[2020] IEHC 195

THE HIGH COURT

RECORD NO. 2013/647 JR

BETWEEN

JJ FLOOD & SONS (MANUFACTURING) LTD AND DAVID FLOOD

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL, MEATH COUNTY COUNCIL

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 20th day of April, 2020

Nature of the Case

1. This is another case in a long line of cases concerning Irish planning law as it applies to quarries and as impacted upon by Ireland's obligations of EU membership. The first named applicant is a limited company and operates a quarry at Murrens, Oldcastle, County Meath and the second named applicant is the director of that company. The applicants maintain that the quarry in question is beyond the reach of the EU Environmental Impact Assessment Directive and the Habitats Directive ("the Directives") because it has remained within the parameters of a pre-1964 user.

2. In 2005, this quarry was registered under s.261 of the Planning and Development Act, 2000 ("PDA 2000") and Meath County Council ("the Council") imposed a number of conditions as to its future operations pursuant to s.261(6) of the PDA 2000. In 2012, in accordance with its obligation under s.261A of the amended legislation, the Council conducted a review and directed the quarry to apply for substitute consent. The applicants maintain that this direction was invalid for the reasons set out below, the most fundamental of which is the applicants' claim that a quarry which stays within its pre-1964 user is not subject to the Directives because it does not require development consent; this being, it maintains, a condition of the applicability of the Directives. An Bord Pleanála ("the Board") upheld the Council's decision. The applicants maintain that the Board's decision was also invalid. They also maintain that s.261A of the PDA 2000 is unconstitutional in failing to provide for adequate procedures in a process which, they say, wrongly and unfairly removes rights which were "vested" in it pre-1964.

3. For the reasons set out in this judgment, I reject the submission that a quarry which commenced operations prior to 1964, even one which stays within its pre-1964 user, is automatically by virtue of that user rendered immune from the Directives. This in turn affects some of the remaining questions raised by the applicants. I reject the submission that the Council was not entitled to issue a direction to the applicants to apply for substitute consent in circumstances where it had previously imposed conditions which envisaged further quarrying for 20 years following the quarry's registration under s.261. I also find that the legislation is not unconstitutional for the reasons put forward by the applicants. I therefore propose to refuse the reliefs sought.

The Reliefs Sought

4. The applicants seek the following reliefs:

i) An order of *certiorari* quashing the decision of An Bord Pleanála, dated 27th June, 2013, wherein the Board purported to make a determination pursuant to s.261A of the PDA 2000, as amended, confirming the earlier determination of Meath County Council of 20th July, 2012.

ii) An order of *certiorari* quashing the decision of Meath County Council made pursuant to s. 261A of the PDA, 2000 on 20th July, 2012.

iii) A declaration that s.261A of the PDA 2000, as amended, is unconstitutional.

5. Although the applicants challenge both the Council and the Board decisions, it is the decision of the Board which falls primarily for scrutiny in these proceedings. In *McGrath Limestone Works Ltd v. An Bord Pleanála & Ors* [2014] IEHC 382, Charleton J. (at paragraphs 9.2 and 9.3) dealt with the issue of when time to seek judicial review begins to run. He considered that the process was not complete until the Board fulfilled its function of reviewing the planning authority's decision. He held that time did not run until the Board's decision because it was the Board's decision, and not "any intermediate step", with which the applicant had an issue. It follows that the final decision in the process, that of the Board on review, is the primary decision with which the Court should be concerned in this judicial review.

The relevant Directives and their interpretations by the CJEU

6. In 1990, Council Directive 85/337/EEC of 27th June, 1985 on the assessment of the effects of certain public and private projects on the environment required the mandatory assessment of projects set out in Annex I of the Directive and a discretionary assessment of projects set out in Annex II, where Member States considered that their characteristics so required. Quarrying is not listed in Annex I of the Directive but it is cited in section 2(c) of Annex II ("[e]xtraction of minerals"). This Directive was transposed into Irish Law in the European Communities (Environmental Impact Assessment) Regulations, 1989 ("EIA Regulations") which came into operation on 19th December, 1989 and the Local Government (Planning and Development) Regulations, 1990 which came into operation on 1st February, 1990.

7. The EIA Regulations required that an environmental impact assessment ("EIA") be carried out in respect of all projects specified in the First Schedule, including those specified under "Extractive Industry" in section 2(d) of Part II: "[e]xtraction of stone, gravel, sand or clay, where the area involved would be greater than 5 hectares".

8. A subsequent Directive, Council Directive 97/11/EC of 3rd March, 1997, amended Annex I of Directive 85/337/EEC to require mandatory EIAs for quarries in excess of 25 hectares. It also introduced the requirement that an EIA be carried out in respect of changes or extensions to projects, already authorised or being executed, which may have significant effects on the environment. This Directive was transposed into Irish Law in the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1999 and required an EIA for the extension of a quarry which brought the total quarry in excess of

5 hectares and represented an increase of over 25% of the existing quarry, provided that the extension itself exceeded 2.5 hectares.

9. Council Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") provides at Article 6(3) that a competent authority must carry out an appropriate assessment of any plan or project which is likely to have a significant effect on a Natura 2000 site, prior to any decision being made to allow the project to proceed. Natura 2000 sites in Ireland comprise Special Areas of Conservation ("SACs") and Special Protection Areas ("SPAs"). SACs are selected for the conservation and protection of habitats listed in Annex I and species (other than birds) listed in Annex II of the Habitats Directive and their habitats. SPAs are sites which have been selected for the conservation and protection of bird species listed in Annex I of the Birds Directive and regularly occurring migratory species and their habitats.

10. The Habitats Directive was transposed into Irish Law by the European Communities (Natural Habitats) Regulations, 1997, which came into operation on 26th February, 1997. Regulation 27 required a local authority to ensure that an appropriate assessment was undertaken when considering an application for planning permission in respect of a proposed development which would be likely to have a significant effect on a European site.

11. The two relevant Directives are sometimes referred to in shorthand as "the EIA Directive" and the "Habitats Directive" and I will adopt that terminology in this judgment. I will also refer to "Environmental Impact Assessments" as EIAs, and "Appropriate Assessments" as AAs. As they have been analysed in a number of previous judgments of the Court, I propose to limit my description of their contents here as much as possible.

12. In relation to the EIA Directive, Article 2(1) (as amended by Article 1 of Council Directive 97/11/EC) imposes an obligation upon Member States as follows:

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4."

This obligation is crucial in the present case.

13. The provisions of the Directives have also been considered in a number of decisions of the CJEU, including a group of judgments known as the "Pipeline" decision, which include *Commission v. Germany* (Case C-431/92, judgment of 11th August, 1995) and *Stadt Papenburg v. Bundesrepublik Deutschland* (Case C-226/08, judgment of 14th January, 2010), in respect of which more will be said below.

14. Ireland's transposition of the Directives proved problematic. In a number of cases, the CJEU found Ireland to have been in breach of its duties under EU law; see *Commission v.*

Ireland (Case C-392/96, judgment of 21st September, 1999), *Commission v. Ireland* (Case C-215/06, judgment of 3rd July, 2008), and *Commission v. Ireland* (Case C-50/09, judgment of 3rd March, 2011). A group of amendments to the Irish planning legislation was introduced, which included a new concept of "substitute consent" (a form of retrospective development consent in respect of developments which should have been, but were not, subjected to the requirement of an EIA and/or an AA) and a regime under which there are a number of "gateways" to obtaining substitute consent. One of those "gateways" was the one used in the present case; that being a decision of a local planning authority directing a quarry apply for substitute consent. A number of judgments have discussed these developments, including *McGrath Limestone Works Ltd v. An Bord Pleanála* [2014] IEHC 382, *An Taisce v. Ireland* [2010] IEHC 415, *Hayes & Ors v. An Bord Pleanála* [2018] IEHC 338, and *Shillelagh Quarries v. An Bord Pleanála* [2019] IEHC 479.

15. It may also be noted that EU law has its own concepts and terminology in this area, and prominent among them are those of "a project" and "whether a project is likely to have significant effects on the environment" (from the Directives); and the concept of a "single operation" (the "Pipeline" cases). These are separate and distinct concepts from those within domestic Irish planning law, such as "unauthorised development", "pre-1964 user", "exempted development", "authorisation", "permission" and other terms commonly used in domestic planning law.

Section 261 of the PDA 2000

16. Section 261 of the PDA 2000 required the owner or operator of a quarry, not later than one year from the coming into operation of the section, to provide to the planning authority in whose functional area the quarry was situated, information relating to the operation of the quarry at the commencement of this section, and on receipt of such information, the planning authority was required to enter it into a register. The information required included: (a) the area of the quarry, including the extracted area delineated on a map; (b) the material being extracted and processed (if at all); (c) the date when quarrying operations commenced on the land (where known); (d) the hours of the day during which the quarry is in operation; (e) the traffic generated by the operation of the quarry including the type and frequency of vehicles entering and leaving the quarry; (f) the levels of noise and dust generated by the operations in the quarry; (g) any material changes in the particulars referred to in paragraphs (a) to (f) during the period commencing on the commencement of this section and the date on which the information is provided; (h) whether (i) planning permission under Part IV of the Local Government (Planning and Development) Act, 1963 was granted in respect of the quarry and if so, the conditions, if any, to which the permission is subject, or (ii) the operation of the quarry commenced before 1st October 1964; and (i) such other matters in relation to the operations of the quarry as may be prescribed.

17. Subsection (6) of s.261 provided for the imposition or modification of conditions of quarries so registered, while subsection (7) provided for a requirement to apply for planning permission instead of the imposition of planning conditions. The applicants'

quarry was registered pursuant to s.261 in 2005, and conditions as to its operations were imposed upon it.

Section 261A of the PDA 2000, as amended

18. This case concerns among other things the correct interpretation of subsections (2)(a) and (3) of s.261A of the PDA 2000. Under s.261A, every planning authority was required to make a determination, within 9 months of the commencement of the legislation, in relation to "every quarry within its administrative area". The determination to be made under subsection (2)(a) of s.261A with regard to each quarry is whether (i) development was carried out after 1st February, 1990 which development would have required, having regard to the EIA Directive, an EIA or a determination as to whether an EIA was required, but that such an assessment or determination was not carried out or made, or (ii) development was carried out after 26th February, 1997, which development would have required, having regard to the Habitats Directive, an AA, but that such an assessment was not carried out.

19. Subsection (3) of s.261A provides:

> (3)(a) Where a planning authority makes a determination under subsection (2)(a) that subparagraph (i) or (ii) or both, if applicable, of that paragraph apply in relation to a quarry (in this section referred to as a 'determination under subsection (2)(a)'), and the authority also decides that—
>
> (i) either the quarry commenced operation before 1 October 1964 or 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 planning authority shall issue a notice, not later than 9 months after the coming into operation of this section, to the owner or operator of the quarry.
>
> […]
>
> (c) A notice referred to in paragraph (a) shall be in writing and shall inform the person to whom it is issued of the following matters:
>
> (i) the determination under subsection (2)(*a*) and the reasons therefor;
> (ii) the decision of the planning authority under paragraph (*a*) and the reasons therefor;
> (iii) *that the person is directed to apply to the Board for substitute consent in respect of the quarry, under section 177E,* with a remedial environmental impact statement or remedial Natura impact statement or both of those statements, as the case may be, in accordance with the determination of the planning authority under subsection (2)(*a*), not later than 12 weeks after the date of the notice, or such further period as the Board may allow;

(iv) the person may apply to the Board, not later than 21 days after the date of the notice, for a review of the determination of the planning authority [...] (emphasis added)

20. I have highlighted certain phrases above in order to focus upon the matters relevant to the present case. The valid preconditions to the local planning authority issuing a notice to the applicants directing them to apply for substitute consent were therefore as follows:

- That a determination had been made in accordance with subsection (2) i.e. that either (i) development was carried out 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 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.

- That the quarry had commenced operation pre-1964.

- That the quarry had fulfilled the conditions as to registration under s.261.

The decisions under challenge in this judicial review
Background

21. On 25th April, 2005, the applicants' quarry was registered with Meath County Council pursuant to s.261 of the PDA 2000. The application process indicated that the quarry had been in operation prior to October 1964 (since 1875) and, at the time of registration, extended to a total area of 36.4 hectares with an extraction area of 25.4 hectares. Traffic arising from the quarry was stated to average at 100 HGV trips per day (50 laden trips) and 10-15 trips for office staff and service vehicles.

22. The Council imposed 23 conditions on the operation of the quarry pursuant to s.261(6)(a)(i) and communicated those to the applicants on 18th April, 2007. It did not choose the stricter option under s.261(7) of requiring the quarry to apply for planning permission accompanied by an environmental impact statement ("EIS"). The conditions included conditions as to: the hours of operation; entrance signage and sightlines; noise levels; earth mounds; dust deposition; surface water and discharge of wastewaters; monitoring of surface and groundwater; arrangements for sewage treatment and disposal; hydrogeological assessment to identify groundwater flow regime in the vicinity of the boundary treatment; and vibration and blasting. Condition 2 set out that the duration of the permission was 20 years, a matter upon which the applicants place considerable reliance in its arguments.

23. A file was created in relation to the applicants' application for registration under s.261.

The impugned Council decision of 20th July, 2012

24. As mandated by s.261A of the PDA 2000, as amended, Meath County Council conducted a review of all the quarries within its area, of which the applicants' quarry was one. In accordance with the requirements of the legislation, a notice was exhibited in the Meath Chronicle. The applicants did not make any submissions at that stage, although they were entitled to do so.

25. On 20th July, 2012, the Council considered the quarry again pursuant to s.261A. It determined as follows:

- *That the quarry had carried out development after 1st February, 1990 which was not authorised by a permission granted under Part IV of the Local Government (Planning and Development) Act, 1963 ("the Act of 1963"), prior to 1st February, 1990, which development would be required, having regard to the EIA Directive, an EIA or a determination as to whether an EIA was required, but that such an assessment or determination was not carried out or made (the first determination, under s.261A(2)(a)(i)). The reason given was as follows:*

  > "Having regard to the scale and characteristics of the development undertaken post the transposing of the EIA Directives, to the traffic volumes generated, noise and dust emissions from the site and the proximity of the site to the Lough Naneagh pNHA it is considered that the development was likely to have had significant effects on the environment and thus an EIA was required."

- That the quarry had carried out development after 26th February, 1997, which was not authorised by a permission granted under Part IV of the Act of 1963, prior to 26th February, 1997, which development would have required, having regard to the Habitats Directive, an AA, but that such an assessment was not carried out (the second determination, under s.261A(2)(a)(ii)). The reason given was:

  > "Having regard to the proximity of QY35 to the White Lough, Ben Loughs and Lough Doo cSAC and the potential for ground water to be linked between the two areas, in the absence of detailed hydrogeological data it cannot be ruled out that the effects of groundwater drawdown or contamination as a result of quarrying activities after 1.07.99 could not have caused a significant effect. Therefore all post 1.07.99 activities at QY35 would have required an appropriate assessment in respect of such activities to give rise to impacts on White Lough, Ben Loughs and Lough Doo cSAC no such assessment has been completed."

- That the quarry commenced operation before 1st October, 1964 (determination under s.261A(3)(a)), and

- That the requirements in relation to registration under s.261 were fulfilled (second determination under s.261A(3)(a)), and

- That the applicants should apply for substitute consent under s.177E within 12 weeks.

26. The planner's report preceding the Council decision was prepared by David Caffrey, Executive Planner and sent to Wendy Bagnall, Senior Executive Planner, on 13th June, 2012. In its assessment, it discusses the planning status of the quarry. It commented that there was little question that the site was operational as a quarry prior to 1990 and noted the s.261 application wherein it was indicated that quarrying commenced in approximately 1875 on an intermittent basis and expanded thereafter in the late 1960s and again in the later 80s/early 90s. It said that from an inspection of the mapping available and from aerial photography, the Planning Authority would concur that quarry operations did commence prior to 1963. It then said that the question now arising was whether the development was authorised by a *bona fide* pre-1964 use and so may be said to have a pre-1964 authorisation. In appraising whether post 1990 and/or post 1997 development could reasonably have been envisaged in 1964, questions of direction, intensification and abandonment were relevant. It said that abandonment was not applicable because operations had been ongoing on a continuous basis save for perhaps for some short time lapses at intermittent times. It said that the issue of intensification was more relevant to the current assessment and said that it was not appropriate to solely assess whether the activities were commensurate with existing levels, but rather to test whether there was a marked increase at a specified time and beyond which would be deemed to be naturally progressive and also whether additional lands were acquired post 1964 given that there could be no inference that those lands could have reasonably been envisaged in 1964. It considered that significant extraction took place between 1974 and 1994, although this could have taken place on an incremental and progressive basis given the twenty-year timeframe between the evidence available. Reference was made to volumetric terms from which it would appear that significant extraction took place between 1999 and 2009 on the basis of the aerial photography available. Reference was made to the s.261 application where it was specified that approximately 40,000 traffic movements per annum were taking place, i.e. about 100 movements per day. There also appeared to be an acknowledgment by the quarry owner that operations had intensified at various times through the decades and this appeared to be borne out by the evidence available. The final determination to be made in discussing the status of the quarry was to ascertain whether lands had been acquired subsequent to 1964. The report said that it was evident from the Land Registry search that additional lands were acquired in the 1990s for quarrying purposes and which could not have reasonably been envisaged in 1964. As a result of all of the foregoing, the planner said:

> "Therefore on the basis of the intensification that took place (as acknowledged by the quarry owner) and that excavation has taken place on lands that could not reasonably have been envisaged, it is considered that the quarry is not operating under a pre-1964 authorisation".

27. The planner's report then goes on to deal with matters under the heading: "Determination as to whether EIA or Determination as to whether EIA was required." This section starts

by noting that if development carried out post-1990 was undertaken on foot of a grant of permission prior to that date or was operating and authorised by a bona fide pre-1964 use, then an EIA is not required. It may be commented that this is not the decision of the Council or the Board in the proceedings before me. The Planning Authority then goes on to say that having established that the quarry was not operating as a bona fide pre-1964 use because of intensification such that a material change of use had occurred and that additional lands had been acquired, an assessment of the nature and quantum of development post 1st February, 1990 needed to be undertaken. I pause to note that the logic of this is not entirely clear, even on the planner's own logic. In any event, it goes on to discuss the extraction area of the quarry, described as approximately 32 hectares. It says that from an inspection of the 1994 aerial photography compared with the latest photography, it would appear as though the area of extraction has altered significantly and certainly to a degree that represented an increase of over 25% of the existing quarry and of itself was above 5 hectares. It says:

> "It can reasonably be asserted therefore that the increase in the quarry area would of itself have necessitated an EIA".

28. It says that cognisance must also be paid to the potential for sub-threshold EIS and whether the works would or would not be likely to have significant effects on the environment. It refers to the fact that in 2005 there was an extraction rate of in excess of 1,000 tonnes per day according to the s.261 application. It commented that this would have obvious and significant impacts on the environment in terms of traffic movements, the impacts on the local road network and noise and dust associated with such quarrying which could be such as to warrant the preparation of an EIS in respect of individual sub-threshold developments in an area. The conclusion was that the works undertaken post-1990 were such that an EIA was required and even if a mandatory EIA was not required, a sub-threshold EIS would have been required. It said:

> "In forming this opinion the Planning Authority had regard to the rate of extraction, the scale of the quarry at c32 hectares and the proximity to sensitive sites and in particular Lough Naneagh (pNHA) 1 km from the site."

29. The next section of the report has the heading "Determination as to whether AA was required." Here it discusses its proximity to the various lakes and talks about the composition of the land and issues relating to the ground water and concludes:

> "Having regard to the proximity of QY35 to the cSAC and the potential for ground water to be linked between the two areas, in the absence of detailed hydrogeological data it cannot be ruled out that the effects of ground water drawdown or contamination as a result of quarrying activities after 1.07.99 could not have caused a significant effect".

30. Therefore, all those activities would have required an appropriate assessment and none such had been completed.

31. The handwriting on the document indicates that it was approved by Ms Bagnall on 19th July, 2012. The notice was served on the applicants three days after that date.

32. The applicants and An Taisce applied separately to the Board for a review of the Council's determination. An Taisce maintained that the quarry was not a pre-1964 quarry as operations had intensified disproportionately. The applicants maintained that the Council was wrong to hold that development was carried out after 1990 or 1997 and that it was not obliged to apply for substitute consent. The applicants made submissions and were also afforded the opportunity to respond to the An Taisce review separately from its own seeking of a review.

The impugned Bord Pleanála decision of 27th June, 2013

33. The report of the planning inspector, Deirdre Mac Gabhann, is dated 11th April, 2013. This report is discussed in detail in a later part of this judgment; therefore I do not propose to set out the details of the report at this point.

34. The Board gave its decision on 27th June, 2013 confirming the determinations of the planning authority.

35. In respect of the determination under s. 261A(2)(a)(i), the following reasons were given:

> "Having regard to:
>
> (a) the submissions of the file including documentation on the review file (planning authority register reference number QY 35), aerial photography and details of site registration under section 261 of the Planning and Development Act, 2000, as amended,
> (b) the nature and scale of operations at the site which entails an extraction area in excess of 5 hectares that was developed after the 1st day of February, 1990,
> (c) the provisions of the Planning and Development Acts, 2000 to 2011, as amended, and in particular Part XA and section 261A,
> (d) the Regulations pertaining to Environmental Impact Assessment 1989 to 1999 and the Planning and Development Regulations, 2001, as amended, which restates the prescribed classes of development which require an Environmental Impact Statement (Schedule 5) which makes provision for a planning authority to require the submission of an Environmental Impact Statement in such cases and the criteria for determining whether the development would or would not be likely to have significant effects on the environment (Schedule 7 thereof), and
> (e) the Department of the Environment, Community and Local Government – Section 261A of the Planning and Development Act, 2000 and related provisions, Supplementary Guidelines for Planning Authorities, July 2012,
>
> it is considered that development was carried out after the 1st day of February, 1990 which would have required an environmental impact assessment, having

regard to the Environmental Impact Assessment Directive, but that such an assessment was not carried out. The Board, therefore, confirms Meath County Council's determination in respect of this development made under section 261A(2)(i) of the Planning and Development Act, 2000, as amended."

36. With regard to the decision under s.261A(2)(a)(ii), the Board said:

"Having regard to:

(a) the documentation on the review file (planning authority register reference number QY35), aerial photography and details of site registration under section 261 of the 2000 Act, as amended,
(b) the location of the quarry in close proximity to two European sites (White Lough, Ben Loughs and Lough Doo Special Area of Conservation and Lough Bane and Lough Glass Special Area of Conservation),
(c) the potential cumulative impact on these European sites of quarrying operations at this site and an adjoining location (planning authority register reference number QY24),
(d) the uncertainty regarding the hydrological linkages between this quarry and the European sites,
(e) the qualifying interests for the European sites which could have been impacted by this quarry, and
(f) the dates on which the above sites of Community interest were designated,

it is considered that development was carried out after the 26th day of February, 1997 which would have required, having regard to the Habitats Directive, an appropriate assessment. The Board, therefore, confirms Meath County Council's determination in respect of this development made under section 261A(2)(ii) of the Planning and Development Act, 2000, as amended".

37. With regard to the decision under s.261A(3)(a), the Board said:

"Having regard to:

(a) the planning history of the site, in particular the evidence on file that the quarry site commenced operations prior to the 1st day of October, 1964, and
(b) the information relating to the registration of the site under section 261 of the 2000 Act, as amended,

the Board confirms Meath County Council's decision in respect of development made under section 261A(3)(a) of the Planning and Development Act 2000 as amended".

The applicants' submissions

(1) A quarry which has stayed within the scope of its pre-1964 user does not require development consent and therefore falls outside the scope of the Directives:

38. The applicants submit that as a matter of law, a quarry which does not require a development consent under national law does not fall within the Directives and/or within s.261A(2)(a) and is not required to apply for substitute consent because the Directive only applies to projects which require development consent under national law after the two trigger dates. Counsel on behalf of the applicants repeatedly stated that "if a quarry does not need development consent, it does not need an EIA". The applicants submit that a quarry which does not require development consent as a matter of national law because it commenced quarrying pre-1964 and has remained within the pre-1964 user does not fall within the Directives. They submit that the quarry falls within the parameters identified in the so-called "Pipeline" decisions of the CJEU (including *Stadt Papenburg)* and that the quarry was simply continuing, after each of the two trigger dates, to engage in the same operation which had commenced prior to each of the two trigger dates. It submits that a quarry cannot be in violation of EU law when it is lawful under Irish law.

39. In a nutshell, the applicants maintain that a quarry which has stayed within its pre-1964 user is immune from the impact of the Directives, irrespective of its impact on the environment, and cannot be placed under any obligation to submit to environmental impact assessment.

(2) The Council, in effect, granted development consent in 2005 following the registration of the quarry in 2005:

40. The applicants maintain, further, that the decision of the Council in 2005 to impose conditions (following the registration of the applicant's quarry) had certain consequences. The applicants reject the proposition that registration of the quarry under s.261 was entirely meaningless with regard to their rights and submit that there must be some consequences which flow from the Council carrying out its statutory duty of assessing the quarry at that time. Registration was more than a "tick-box exercise", which was manifest from the fact that the Council had imposed 23 conditions including a permission to continue quarrying for 20 years. The applicants take issue with the authorities insofar as it is suggested that registration was little more than an administrative act, including the discussion of the issue in *McGrath Limestone*. The applicants claim that the Council's decision in 2005 to allow the applicants to continue quarrying, with conditions imposed, amounted to a development consent and that the Council was not entitled to resile from its earlier finding and/or was estopped from doing so.

(3) The direction to apply for substitute consent amounted to a finding that the quarry was an unauthorised development:

41. The applicants submit that the service of a notice to apply for substitute consent (although nowhere explicitly stating that the development was unauthorised) was, in effect, a finding that the quarry was an unauthorised development because unless the Council had concluded that the development was outside its pre-1964 user, it could not have reached the conclusion that it was necessary to serve it. The applicants claim that if they have stayed within their pre-1964 user, it follows that they are not unauthorised development and, if they are not unauthorised development, they do not need to seek

development consent and, if they do not need to seek development consent, the Directives do not apply to them. Therefore, they say that it is inconsistent for a decision-maker to simultaneously conclude that they are a pre-1964 quarry (therefore not requiring development consent) and that they must apply for substitute consent.

(4) The fact-finding was inadequate:

42. The applicants maintain that the reports of the planner and inspector demonstrated a shallow and superficial examination of the facts which led them to the erroneous conclusion that the quarry had exceeded its pre-1964 user. They submit that the correct approach to the facts, as set out in *Waterford County Council v. John A. Wood Ltd* [1999] 1 IR 556, should have been followed but they failed to properly consider the history of the development at the site and whether or not there had been a material change of use. While the inspector's report (erroneously) concluded that the quarry had exceeded its pre-1964 user, the decision of the Board was completely silent on the question, therefore it was impossible to say whether it adopted the Inspector's erroneous conclusions. The Board had erroneously made a "bald assessment of the entire quarry" and had failed to consider that a significant portion of the development was carried out before the two Directives; no particular development or areas requiring EIA or AA were identified.

(5) Inadequate reasons:

43. The applicants complain that both decision-makers failed to adequately to record their reasons and, in particular, failed to explain how much of the planner/inspector's reports they were accepting or adopting.

(6) The Constitutional/Fair procedures argument:

44. The applicants submit that the Council breached fair procedures because it failed to invite submissions on the issue of whether the quarry was within its pre-1964 user and/or constituted unauthorised development prior to reaching its decision thereon. In the written submissions, the applicants went so far as to assert that they had never received any "charge or complaint" before they were "in effect convicted of unauthorised development". They complain that they had no advance notice that the Council might resile from the view taken in 2005, no opportunity to make submissions on the issue, no hearing, no testing of the evidence, and no independent adjudication on the matters at issue. Further, they complain that it is unclear what burden of proof was applied and point to the language used by the inspector that she was "not confident" that the expansion of works or the introduction of procession could have reasonably anticipated in 1964. A comparison was drawn with the rights which would apply in a s.160 enforcement procedure, as discussed in *Pierson v. Keegan Quarries Ltd (No. 1)* [2009] IEHC 550, and the applicants complained that their only recourse is by means of a judicial review which is necessarily limited in scope. Insofar as s.261A permits what happened in the absence of setting out any such procedural safeguards, it was necessarily unconstitutional. The applicants claim that they had "vested rights" which could not be displaced in the absence of a valid determination that the quarry was unauthorised following a process which

involved fair procedures. The applicants rely on *An Taisce* for the proposition that they had "vested rights".

45. The applicants pointed to the practical consequences that would ensue if they were ultimately directed to remediate. It was suggested that the "clock has been re-set entirely" and that they might potentially be required to remediate in respect of development as far back as before 1964; and that there had been no indication of when they had "crossed the line" into disproportionate or non-contemplated development.

The respondents' submissions
The Board's submissions

46. The Board says that the Directives placed an obligation on Member States, as a matter of EU law, to require quarries to seek development consent where development within the meaning of the Directives had taken place after the trigger dates irrespective of the planning status of the quarry under domestic law. This allowed for two limited exceptions only, namely: (1) those with existing planning permission at the time of the two relevant dates; or (2) those with pending planning applications at the time of the two relevant dates. The Board argue that these exceptions do not include a quarry which commenced pre-1964 even if it stayed within the pre-1964 user, as such an exclusion from the domestic planning code cannot be equated with a permission or pending planning application for the purposes of the Directives. The Board relies on the decision in *Westland & Bulrush v. An Bord Pleanála* [2018] IEHC 58 to argue that where a project has no existing domestic planning permission and no planning application was pending at the time of the trigger dates, it is not immunised from the effect of the Directives simply because it had, under domestic planning law, an exclusion or user of long-standing. The whole objective of introducing s.261A was to force planning authorities to identify quarries which were not in conformity with EU law and afford some of those quarries the opportunity to rectify their position, even though the difficulties were not necessarily entirely of the quarry's own making (i.e. some positions may have been partly owing to the fault of the State in the form of inadequate legislation, failures of enforcement). It submits that the applicants are looking at the matter "back to front" in its submission which says "I do not need development consent and therefore I do not need an EIA", because the correct approach is "if you need an EIA, you need a development consent; the requirement for development consent follows from the fact that the development is such that it requires an EIA".

47. The Board points to the distinction between the matters to be addressed under subsections (2)(a) and (3) of s.261A respectively; and emphasises that the purpose of subsection (3) is to ensure that only quarries which are "ostensibly lawful" are entitled to apply for substitute consent. If a quarry has no pre-1964 user and/or has not registered, then it would have to be the subject of enforcement. The significance of the pre-1964 user under s.261A is solely to give an entitlement to apply for substitute consent but it does not provide immunity from the requirement to obtain consent for development after the trigger dates which required an EIA. The Board says that the applicants' position is illogical because they submit that a determination that the quarry has pre-1964 user

precludes the Council from allowing it to apply for substitute consent, whereas the whole point of subsection (3) is to *allow* such a quarry to apply.

48. The Board submits that the very fact that the two subsections - s.261A (2)(a) and (3) - are separate suggests that the legislature views the two issues as distinct and that a determination that there is a pre-1964 commencement or the grant of planning permission is not determinative of whether there is development post-1990 or 1997.

49. The Board submits that, as a general proposition, it is neither unusual nor prohibited for the legislature to introduce new regulation into an area that has previously not been regulated, and that a person engaged in the economic activity in question has no indefinite immunity from regulation simply because it has not been regulated in the past. It is simply wrong, they submit, to suggest that because the person's activity was not previously subject to regulation, it cannot ever be subject to regulation.

50. The Board submits that many of the arguments now being made by the applicants have been determined by the High Court in decisions handed down since these proceedings were commenced, including *McGrath Limestone*, and *Westland & Bulrush*.

51. The Board submits that the process envisaged in s.261A does not involve a value judgment on the quarry but rather places an obligation on the planning authority. This is manifest, it says, from the fact that a quarry which has actual planning permission, for example from 1978, or 1994, can also be directed to make an application for substitute consent. It is simply a determination of fact as to whether such development has occurred that would have required the relevant assessments.

52. The Board submits that it has made no finding that the applicants' quarry constitutes an unauthorised development, and that the complaints about procedures and determinations on the evidence are misconceived and based upon the false premise that there had been such a finding. The Board has been looking (correctly) at a much narrower question, namely, whether there was development about 1990 or 1997 which required either an EIA or an AA. The applicants would only become unauthorised if they failed to comply with the direction to seek substitute consent and would be a consequence of non-compliance with the direction; not by reason of any determination of the underlying status of the quarry made in the Board's decision of 27th June, 2013.

53. The Board submits that the applicants wrongly suggest that the Board should have been determining whether or not they had a pre-1964 user in order to determine whether or not there had been development within the scope of the Directives; and then complain that the Board inadequately carries out a task which the Board says it should not have been doing in the first place.

54. The Board submits that there is no inconsistency between the Board's determinations under s.261A(2)(a)(i) and s.261A (2)(a)(ii); that the applicants' argument in this regard is premised on the view that an analysis of pre-1964 user was necessarily imported into the first determination under s.261A(2), which is a fundamental misconception.

55. The Board submits that the applicants' case is premised on a fundamental misconception that registration under s.261 and/or imposition of conditions somehow pre-determined either of the determinations the Council was required to make under s.261A or the determinations of the Board on a review of same.

56. It submits that the fact-finding was appropriate (including that the Board did have regard to the planning history of the site) and fairly grounded the conclusion that the development occurred after the trigger dates for the purposes of the Directives.

57. It submits that the reasons given are adequate and such as to enable a reasonable person apprised of the broad issues to understand the basis on which the Board had reached its decision.

58. The Board submits that the argument as to fair procedures is built upon the erroneous foundation that there had been a finding of unauthorised development. It submits further that the procedures were fair and had been approved in *McGrath Limestone*; that the applicants had notice of the decision; that they had sought a review of the Council's decision; that they had access to the planner's report on which the decision was based; that a detailed submission was made to the Board on review; and that submissions were made in relation to the An Taisce request for a review.

59. Similarly, it submits that the argument regarding a failure to give reasons had been predicated on the Board having implicitly decided that there was unauthorised development but again fell by reason of an erroneous premise. The reasons given were adequate in relation to what they actually (and correctly) determined.

60. The Board also points out that s.261(7) of the PDA 2000, which permits a planning authority to direct the submission of an EIS, only concerns EIAs and there is no equivalent provision in relation to AAs under the Habitats Directive. Therefore, the applicants cannot, in the Board's view, argue that the imposition of the conditions under s.261 means that the planning authority has "looked at, considered or definitively decided" that an AA was or was not required as s.261 "is simply silent on the point". *The Council's submissions*

61. Regarding the registration of the quarry and the imposition of conditions in 2005, the Council submits that registration under s.261 does not change the legal status of the quarry nor does it involve any determination of the planning authority as to whether the quarry has an established use or not; it also does not involve any determination as to the planning status of the quarry. The Council never assured the applicants that the development was 'legal' and is not responsible for any belief they hold in that regard. The registration under s.261 and/or the imposition of conditions by the Council does not constitute development consent for the purposes of an EIA or an AA. The Council explains that the s.261 procedure involves information being provided by the applicants and was accepted 'on its face' by the Council.

62. The Council submits that it accepted that the applicants had a pre-1964 user; if it had not, it could not have considered s.261A(3) to be fulfilled and would not have given the direction to apply for substitute consent.

63. To the extent that the planner's report discussed the issue of pre-1964 user, this could be considered 'an extra limb', which I took to mean that it may have been surplusage.

64. It submits that while the s.261 procedure involves information being provided by the applicants and being accepted at face value by the Council, the determinations and decision under s.261A were made following an examination of all materially relevant aspects of the quarry. The latter did not involve any reversal of any previous decision, and that there was no estoppel or resiling of any kind by the Council. It maintains that the Council's fact-finding is appropriate and correct.

65. The Council further submits that it is incorrect of the applicants to suggest that a pre-1964 quarry continues to be excluded from the planning code and is immune to regulation; the PDA 2000 has removed quarries from their position of exclusion from the planning code and "brought them back into the fold" (with particular reference to paragraph 3 of *An Taisce v. Ireland* [2010] IEHC 415). The very fact that they have been made the subject of conditions in 2005 demonstrates that they are subject to regulation and underscores that the nature of that regulation could change over time.

The Attorney General's submissions

66. The Attorney General responds to the portion of the applicants' case which suggests that there is an absence of fair procedures within the legislation having regard to the impact that it had upon what the applicants describes as "vested rights". It submits that this contention has been flatly rejected in *McGrath Limestone*, and that the underlying premise that a pre-1964 quarry (even one which stayed within its proportionate use) has vested rights which cannot be interfered with by legislation is incorrect. Such a notion has also been rejected, in the context of a challenge to the constitutionality of s.261, in *M & F Quirke & Ors v. An Bord Pleanála & Ors* [2009] IEHC 426. Counsel for the Attorney General disputes that the *McGrath Limestone* case can be distinguished on the basis that Charleton J. reached his conclusion by reference to a case where there had been a finding that what was happening was not within reasonable contemplation. Counsel says that this did not form part of the judgment; Charleton J.'s conclusion that s.261A was both necessitated by EU law and constitutional was entirely directed to a system of regularisation which brings quarrying, after the relevant dates, within a development consent and assessment process and is not contingent on those quarries being brought within the process as being unlawful as a matter of Irish law. Counsel submits that this would be in breach of exceptionality principle.

67. Counsel on behalf of the Attorney General disputes the applicants' contention that s.261A had not been necessitated by the decision in *Commission v. Ireland* (Case C-215/06) and was confined in its scope to the retention permission issue. He says that, on the contrary, the whole scheme of s.261A is a response which was necessitated by that decision and

that this had been recognised in the authorities. Indeed, far from being an attack on vested rights, it is a response which was introduced 'in ease' of quarry operators. Counsel points to paragraphs 36-8 of the *Commission v Ireland* (Case C-215/06) decision, which makes it clear that one of the Commission's several complaints included "that the enforcement regime established by Ireland does not guarantee the effective application of the Directive, and that Ireland has thereby failed to fulfil its general obligation under Article 249 EC". Clearly, the case did not relate solely to the retention planning issue; the absence of a requirement for development consent before development took place was also complained of. Counsel then points to paragraph 49 of the judgment where the CJEU emphasised the need for a particular process. The CJEU found that our system did not comply with EU law because it did not ensure that projects were assessed before they took place. A State could not simply avoid the obligations of EU law by not having a development consent process. Counsel for the Attorney General agrees with the submission of counsel for the Board that the applicants are placing issues in the wrong order; where there is a requirement for an EIA, there must be a process for a development consent so that there is a framework within which that assessment takes place.

68. Counsel also references *Comune di Corridonia* (Case C-196/16), where it was clarified that for ex post facto environmental assessment, it must be exceptional; it must not circumvent EU rules; and it must be retrospective as well as forward-looking.

69. Counsel for the Attorney General submits that, insofar as the applicants rely upon the "Pipeline" cases exception, the debate as to its scope has been resolved against the argument which the applicants are making. The *Westland & Bulrush* case has made it clear that the "Pipeline" exception only applies in cases where there is a development consent which predates the trigger dates and does not apply where an operation has commenced as an exempted development; similarly, it could not apply where something has commenced before there was ever planning control. He submits that there could be no difference in principle between the argument that one is entitled to rely on a "Pipeline" exception because the development is exempt as a matter of national law and the argument that one is entitled to rely on a "Pipeline" exception because my development was never the subject of a development consent process because it started before planning controls were introduced.

70. Counsel also referred to the CJEU decision in the "nitrogen deposition case" *(Coöperatie Mobilisation for the Environment UA & Ors v. College van gedeputeerde staten van Limburg & Ors,* joined Cases C-293/17 and C-294/17, judgment of 7th November, 2018) where the issue arose as to whether agricultural activities causing nitrogen deposition in sites protected by the Habitats Directive, and which were authorised before the Directive came into force, could be said to be a single operation or project within the meaning of the *Stadt Papenburg* case, with the result being that the activity did not fall within the scope of the Directive. The activity had been authorised under national law prior to the Directive's transposition date. The referring court was uncertain as to how to approach the matter in circumstances where the fertilising takes place on different plots of land, in

variable quantities, and following various techniques which themselves evolve over time as a result of technical and regulatory changes, but also in circumstances where the nitrogen deposition had not, overall, increased after the entry into force of the Directive. The Court said that, according to its case-law:

> "…the decisive criterion for establishing whether a new project requires an appropriate assessment of its implications to be carried out is *whether there is a possibility that that project will have a significant effect on a protected site*.
>
> 83 Consequently, where there is no continuity and, inter alia, the location and the conditions in which it carried out are not the same, the recurring activity of applying fertilisers on the surface of land or below its surface cannot be classified as one and the same project…" (emphasis added)

71. It said that "[i]t might be a case of new projects requiring an appropriate assessment" and that "the decision as to the obligation to conduct such an assessment depending, in each case, on the criterion *relating to the risk of a significant adverse effect on the protected site on account of the changes thus brought about by such an activity*" (paragraph 83).

72. The fact that the overall deposition of nitrogen had not increased was irrelevant to the question of whether a new project required an appropriate assessment to be carried out (paragraph 84). Even if a project was authorised before the Directive came into force, its implementation nevertheless falls within the scope of the Directive. Its formal answer to the question posed was as follows:

> "86 In the light of the foregoing, the answer […] is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a recurring activity, such as the application of fertilisers on the surface of land or below its surface, authorised under national law before the entry into force of that Directive, may be regarded as one and the same project for the purposes of that provision, exempted from a new authorisation procedure, in so far as it constitutes a single operation characterised by a common purpose, continuity and, inter alia, the location and the conditions in which it is carried out being the same. If a single project was authorised before the system of protection laid down by that provision became applicable to the site in question, the carrying out of that project may nevertheless fall within the scope of Article 6(2) of that Directive."

73. Counsel submits that the Court's conclusion that the activity in question was not a single operation was reached by having regard to factors which would apply similarly to quarrying.

74. Counsel references the provisions of s.177 and s.261A of the legislation and points out that even someone who has a planning permission under Irish law falls into the net of having to apply for substitute consent if otherwise captured by the Directive, and this is

relevant to the "vested rights" argument. It is difficult to see how someone with a pre-1964 user could be in a better position than someone with actual planning permission.

75. Counsel submits that fair procedures were in fact observed in the following ways: first, the notice was published by the Council under s.261A; secondly, the applicants had an opportunity to make submissions in response to that notice but had chosen not to do so; and thirdly, the applicants were entitled to make submissions to the Board, which has the information given to it by the planning authority, can seek more information, and can hold an oral hearing if necessary. The fairness of these procedures had been endorsed in *McGrath Limestone*.

The Court's analysis

76. I propose to address the questions raised in this case in the following sequence:

i. Does the fact that a quarry has stayed within its pre-1964 user automatically render it immune from the requirements of the EIA Directive and the Habitats Directive?

ii. What test should a decision-maker apply (whether it be a planning authority or the Board on review) when engaging in the inquiry under subsection s.261A(2)(a) of the PDA 2000, as amended (as distinct from subsection (3) of s.261A)?

iii. Does a direction to a quarry to apply for substitute consent under s.261A amount in substance to a decision that the quarry was "unauthorised"?

iv. Does the fact that a planning authority registered a quarry and imposed conditions upon it pursuant to s.261(6) of the PDA 2000 (as amended) preclude a later decision by the planning authority to direct the same quarry pursuant to s.261A to make an application for substitute consent?

v. Did the Council and Board in the present case correctly apply the tests set out in s.261A(2)(a) and (3) and give adequate reasons to support their findings in respect of the applicant quarry?

vi. Does s.261A violate constitutional requirements in respect of fair procedures?

(i) Does the fact that a quarry has stayed within its pre-1964 user automatically render it immune from the requirements of the EIA Directive and the Habitats Directive?

77. This argument was pithily encapsulated by counsel on behalf of the applicants when he submitted: "If I don't need development consent, I don't fall within the Directives". In other words, the argument is that because a quarry within a pre-1964 user does not need to apply for planning permission under domestic law, the Directives do not apply because they only apply to developments requiring planning permission under domestic law. The net response of the Board was to argue, equally pithily, that the applicants had posed the question "back to front", and that the correct principle is: "If you fall within the Directives, you need development consent".

78. I agree with the Board that the latter is the correct approach to the issue. A positive obligation is placed upon Member States, under EU law, to ensure that domestic law complies with the Directives; this is explicitly stated in Article 2 of the EIA Directive as set out earlier in this judgment. One must start the analysis by looking at Irish law while wearing the spectacles of EU law, as it were, rather than the other way around. EU law cares little for domestic concepts (such as whether or not a quarry as a pre-1964 user) and encompasses all developments falling within its scope other than those specifically put outside its scope by the Directives themselves.

79. In this regard, I find persuasive the analysis of the scope of the Directives set out in the judgment of Meenan J. in the decision in *Westland & Bulrush v. An Bord Pleanála* [2018] IEHC 58. The ruling in this case was that the Directives apply even if a development had an *exempted status* under domestic planning law, on the basis that the Directives exclude only those projects which had actual planning permission (or a pending application) at the two trigger dates, and that a domestic *exemption* cannot be equated, as a matter of EU law, with development consent under the Directives. The manner in which this arose in *Westland & Bulrush*, which concerned two separate peat extraction operations, was as follows.

80. Each of the peat extraction operations had commenced prior to the trigger dates for the EIA and AA Directives. Prior to the PDA 2000, turbary had an exempt status under Irish planning law. Under the PDA 2000, turbary as such was no longer exempted under section 4 but the applicants' activities continued to fall within exempted development because of Article 11 of the Planning and Development Regulations, 2001 which provided that development which commenced before the Act and which was previously exempted continued to be exempted. Section 4(4) of the PDA 2000 was then amended by the Environment (Miscellaneous Provisions) Act, 2011 to provide that development shall not be exempted development if an EIA or an AA of the development is required.

81. What was critical in the case was whether or not the applicants fell within s.17(2) of the Environment (Miscellaneous Provisions) Act, 2011. Section 17, in essence, provided that development would not be an exempted development if an EIA or AA was required but provided in s.17(2) that this amendment would not apply to development which had (a) begun prior to the commencement of the section, and (b) completed not later than 12 months after such commencement. A decision of An Bord Pleanála made pursuant to s.5 of the PDA 2000, had ruled that the developments required an EIA and an AA, and the developers sought to challenge this.

82. One of the grounds of challenge was that the Board had erred in law in finding that the EIA Directive applied to peat extraction which had commenced prior to the coming into force of domestic legislation which gave effect to the EIA Directive. The developers argued that this requirement applied only to operations which involved a "new or extended" area, and relied upon the so-called "Pipeline" decisions of the CJEU, including *Commission v. Germany* (Case C-431/92, judgment of 11th August, 1995), *Burgemeester v. Gedeputeerde Staten van Noord-Holland* (Case C-81/96, judgment of 18th June,

1998), *Commission v.* Austria (Case C-209-04, judgment of 23rd March, 2006) and *Stadt Papenburg v. Bundesrepublik Deutschland* (Case C- 226/08, judgment of 14th January, 2010).

83. Meenan J. took the view that those cases were of no assistance to the developers because they were confined to situations where permission or consent for a project had been sought before the expiry of the time limit for transposing the Directive in question. On the facts of the case before him, neither Bulrush nor Westland had any planning permission, extant or pending, during the time allowed for the transposition of either Directive. This was, in effect, part of their more general argument as to retrospectivity, which he rejected. Paragraph 43 is key to his conclusion:

> "In my opinion, the decision in Stadt Papenburg and other 'Pipeline Cases' are of no assistance to Bulrush or Westland. These cases cover situations were permission or consent for a project had been sought before the expiry of the time limit for transposing the Directive in question. This is not the case here. Neither Bulrush nor Westland had any planning permission pending during the time allowed for the transposition of either the Environmental Impact Directive or the Habitats Directive. In my view, the submissions made by both Bulrush and Westland that they are, in effect, 'Pipeline Projects' is an aspect of the more general submission that the relevant legislation offends the principle against legislation being retrospective."

84. He went on to say at paragraph 48:

> "In previous paragraphs, I have upheld the decision of the respondent that an Environmental Impact Assessment and an Appropriate Assessment is required. Therefore, under s. 4(4), the 'development' by Bulrush and Westland is no longer an 'exempted development'. The removal of the exemption is not retrospective. Section 4(4) does not make unlawful that which was lawful at the time it was done. The effect of s. 4(4) is prospective. Bulrush now require planning permission for their activities. The wording of s. 4(4) which gives rise to this is clear and unambiguous.
>
> 49 For many years, both Bulrush and Westland enjoyed the benefit of their 'development' being an 'exempted development'. Once such a benefit has been given, it does not follow that it can never be limited or removed in its entirety. There are many activities which were once free of regulation but are now subject to regulation. Peat extraction is one such activity which is now subject to regulation arising out of its effect on the environment. As was stated by O'Neill J., in the context of a quarry, in M&F Quirke & Sons v. An Bord Pleanála [2009] IEHC 426:-
>
> > 'Over the years the area in which a quarry is located may change significantly, so that the effects of the quarrying operations on the surrounding area may be very different to the effects in 1964. Developments in environmental science may now make apparent environmental damage from quarrying which was not known in 1964. Apart from statutory provision,

> the law of nuisance has long recognised that activity carried out on land may be restrained where that activity causes deleterious effects to escape which cause damage to adjoining property. It could never be said that there was an unrestricted right to use property for any activity, including quarrying, regardless of the effects that activity had on the enjoyment of other persons of their lives, health and properties. Many activities are regulated and restricted in a variety of statutory codes in the interest of the common good. I see no difference in principle or in substance between these statutory regulatory regimes and the type of regulation provided for in s. 261(6). In all cases the activity restricted by statute would have been unregulated or unrestricted before the enactment of that type of legislation.'

85. The crucial distinction drawn by Meenan J. is between the situation where (i) an activity has had an exemption or exclusion from the domestic planning code, on the one hand, and (ii) an activity which actually had planning permission or had a pending planning application in existence as of the trigger dates, on the other. The two categories are not to be equated with each other when considering whether or not the Directives apply.

86. The conclusion drawn by Meenan J. seems to me to apply with equal force in the present context. The purpose of s.261A was to comply with Ireland's EU obligations which require Member States to ensure conformity with EU law in this area. If the applicants' argument were correct, then an entire industry with significant effects on the environment such as quarrying would be outside the scope of the Directives simply because the Member State had, historically, decided to exclude the activity from domestic planning law. The applicants' argument is one which seeks to invert the corrected relationship between domestic law and EU law, by seeking to elevate the status of a quarry under domestic planning law prior to the date of transposition of the Directives to a status which trumps EU law requirements concerning quarries. This cannot be correct. The Directives impose an obligation on Member States to ensure that projects which require assessment are made subject to a requirement to apply for and obtain development consent. The only projects which are relieved of this obligation are ones which either already had a development consent or were in the process of obtaining a development consent, i.e. a consent application was pending. The rationale for relieving such projects from the Directive does not apply to a project which has never held any form of development consent. It seems to me also that the decision of the CJEU in the more recent "nitrogen deposits" case, relied upon by the Attorney General and described at some length above, continues with an interpretation of the Directives which restricts exclusions from their scope, and I also note the emphasis on exceptionality repeated in the *Comune di Corridonia* case (Case C-196/16).

87. I note that the reasoning of Meenan J. was endorsed by Simons J. in *Friends of the Irish Environment Ltd v. Minister for Communications & Ors* [2019] IEHC 646 before he went on to strike down certain Ministerial regulations providing for a lengthy transitional period prior to the commencement of a new licensing regime in the peat harvesting sector. Simons J. identified a number of inconsistencies between the regulations and EU law,

including the absence of any possibility of suspending peat extraction during the transitional period; the absence of exceptional circumstances which justify affording developers who have carried out - and continue to carry out - development in breach of EU law an opportunity to regularise their legal status; and the absence of proper legislative provisions to ensure that any assessment is both prospective and retrospective. He held that these shortcomings were similar to the "old" planning legislation which had been condemned by the CJEU in *Commission v. Ireland* (Case C-215/06, judgment of 3rd July, 2008). He also held the use of secondary legislation to amend primary legislation was, in the circumstances of this case, impermissible. At paragraphs 32-35 of his judgment, Simons J. discussed with approval the reasoning in the *Bulrush* case and its conclusion.

88. I would therefore answer the first question I have posed in the following way: the fact that a quarry has stayed within its pre-1964 user does not automatically render it immune from the requirements of the EIA Directive and the Habitats Directive simply by virtue of the fact that it has stayed within its pre-1964 user.

89. Insofar as the Government Guidelines published in January 2012 suggest otherwise, I would consider them to be erroneous in this regard.

(ii) What test should a decision-maker apply (whether it be a planning authority or the Board on review) when engaging in the inquiry under subsection s.261A(2(a)) of the PDA 2000 as amended (as distinct from subsection (3) of s.261A)?

90. For the reasons explained above, the fact that a quarry has stayed within its pre-1964 user is not determinative of the question of whether a quarry triggers the requirements for assessment under either of the two Directives. In my view, the fact that the quarry commenced prior to October 1964 only becomes relevant at the second stage of the consideration i.e. under s.261A(3), and is not relevant to the first inquiry under s.261A(2)(a). My reasons are as follows.

91. First, this is apparent from the fact that the two subsections (i.e. subsection (2) and (3) of s.261A) are quite distinct from each other and are clearly intended have a different focus. In my view, the first subsection is directed towards the threshold issue of whether the quarry triggers an assessment under either of the Directives, while the second is concerned with establishing whether - notwithstanding a breach of the requirements of the Directives - the development should be allowed to apply for development consent retrospectively, i.e. by way of an application for substitute consent. To put another way, the second is concerned with "eligibility criteria" which are crafted with reference to domestic law, i.e. a quarry is eligible to apply for substitute consent under s.261A only if it satisfies the conditions in subsection (3).

92. Secondly, if the submission of the applicants that there was an inconsistency were correct, in the decisions of the Council and the Board in the present case, between their conclusions in respect of subsections (2)(a) and (3) of s.261A respectively, it would mean that every decision under s.261A concerning a pre-1964 user quarry would be

inconsistent in the same way. However, there is no inconsistency if one reads subsection (2) as concerning the concept of development within the Directives without reference to domestic concepts such as a pre-1964 user.

93. Thirdly, s.261A was introduced following the decision in *Commission v. Ireland* (Case C-215/06, judgment of 3rd July, 2008) and, in my view, the conclusion I have reached on its interpretation is much more consistent with what is required by EU law than the applicants' interpretation.

94. Fourthly, the whole of the statutory scheme relating to substitute consent is premised upon the view that a developer may be operating lawfully under domestic law but that the situation may be defective from an EU law perspective and that development consent therefore needs to be obtained retrospectively. The existence of provisions such as s.177B and s.177C clearly demonstrate this. So, too, does s.261A(3) itself insofar as it envisages that a developer who actually has planning permission may be directed to apply for substitute consent just as much as a developer who has a pre-1964 user. It is inconceivable that a developer who has planning permission could be in a worse position than a developer who has a pre-1964 user.

95. Accordingly, I am of the view that subsection (2)(a) of s.261A requires the decision-maker to address its mind to precisely the question set out in the subsection and that issues of whether there was a continued pre-1964 user should not be superimposed upon that subsection.

96. For completeness, I wish to refer to *Shillelagh Quarries v. An Bord Pleanála* [2019] IEHC 479, where the High Court (Barniville J.) held that the reference to pre-1964 commencement of operations for the purpose of sub-section (3) of s.261A has the same meaning as pre-1964 development under s.261 (which was definitively interpreted in *An Taisce* (Charleton J); it therefore means not only that the operations commenced before that date but also that the current operations were within the contemplation (or proportionate to) that pre-1964 development/operation. In my view, the issue of pre-1964 proportionate user is relevant to that extent, *but to that extent only*, i.e. it is relevant to subsection s.261A (3) only.

(iii) Does a direction to a quarry to apply for substitute consent under s.261A amount in substance to a decision that the quarry was "unauthorised?

97. In my view, the s.261A direction to apply for substitute consent amounts to a decision that the quarry was not in compliance with EU law as set out in the Directives and that in order to bring itself into compliance, the quarry must apply for substitute consent and follow the relevant procedures. I do not think it could accurately be said that it amounts to "unauthorised development" because that phrase is used to denote illegality under domestic planning law. As noted under the previous heading, a quarry might, in principle, be compliant with domestic law (as interpreted by the Supreme Court in *Waterford County Council v. John A. Woods* [1999] 1 IR 556) yet still require development consent as a matter of EU law.

98. The applicant in *McGrath Limestone* had made an argument (similar to some of the arguments in the present case) that the s.261A notice from the County Council constituted a "condemnation". This was rejected by Charleton J., who said:

> "This was far from a finding that disreputable conduct had occurred, much less that a criminal offence had been perpetrated. All that was found was a state of facts following an appropriate enquiry. This does not amount to a declaration of unlawful conduct. It is, instead, recognition that a state of affairs that is not in conformity with European law requires rectification."

99. In considering whether or not a direction to apply for substitute consent amounts to a finding that a quarry was "unauthorised", there is a danger of becoming side-tracked into an argument which is semantic rather than one of substance. The issuing of a direction to apply for substitute consent is not a form of penalty or sanction. Rather, it is in ease of a quarry operator in that it opens a gateway to the regularisation of the planning status of the lands, with the necessity of having to apply for leave to apply from An Bord Pleanála by reference to the criteria under s.177D. I agree with Charleton J. when he states that a s.261A direction cannot be considered a declaration of criminality or a condemnation of the conduct of the developer. I also agree with him when he states that it constitutes recognition of a state of affairs that is not in conformity with European law and that requires rectification. This conclusion is re-enforced when one considers that the legislation specifically provides that the development will become unauthorised if the developer does not apply for substitute consent; such a provision would be unnecessary if the serving of a s.261A direction itself had already had that effect. However, I agree with the applicants' argument to the extent that a direction under s.261A is a declaration that the quarry is, as a matter of fact, in breach of EU law insofar as it is operating without having submitted to an EIA or AA. The situation could perhaps be described as a declaration that the state of affairs is unlawful under EU law and now requires to be rectified by using one of the mechanisms available under domestic law, and that if this mechanism is not used, it will in due course become unauthorised under Irish law too.

(iv) Does the fact that a planning authority registered a quarry and imposed conditions upon it pursuant to s.261(6) of the PDA 2000, as amended, preclude a later decision by the planning authority to direct the same quarry pursuant to s.261A to make an application for substitute consent?

100. For the reasons that follow, I have concluded that the imposition of conditions on a quarry in the period 2006 or 2007 cannot preclude the application by the planning authority (or the Board, on review) of the amendments subsequently introduced under the Planning and Development (Amendment) Act, 2010. This conclusion follows both as a matter of statutory interpretation (there is nothing which limits section 261A in the manner contended for by the applicants) and from first principles. Indeed, arguments in similar terms have been rejected by the High Court in *McGrath Limestone*. Before turning to that judgment, it may be helpful first to consider the judgment in M & F Quirke & Ors v. An Bord Pleanála & Ors [2009] IEHC 426.

101. O'Neill J explicitly envisaged that notwithstanding that conditions are imposed at one point in time under s.261(6), the developer might in the future be required to seek planning permission:

> "7.19 As to the argument that the mandatory requirement to obtain planning permission under s. 261(7) of the Act of 2000 precludes the imposition of a condition to obtain planning permission under s.261(6) of the Act of 2000, in my view, the respondent is entitled to impose a condition on the operation of a quarry which is in the interests of proper planning and sustainable development. *This may necessarily include a condition requiring planning permission to be sought at a future date*, notwithstanding the existence of s.261(7) of the Act of 2000. This is so because a quarry's operations may have significant effects on the environment but not meet the requirements laid down in s. 261(7), and the interest of proper planning and sustainable development *could require in the future the imposition of revised conditions, the appropriateness of which could only be assessed through the mechanism of the planning permission process*. The absence of a provision for compensation in s.261(6) is not a material consideration in arriving at the foregoing construction of s.261(6), as *the mere requirement to obtain planning permission could not per se be said to injure property rights to an extent sufficient to warrant compensation*. Neither could the imposition of conditions necessary for proper planning and sustainable development, be said to give rise to a right to compensation. Should the conditions which may be imposed in a future planning permission have the effect of bringing about the cessation of quarrying at any of the quarries operated by the applicants, then, at that stage, an issue would arise as to whether any such applicant was entitled to compensation under s.197 of the Act of 2000." (emphasis added)

102. If a planning authority is entitled to impose conditions under s.261(6) and also entitled to require that a quarry apply for permission in the future, there is no reason in principle why the Oireachtas cannot impose the same requirement (particularly if it is required to do so under EU law).

103. The respondents submit that the issue raised by the applicants has previously been addressed (and rejected) in *McGrath Limestone Works Ltd v. An Bord Pleanála* [2014] IEHC 382. The facts are similar to the present case insofar as the applicant quarry had been registered under s.261 and had been made the subject of conditions under s.261(6), including conditions as to noise, blasting, operating times, traffic, water quality monitoring, and dust, and had later been directed to apply for substitute consent under s.261A. However, the applicants maintain that the judgment is premised on the view that this particular quarry had gone outside its pre-1964 user, while its own quarry (the applicants claim) has stayed within its pre-1964 user. Accordingly, it maintains that the decision in *McGrath* does not determine the issues in the present case. I will return to the submission that *McGrath* can be distinguished below after first considering the judgment.

104. In his judgment, Charleton J. addressed a variety of arguments which had been made concerning the relationship between registration and the imposition of conditions under s.261, on the one hand, and a direction to apply for substitute consent under s.261A, on the other. Among other things, he rejected the argument that registration and the imposition of conditions amounted to a declaration of lawfulness and said (at para 4.2):

> "Among the explanations of the section is this Court's judgment in *O'Reilly v Galway City Council*. Central to the relevant decisions of the High Court is that this provision does not go beyond its express terms and that it does not make lawful or authorised what was not otherwise thus. Registration, in this context, means no more than putting details in a register. Requirements by a local planning authority following registration cannot amount to a situation whereby the constitutional law making power of the Oireachtas is disenabled. The imposition of conditions neither upsets the general principle that the law may be changed and nor can that process operate as a bar against a local planning authority conducting investigations with a view to enforcing the planning code."

105. He then quoted from his own judgment in *An Taisce v. Ireland* [2010] IEHC 415 to the effect that registration of a quarry under s.261 did not alter its status, where he had said: "If the use of a quarry was unlawful before registration, that status remains afterwards". He also pointed out that the same conclusion had been reached in *Shillelagh Quarries Limited v. An Bord Pleanála* [2013] IEHC 92 by Hedigan J. and by Irvine J. in *Pierson & Ors v. Keegan Quarries Ltd* [2009] IEHC 550. He continued:

> "Nothing in the section enables a local planning authority to make any binding determination that a quarry if registered subject to conditions would thereafter be exempt from the need to apply for planning permission if investigation or admission uncovered, for instance, that any unauthorised development had taken place or that any declared status by quarry owners that they were outside the scope of the planning code because of use existing in 1964 was optimistic. That year was now 50 years ago. A lot has changed since in terms of both demand in the economy and the use of technology in quarries. Further, it is 40 years since Ireland joined what has now become the European Union and whereby, in consequence, legislation mandated supra-nationally has become dominant in our legal landscape."

106. Charleton J. went on to consider related arguments based on the principle of legitimate expectation and/or estoppel and also rejected these arguments. Similar arguments were not pressed in the present proceedings.

107. The applicants submit that the decision in *McGrath Limestone* can be distinguished on the basis that the McGrath quarry was clearly outside its pre-1964 user and therefore, Charleton J.'s comments must be confined to that particular context, whereas they applicants' quarry (they submit) has stayed within its pre-1964 user. In this regard, the applicants rely in particular upon certain passages in the judgment of Charleton J, including para 8.4 in particular.

108. With respect, the reasoning which underpins the judgment in *McGrath Limestone* is not confined to the case of a quarry which has exceeded its pre-1964 user rights. The judgment is predicated, in large part, on the principle that the Oireachtas is entitled to introduce new environmental controls and to apply same to existing development projects, and indeed is under an obligation to do so if this is necessary to ensure compliance with EU law. This principle applies equally to development projects which are fully compliant with their existing authorisations as to those which are not.

109. Therefore, even if *McGrath Limestone* left open the position regarding an applicant which had remained within its pre-1964 user, I am of the view that because this user does not render the quarry immune from the Directives (according to my earlier finding), an earlier decision by a planning authority to register a quarry under s.261 and impose conditions under s.261(6) cannot preclude the planning authority from directing it to apply for substitute consent in accordance with s.261A. On the contrary, the local authority is required to do so by the legislation which was enacted to give full effect to the Directives in circumstances where Ireland had been found to have inadequately transposed them prior to that time. The logic of the applicants' position, if followed through to its conclusion, is that an earlier error in the transposition of an EU Directive could not be remedied, despite the State's obligations under EU law.

110. In that regard, it is somewhat surprising that the applicants submit that s.261A was not a response to the decision in *Commission v. Ireland* (Case C-215/06); it appears to me beyond doubt that it was, and that Charleton J. was entirely correct when he so explained. The applicants' suggestion that the *Commission v. Ireland* case was limited to retention permission is simply incorrect when one looks at the arguments addressed by the CJEU, including paragraphs 36-8 and 49 in particular. The judgment emphasises that Member States are obliged to transpose the Directive by ensuring that developers apply for development consent.

111. A further point which underscores the fact that the purpose of s.261A was to remedy the State's own failures in transposing the Directives is the fact that s.261 never addressed the requirement for an AA under the Habitats Directive. While argument took place in *Commission v. Ireland* (Case C-50/09) that the requirement for submission of an EIS was sufficient compliance with the EIA Directive (an argument which ultimately failed in the CJEU), it could never have been contended that the procedure under s.261 somehow immunised a registrant quarry from compliance with the Habitats Directive.

112. In my view, it is clear that the entire regime of substitute consent, and the role of a planning authority in granting a direction under s.261A, was designed to bring the regulation of quarries into conformity with the requirements of the Directives. The fact that a developer may not have been at fault in any way under Irish law up to that point did not absolve the State from having to introduce legislation to bring about compliance, the planning authority from following that legislation, or the developer from having to conform to the Directives. Therefore, even if a planning authority had registered a quarry and imposed conditions under s.261(6), this does not present any obstacle to the same

planning authority, some seven years later, directing the same quarry to apply for substitute consent. It will be recalled that such a direction may be given under s.261A(3) to a quarry which has explicit planning permission. The fundamental point is that s.261A was necessary in order to bring Irish law into compliance with EU law, and that no matter what the planning status of the development under domestic law, if it otherwise falls within the scope of the Directives, it needs to regularise its position under the Directives.

(v) Did the Council and Board correctly apply the tests set out in s.261A(2)(a) and (3) and give adequate reasons to support their findings?

113. In this section I am primarily concerned with the inspector's report and the Board's decision, for the reason set out at paragraph 4 above. I will turn to the inspector's report first. Having set out various matters, including a description of the existing quarry, the planning history of the site, the Council's decision, the legislative and policy background, and the submissions of the parties on review, the inspector's report proceeded to observe the following in a section of her report entitled "Assessment". Under a heading "Scale of Development Post Trigger Dates", she referred to the aerial photographs of the quarry for 1973/4; 1994/5; 1999/ 2000; 2004/5; and 2009/2010, all of which showed the registered quarry boundary and the registered extraction area. In 1973/4, quarrying activity was evidenced in the northern most part of the site and appeared to comprise the northern part of a single agricultural field adjacent to the access road. By 1994/5, quarrying had progressed in a southerly direction to include an area approximately 4-5 times the size of the original quarry and several fields. By 1999/2000, land to the north west of the original area was being worked on, almost doubling the size of the working area since 1994/5. By 2004/5, the quarry had been extended again primarily around the southern and eastern periphery of the site; there was further expansion to this area by 2009/10. The inspector commented that on her inspection of the site, the quarry had extended further south again. She commented: "[c]learly there has been substantial development of the quarry at Murrens post 1st February 1990 and post 26th February 1997". The next section of her report is entitled "Planning Status of Development". She set out the information provided by the land Folios (5536 and 5534) in some detail, then referred to the owner/operator's submission that the land under Folio 5534 was leased to J. J. Flood and referred to the insurance policy for the year 1960/1 submitted by the owner/operator showing Mr. Flood's description as "sand pit owner and manufacturer of cement blocks". She also referred to the submission of the owner/operator that the lands the subject of Folio 5534 had been in the ownership of the Flood family since before 1964. She accepted that the overall Murrens land holding comprising Folios MH5534 and MH5536 had been in the Flood family since pre-1964, and that quarrying had taken place since this time, but she concluded that the extent of the quarry works that had taken place since 1st October 1964 could not reasonably have been anticipated in 1964 and that there had been a "material change of use of the site" by virtue of the "significant increase in land worked at Murrens and the introduction of processing on the site". Under a separate and later section in her report entitled "Requirement for EIA/Determination for EIA", she referred to the European Communities (EIA) Regulations 1989 and their requirement for EIA for "Extractive Industry (d) Extraction of stone, gravel, sand or clay,

where the area involved would be greater than 5 hectares" (First Schedule, Part II of the Regulations). She then said:

> "Post 1st February 1990 the quarry at Murrens expanded significantly to comprise at the time of registration in April 2005 a total area of 36.4ha and extraction area of 25.4 ha. It is not possible to identify the extent of the quarry in 1990, but in 1994/5 the extraction area extended to c.12ha (see aerial photographs). Therefore post 1st February 1990, the extraction area of the quarry has increased by at least c13.5ha. As this area is greater than the 5ha threshold set out in the EC(EIA) Regulations 1989, in place at the time, EIA for the works taking place post 1st February 1990 would have been required."

114. The next heading in the inspector's report is "Requirement for AA". She noted that approximately 1km south west of the site were White Lough, Ben Loughs and Lough Doo SAC and pNHA, and approximately 2.2km south east of the site were Lough Bane and Lough Glass SAC. She described the project operations and noted that there were no streams on or immediately adjoining the site or discharges from the site. However, she noted that the water table had been breached in the main working area towards the east of the site. She also noted a large-scale quarry operation immediately north-west of the Murrens quarry. She referred to the characteristics of the SACs and the conservation objectives in respect of them. She said that the proposed development was removed from the European sites and would not affect them directly by way of habitat loss or indirectly, arising from noise, dust and disturbance. She then said:

> "However, indirect effects are possible if there is a hydrological link between the quarry and the Natura 2000 sites. As the quarry is one of a number operating in the area, there is the risk of cumulative hydrological impacts if these are also linked to protected sites… The owner/operator states that White Lough, Ben Lough and Lough Doo cSAC is in a different catchment area to the quarry in that surface water drains towards Lough Sheelin rather than the Shannon. However, there is no evidence to support this statement and I note that one of the planning authority's conditions imposed on the quarry is to carry out a hydrogeological assessment to identify the groundwater flow regime operating in the vicinity of the facility. There is no information on file to suggest that this has been carried out and in the absence of same, I do not consider that it is possible to accurately determine the hydrological relationship between the site and the terrestrial ecosystems comprising the two candidate SACs in the vicinity of the site. Whilst I accept that the quarry neither abstracts water from the lands nor discharges water, it would appear that groundwater on eh site has been breached and there is a risk of direct contamination of groundwater with consequent risk to related ecosystems".

115. Accordingly, she concluded:

> "Having regard to the proximity of the quarry to two candidate Special Areas of Conservation, the absence of detailed hydrogeological data on the groundwater flow regime in the area, the apparent breaching of groundwater in the quarry site and

the operation of the quarry in conjunction with other large scale extractions within the immediate vicinity of the quarry site (notably PA Ref. QY24), I consider that it is not reasonable to conclude that the quarry, individually and in combination with other plans or projects would not be likely to have a significant effect on any European site and in particular [the particular SACs in question] in view the sites' conservation objectives and that an appropriate assessment would therefore be required."

116. She then summarised and set our her conclusions and recommendation in a single section as follow:

"9.1 In summary, having regard to the above, I recommend that the Board:

i. Confirm the determination of the planning authority under section 261A(2)(a) of the Planning and Development Acts 2000-2011, for the reasons and considerations set out below,
ii. Confirm the decision of the planning authority under section 261A(3)(a) for the reasons and considerations set out below,
iii. Following from the above, grant the owner/operator an extension of time in which to apply to the Board for substitute consent (as sought under Board file SH17.009).

RECOMMENDATION (1)

1. To confirm the determination of the planning authority under Section 261A(2)(a) that:

i. The subject quarry has carried out development 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, and
ii. The subject quarry has carried out development after 26 February 1997 which development would have required, having regard to the Habitats Directive, an appropriate assessment, but that such an assessment was nor carried out.

REASONS AND CONSIDERATIONS (1)

Having regard to:

i. Part II of the First Schedule of the European Communities (EIA) Regulations 1989, which required EIA for quarries where the area involved for extraction of stone, gravel, sand or clay was greater than 5ha, and the c.13.5+ha of lands at Murrens from which sand and gravel has been extracted since 1994/5 (as demonstrated in aerial photography), it is considered that an

environmental impact assessment or determination as to whether an environmental impact assessment was warranted.

ii. Having regard to the proximity of the quarry to two candidate Special Areas of Conservation, the absence of detailed hydrogeological data on the groundwater flow regime in the area, the apparent breaching of groundwater in the quarry site and the operation of the quarry in conjunction with other large scale extractions within the immediate vicinity of the quarry site (notably PA Ref. QY24), it is considered that it is not […] reasonable to conclude that the work carried out at the quarry, post 1st February 1997, individually and in combination with other plans or projects would not have had a significant effect on any European site and in particular the White Lough, Ben Lough and Lough Doo cSAC (site code 001810) and Lough Bane and Lough Glass cSAC (site code 002120) in view of the sites' conservation objectives and that appropriate assessment would therefore have been required.

RECOMMENDATION (2)

2. To confirm the decision of the planning authority under Section 261A(3)(a) that:

   i. The quarry development commenced operation before 1 October 1964, and
   ii. The requirements in relation to registration under section 261 were fulfilled.

REASONS AND CONSIDERATIONS (2)

Having regard to:

i. The ownership of lands at Murrens by the family of the quarry owner/operator since 1917, the information presented by the owner/operator demonstrating the use of these lands for quarrying prior to 1964 (reflected in historic OS maps) and their on-going use for quarrying since, it is considered that the quarry development at Murrens commenced operation before 1 October 1964.

ii. The registration documentation on file with regard to the quarry at Murrens, the decision by the planning authority to impose conditions on the operation of the quarry and the correspondence on file from the applicant to the planning authority in respect of these conditions, it is considered that the requirements in relation to registration under section 261 were fulfilled."

117. It is interesting to note that despite her earlier finding that the quarry had not stayed within its pre-1964 user, she nonetheless recommended that the Board confirm the decision of the planning authority under s.261A(3)(a) that the quarry development had commenced operation before 1st October, 1964. This may be that the inspector considered that commencement for that purpose meant commencement simpliciter, a view which has since been held to be incorrect by the High Court in *Shillelagh Quarries v. An Bord Pleanála* [2019] IEHC 479 (Barniville J.).

118. The Board's decision, including its reasons, has been set out earlier in this judgment at paragraphs 34-36. It will be recalled that it referred, among other things, to: (a) the submissions on the file including documentation on the review file (planning authority register reference number QY 35), aerial photography and details of site registration under s.261 of the PDA 2000, as amended; and (b) the nature and scale of operations at the site which entails an extraction area in excess of 5 hectares that was developed after 1st February, 1990, before reaching the conclusion that development was carried out after 1st February, 1990 which would have required an EIA having regard to the EIA Directive, but that such an assessment was not carried out. It also referred to the location of the quarry in close proximity to two European sites and the potential cumulative impact on these European sites of quarry operations at this site and an adjoining location, "the uncertainty regarding the hydrological linkages between this quarry and the European sites" and considered that development was carried out after 26th February, 1997 which would have required an AA under the Habitats Directive. It is therefore clear that the conclusions in that regard were consistent with and based upon the inspector's report.

119. Fundamentally, the applicants' position was that the two reports and the Council and Board had inadequately dealt with the evidence which, if properly considered, should have led to the conclusion that the applicants had stayed within their pre-1964 user and therefore that no "development" within the meaning of the Directives and/or s.261A(2)(a) had taken place.

120. In support of their position that they had remained within the pre-1964 user, the applicants maintain that the lands were always intended to be used for quarrying and had been in the same family for generations, tracing back to the same grandfather. The applicants maintain that John J. Flood had a lease over the lands at Folio 5534 at the time the PDA came into force in 1964 and exhibited an insurance policy relating to the period 18th October, 1960 – 18th October, 1961 providing indemnity to John J. Flood, described as "sand pit owner and manufacturer of cement blocks", for "The Murrens, Oldcastle, Co. Meath" to demonstrate that he was engaged in quarrying at that time (pre-1964). They also exhibited an Ordnance Survey Map from 1958 to demonstrate quarrying on both folios before the appointed date. These had been before the planning authorities and were taken into account by them. The applicants submit that the map considered by the Inspector in preparing her report is incorrect and it is not the same map as submitted by the applicant company during the section 261 application. The Topographical Map relied upon by the applicants was incorrectly superimposed by Meath County Council onto the OSI Aerial map relied upon by the Inspector. This incorrect map suggests that the applicants had been operating outside of their registered area, but this was not the case. The applicants also complain that the Inspector concludes that there was a material change of use of the lands as a result of the introduction of processing onto the site, which is incorrect as a matter of fact.

121. The Board accepts that in making its determination under s.261A(2)(a), the Board only had regard to development that occurred after 1st February, 1990 & 26th February, 1997 but, of course, maintains that this was correct approach in the application of

s.261A(2)(a). I have held earlier that this is indeed the correct approach. As it happens, the Board also does not accept the narrative advanced by the applicants concerning the site (particularly regarding the assertion that the original owner of both folios was one person, a grandfather of David J. Flood); and takes issues with other aspects of the applicants' submissions, such as with regard to the 1958 OS Map relied upon by the applicants, and it notes that there was no mention of a lease over the lands (which were purchased in 1990) when information was submitted to the Council for the purpose of registration under s.261. However, leaving aside the Board's submissions in relation to the pre-1964 and "proportionate development" issues, and more pertinently for present purposes, regarding whether there was development for the purposes of the Directives, the Board says there was ample evidence to justify the conclusion that there had been development within the meaning of s.261A(2)(a). Based on the aerial photos and maps, the Inspector had conducted a "detailed calculation of the extent of the extension of alteration of the quarry that has taken place post the relevant dates" . The quarry quadrupled in size between 1973 and 1995, and doubled again between 1995 and 2004 and has grown again since. The inspector concluded that there had been an expansion of at least c.13.5 hectares since the relevant trigger dates for the Directives. Therefore, it is submitted that the Board rightly concluded that the extraction area exceeded 5 hectares, which immediately rendered screening compulsory for EIA. It submits that there is no obligation to identify the particular part of the quarry where the quadrupling of size from 1973-1995 occurred, or the particular part where the doubling in size between 1995-2005 occurred.

122. I am in agreement with the Board's position on this issue. The applicants' submissions on this issue were fundamentally premised on what I have ruled to be an incorrect premise, namely that the issue of whether a quarry has stayed within its pre-1964 user is relevant to the inquiry under s.261A(2)(a). Insofar as the decision-makers addressed the issue of pre-1964 user in the case of this quarry, they ruled in favour of the applicants under s.261A(3), stating in each of their respective decisions that the quarry did have a pre-1964 user. This rendered the quarry eligible to apply for substitute consent. If the decision-makers had reached the conclusion that the quarry had gone outside its pre-1964 user, they could not have directed such an application. Therefore, and insofar as any part of the inspector's report suggests that they had gone beyond their pre-1964 user, this is irrelevant for present purposes. It did not block their eligibility to apply for substitute consent under s.261A(3) and was irrelevant to the inquiry under s.261A(2). Regarding the inquiry under s.261A(2)(a), the Board was fully entitled to reach the conclusion that there had been development within the meaning of the Directives (which is the test echoed in s.261A(2)(a)) on the basis of the calculations of the inspector showing that the expansion of the quarry since the trigger dates had (greatly) exceeded the required minimum for the application of the EIA screening process. Further, the Board was fully entitled to conclude, as had the Inspector, that the possibility of impact on the European sites via hydrogeological link and therefore further investigation was required to be carried out. I therefore refuse to quash the findings and conclusions of the Board.

(vi) Does s.261A violate constitutional requirements in respect of fair procedures?

123. In *McGrath Limestone*, Charleton J. also referred to the procedures set out in respect of the s.261A process and approved them, setting out that it was not necessary to apply the *East Donegal Co-operative* principles because they were, in their own terms, in conformity with constitutional requirements. He also examined, and rejected, challenges to the constitutionality of s.261A based on Article 15.5.1° of the Constitution (retrospectivity) and an argument founded upon alleged deprivation of property rights and unjust attack under Article 40.3 and Article 43 of the Constitution. In this regard, he referred to and quoted extensively from the decision of O'Neill J. in *M & F Quirke & Ors v. An Bord Pleanála & Ors* [2009] IEHC 426, in which case one of the arguments centred on the contention that restrictions on blasting imposed under s.261 were unconstitutional and this had been rejected. The emphasis in the case before me, however, was not so much on the substantive rights but on procedural justice.

124. One of the arguments advanced on behalf of the applicants was founded upon the judgment of Irvine J. in *Pierson v. Keegan Quarries Ltd (No. 1*) [2009] IEHC 550, in which she emphasised the limited nature of consultation and submissions under the s.261 process when compared with an application for planning permission. She addressed this point in a context where certain individuals living close to the quarry had submitted a s.160 application and the developer argued that the applicants were not entitled to avail of s.160, that they could have had an input at the s.261 stage and/or should have brought judicial review proceedings in respect of the registration and imposition of conditions instead of seeking to litigate a s.160 application. Irvine J. referred to the limited input of the public into the s.261 process as follows at paras 59-62:

> "59. […] in my view, the statutory right of interested parties to engage in the consultative process as provided for in s. 261 is extraordinarily limited […]
>
> 60. Consultation with the public under s. 261 only commences after a quarry has actually been registered and after it has advised, by newspaper advertisement, how it proposes to deal with the application for registration. In this case, the indication given was that conditions would be imposed by the counsel on the continued operation of the quarry.
>
> 61. Under s. 261 there is no obligation on the planning authority to furnish to the public any details as to the conditions that it may be considering imposing at the time their observations are sought. After the four weeks provided for the submissions and observations under s. 261(4)(b)(v), the planning authority is entitled to fix those conditions and notify them to the owner. Thereafter, all subsequent dealings between the owner and the planning authority are hermetically sealed from public participation. Only the owner may make submissions as to the conditions to be imposed. The public have no equivalent right. Thereafter, upon the formal imposition of the conditions, once again, the public have no right of appeal to An Bord Pleanála, a right solely vested in the owner.
>
> 62. […] It cannot be inferred from the public's right to make the limited contribution to the s261 process just referred to that that the legislature intended that quarries

operating as unauthorised developments could have their status legitimised in a binding way in the course that process. There is simply no comparison between the public's right to make observations under s. 261 and the statutory rights which they enjoy as interested parties participating in the normal planning process."

125. She then commented on the inappropriateness of the judicial review remedy for cases involving factual disputes (paras 65-71):

> "65. Once again, I cannot accept that this was the intention of the legislature. One of the core issues in the present proceedings under s. 160 is a dispute as to fact as to whether or not the respondent's quarry was used as such prior to 1964. This type of factual dispute is simply not amenable to be resolved in any judicial review proceedings […]
>
> 69. The limitations of judicial review as a remedy where there is any dispute as to fact are well described by O'Sullivan J. in his decision in *Aer Rianta Cpt. v. Commissioner for Aviation* (Unreported, 16th January, 2003).

She quoted from that judgment and continued:

> "71. That quotation from the judgment of O'Sullivan J. ably and graphically depicts the limitations of judicial review as a remedy where a party wishes to dispute a decision made in the face of disputed facts rather than the fairness and lawfulness of the process leading to that decision. It is difficult to believe that the legislature, having afforded to members of the public a right to challenge a use of land as unauthorised in the manner provided for in s. 160 of the Act could have intended, as submitted by the respondent, to obliterate such fundamental protections in such a silent and stealthful way by the introduction into the planning code of the provisions of s. 261 of the 2000 Act."

126. The applicants maintain that the same reasoning applies to the benefit of the applicants in the present case; in effect, it is argued that their development was deemed to be unauthorised "by stealth" and without a proper opportunity for them to deal with the factual issue of the pre-1964 user, involving matters such as notice and opportunity for submission, and in a context where the decision-maker (unlike in a judicial review) is free to engage in full and comprehensive fact-finding. If, it is argued, the objectors in Pierson were entitled to all the procedures inherent in a s.160 application as distinct from the limited review inherent in a judicial review, then so too was a developer who had property rights and other interests in respect of a quarry.

127. The first point to be made is that the position of the local residents in *Pierson* is entirely distinguishable from that of the applicants in the present case. The applicants here had full rights of participation both before the determinations made by the Council, and again before An Bord Pleanála: the applicants were party to the appeal, had the right to make written submissions and the right to request an oral hearing. The applicants had an entitlement to reply to the written submissions made by the planning authority and third

parties. By contrast, the local residents in *Pierson* had very limited rights, and could not, for example, appeal the planning authority's decision to An Bord Pleanála.

128. A further flaw in the applicants' argument is that it is premised upon the view (which I have found to be erroneous) that the decision amounted to a finding that the quarry constituted an unauthorised development and that it had gone beyond its pre-1964 user. I concluded above that the decision under s. 261A(2)(a) (correctly) did *not* involve a determination that the quarry was "unauthorised" because it was no longer within its pre-1964 user. Rather, it constituted a determination that (i) development was carried out after 1st February, 1990 which development would have required, having regard to the EIA Directive, an EIA or a determination as to whether an EIA was required, but that such an assessment or determination was not carried out or made, and (ii) development was carried out after 26th February, 1997, which development would have required, having regard to the Habitats Directive, an AA, but that such an assessment was not carried out. On this issue, the applicants *did* have notice that this determination would be carried out as a notice was published in the Meath Chronicle; and they *did* have an opportunity to make submissions, but chose not to do so.

129. The question of whether the quarry had been commenced prior to 1964 only arose for consideration after the threshold issue, i.e. whether an assessment under the Directives had been triggered and had been determined. Again, the applicants were on notice that this was one of the issues which was going to be determined by the Board, and in respect of which it could make submissions. Not only have the applicants failed to establish a breach of fair procedures, it appears that, insofar as the issue of whether the quarrying stayed within pre-1964 use was concerned, the conclusion of both the Council and the Board was in fact in favour of the applicants (under subsection 261A(3)). Indeed, the finding may possibly have been unduly favourable to the applicants, having regard to the fact that *Shillelagh Quarries v. An Bord Pleanála* [2019] IEHC 479 (Barniville J.) has, in the meantime, held that pre-1964 commencement of operations means not only that the operations commenced before that date but also that the current operations were within the contemplation (or proportionate to) that pre-development/operation. If and insofar as the decisions of the Council and the Board in the present case were premised on the view that the quarry fell within subsection (3) of s.261A because it had commenced operations before 1964 *simpliciter* (even if it had not stayed within the contemplated use), this would now be seen as unduly favourable to the applicants.

130. The bottom line, in any event, is that the planning authority published notice of its intention to do what it was required to do under s.261A. The parameters of what was to be examined were explicit. None of this is in dispute. The applicants therefore had notice of what was going to be carried out and had an opportunity to make submissions at that point but chose not to do so. They could have put in any information they wished to at that stage, concerning the facts. They would not have been constrained in any way. The applicants also had, and exercised, the right to make submissions to the Board in the reviews conducted by the Board (on the applicants' request as well as that of An Taisce). The procedures under the section seem entirely acceptable to me, and the problem (if

any) seems to be caused by the applicants' failure to submit evidence and make observations after the planning authority published notice of its intention to examine all quarries in its area together with the precise parameters of that exercise. If the applicants simply made an assumption that the fact of its past registration under s.261 and imposition of conditions under s.261(6) meant that there had been determinations already that (a) it fell within a pre-1964 user; and (b) it was immunised from the Directives, that was a mistake based upon an erroneous interpretation of the law; but that mistake cannot be converted into a successful claim that the procedures under the legislation are constitutionally deficient.

Final Conclusion

131. Having regard to the above conclusions and reasons, I refuse the reliefs sought.