that the respondent contravened condition 13 of that permission whereby all vehicles carrying quarried or other dust producing materials to or from the site of the permission were required to be sheeted*". However, all this observation conveys to this Court is that given a particular uncontroverted assertion, O'Donovan J. was not persuaded of the contrary. However, O'Donovan J. (rightly) does not close his mind to the possibility that he might have been persuaded of the contrary. For the principle as espoused by the respondents would have as its result that a patently wrong assertion could be made in affidavit and fall thereafter, thanks perhaps to mere oversight on the part of opposing counsel, to be deemed to have been established on the balance of probabilities.

Proposition #5

The High Court, under s.160, does not have jurisdiction to entertain a contention that a development is unauthorised development.

19. In this regard, the respondents have pointed to *Cantwell v. McCarthy* [2005] IEHC 351. However, it does not appear to the court that *Cantwell* is authority for such a sweeping proposition. Indeed it would seem odd that in an application for an injunction in relation to an unauthorised development, the court would not have jurisdiction to entertain a contention that the development in issue was an unauthorised development. Rather, Murphy J. concludes in this regard in *Cantwell*, at para. 9.3, that "[A]*n application for an order pursuant to s.160 must fail so long as the permission remains unrevoked.*" The distinction between this proposition and the wider proposition proffered by the respondents in this case appears to the court to be of some significance. For *Cantwell* was a case in which planning permission had issued and had not been revoked; here, by contrast, the central plank of An Taisce's case is that no planning permission has ever issued. That An Taisce would be allowed to contend that no planning permission has ever issued but that the court would not have jurisdiction to entertain the unavoidably linked contention that the development in issue is not an unauthorised development would make no sense in practice or in law. Thus, the court considers that it does have jurisdiction to entertain the contention that planning permission has never been granted and must therefore, as a matter of logic, have jurisdiction to entertain the inextricably linked contention that the development which would have been the subject of such planning permission, had it been granted, is an unauthorised development.

V. Nature of Section 160 Procedure

20. The respondents contend that s.160 establishes a 'summary type' procedure that is not an appropriate vehicle through which to resolve novel questions of law or complex questions of fact. In this regard, they point to dicta concerning s.27 of the Local Government (Planning & Development) Act 1976, as amended which referred to s.27 as a "*fire brigade section*" (*Dublin Corporation v. McGowan* [1993] 1 I.R. 405, 411) and suggested that "*novel questions of law and complex questions of fact…could not be dealt with readily in summary proceedings*" *(Waterford County Council v. John A Woods* [1999] 1 I.R. 556 at 563). A number of points might be made in this regard. First, the court is not bound by dicta concerning a repealed provision that has been succeeded by a provision which establishes a much-amended and streamlined procedure, though such dicta may, of course, provide illuminating guidance as regards the proper interpretation of the later provision. Second, the Rules of the Superior Courts anticipate that oral evidence may be given in s.160 proceedings. The notion that novel questions of law and complex questions of fact cannot be decided in proceedings where oral and affidavit evidence may be given, albeit that such proceedings typically proceed by way of affidavit evidence, and where parties/counsel may put such arguments as they will does not hold true. If that were the case then, in truth, there would be no case in which such questions could be decided. Third, if it were true that s.160 proceedings were not an appropriate vehicle through which to resolve cases presenting novel questions of law or complex questions of fact, then injunctive relief by way of s.160 would be impossible to obtain in such cases. There is nothing in s.160 to suggest that the Oireachtas thought that in such cases, injunctive relief by way of s.160 should be unavailable. And it ill-behoves the courts to impose constraints that our elected lawmakers did not envision and which the law does not otherwise require. Fourth, it is not beyond the wit of counsel learned in the law to

identify in likely every s.160 application some putative question of law or fact which would purportedly take such application outside the scope of s.160, even though, again, there is nothing in s.160 to suggest that our elected lawmakers aimed at such an end where such a question presents. Fifth, even if the respondents were correct that s.160 establishes a 'summary type' procedure that is not an appropriate vehicle through which to resolve novel questions of law or complex questions of fact (and the court does not consider that the respondents are correct in this regard) the court does not consider any novel question of law or complex question of fact to present in the within application in any event.

VI. Discretionary Nature of Section 160 Relief

21. It is clear from the use of the word "*may*" in s.160(1) that the nature of the relief to be granted pursuant thereto is discretionary. And though the discretionary nature of the relief does not flow from the absence of *locus standi* requirements in s.160, it is undoubtedly true, as Barrington J. opined, in respect of the since repealed s.27 of the Act of 1976, in *Avenue Properties Ltd v. Farrell Homes Ltd* [1982] I.L.R.M. 21 that the absence of such requirements makes it "all the more important that the Court should have a wide discretion as when it should and when it should not intervene". The court has been referred to a number of helpful cases in which this discretionary power has previously been exercised, and the factors considered to be of relevance in the exercise of same:

(i) Public Interest

- in *Leen v. Aer Rianta* (Unreported, High Court, 31st July 2003), as recently cited with approval by the Supreme Court in *Derrybrien v. Saorgas Energy Limited* [2015] IESC 77, McKechnie J. took into account the public interest in ensuring that an airport was not closed down and noted that in general any element or feature of public interest which arises from the particular circumstances can be taken into account.

(ii) Commercial Impact

- in *AmphitheatreIreland Ltd. v. HSS Developments* [2009] IEHC 464, Hedigan J., at para. 41, took into account the "*beneficial impact in terms of employment, the influx of people to related facilities at Citywest including the hotel, and the long-term viability of the hotel and the Citywest complex*".

(iii) Undue Hardship

- in *Wicklow County Council v. Jessup & Smith* (Unreported, High Court, 8th March, 2011), Edwards J. declined to make an order where "*the consequences would be devasting for the respondents*"; this attentiveness to the issue of undue hardship that may present for the respondents is also evident in the earlier line of case-law concerning the since repealed s.27 of the Act of 1976 (see, for example, *Avenue Properties*).

(iv) Opinion of planning authority

- the opinion of the planning authority is relevant (see, for example, *Grimes v. Punchestown Developments Company Ltd.* [2002] 1 I.L.R.M. 409 and *Smyth v. Dan Morrissey Ireland Ltd., op. cit.*).

(v) Behaviour of Parties

- Clearly when it comes to the granting of discretionary relief, indeed likely when it comes to the fashioning generally of reliefs, the court, as a court of conscience, will have regard to the previous conduct of the parties. Here certain references have been made to the behaviour of a Mr Sweetman with whom An Taisce appears to have liaised. However, he does not appear to be an agent or employee of An Taisce, the applicant in these proceedings, and thus his actions cannot be attributed to An Taisce. There is also a general assertion that An Taisce has adopted contradictory positions in its submissions in this application and during the substitute consent process. This, the court presumes, is a reference to what seems to be An Taisce's varying position (as described by Mr McTigue in his affidavit evidence) as regards whether there was quarrying before 1964. However, this historical detail seems to the court to be very much an issue on which a party, based on the information to hand at any one time, could, quite legitimately, take a varying position.

VII. Conclusion as to Injunctive Relief Sought

22. The court is loath to grant an injunction that would effectively halt a viable and, it would seem, long-standing business from continuing in operation, with all the adverse consequences that this could bring for the owners and any employees. However, for the reasons identified above, the court considers that the respondents are engaged in unauthorised development that ought to be the subject of planning permission and which is not covered by the substitute consent that has been obtained. There is clearly a public interest in the promotion of legitimate commercial enterprise. However, there is also a public interest on the part of those now living, and those yet to come, in the protection of our natural environment to the level, and in the manner, contemplated by law. So what is the court to do?

23. Notwithstanding the potential for injunctive relief via s.160, the primary enforcers of planning and development law are planning authorities. And in this regard, a particularly striking feature of the case at hand, and a factor that has largely driven the court to the conclusion that it has reached as to how to exercise its discretion under s.160 in this instance, is that no enforcement action has been taken to this time; indeed the court does not see in the papers before it that any such action has even been threatened at any time. So if there is, and there is, when it comes to the respondents' quarrying business, a difficulty presenting as regards planning permission, there does not seem to be that type of imminent and serious threat to the environment that the court considers would justify it in supplanting the planning authority in its apparent view of matters and electing, from a remove, to wield the sledgehammer of injunctive relief.

24. Having regard to all of the foregoing, the court has decided, on balance, not to grant the injunctive relief now sought. Of course, the court's decision does not preclude the planning authority from taking enforcement action now or at some future time, a factor which the respondents may wish most earnestly to consider when resolving how best to proceed after the court delivers the within judgment.

VIII. Application for Protective Costs Order

25. Separate to the principal motion in these proceedings, An Taisce has made application for an order pursuant to s.7 of the Environment (Miscellaneous Provisions) Act 2011 declaring that s.3 of that Act applies to the within proceedings. It did not appear that this was a matter of much contention between the parties; neither was it a matter of agreement between them. So the court will adjudicate on the point. These are civil proceedings within the meaning of s.4(1)(a) and (b) of the Act of 2011 and that do not come within s.4(3) of that Act. They are therefore proceedings to which s.3 of the Act of 2011 applies. They are also proceedings in which An Taisce has succeeded in its contentions as to the true legal purport of a substitute consent, albeit that the court has elected, in its discretion, not to grant the injunction sought. Having succeeded on the law, An Taisce may consider that an order of costs in its favour, pursuant to s.3(4) of the Act of 2011, is merited. As the court has not heard any argument on this aspect of matters, it will refrain from making any order as to costs until it has heard the parties further in this regard.