THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 871 J.R.]

BETWEEN

JOHN HEHIR

APPLICANT

AND

AN BORD PLEANÁLA AND CLARE COUNTY COUNCIL

RESPONDENTS

AND

WHELANS LIMESTONE QUARRIES LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on 23rd day February of 2016.

1. Three sets of proceedings have been instituted by the applicant, two for judicial review, and the third for a planning injunction under s. 160 of the Planning and Development Act 2000, as amended (the "Act of 2000"). In the judicial reviews the applicant seeks to quash the decision of An Bord Pleanála (the "Board") made on the 23rd August, 2012, by which the Board granted planning permission to the notice party ("Whelans") for the continuation of quarrying activities at Fountain Cross, Ennis, Co. Clare ("the Quarry"). The activities in respect of which permission was granted include the excavation and processing of limestone and aggregates, landscaping works and certain restoration and other associated works at the location.

2. The s. 160 proceedings stand adjourned pending the determination of these two judicial reviews which have been the subject of a case management order made by O'Malley J. on 14th March, 2014, who ordered the trial of a single modular issue as follows:-

> *"Whether the Bord was correct in determining that the quarry, the subject matter of the appeal to the Bord (Ref PL03.229040) commenced operation prior to 1st October, 1964 within the meaning of s. 261 of the Planning and Development Act 2000."*

The statutory context

3. The application for planning permission arose in the special statutory context created by s. 261 of the Act of 2000 and these special provisions relating to quarries have been much litigated, as will be apparent from the number of judgments mentioned in my analysis.

4. Section 261 of the Act became effective on 28th April, 2004 and provided for the compulsory registration by local authorities of all quarries within their functional area. It is now well established that as a matter of law registration in itself does not confer a planning status on quarrying activity, and the fact of registration neither makes a quarry user authorised nor unauthorised: per Charleton J. in *McGrath Limestone Works Ltd. v. An Bord Pleanála & Ors.* [2014] IEHC 382:-

> *"Registration, in this context, means no more than putting details in a register."*

5. Under the legislation the local authority may in the course of the registration process under s. 261(7) require an applicant make a fresh planning application in respect of quarries which commenced operation before the 1st October, 1964, ("the appointed date") where the quarrying activity is carried out in an area in excess of 5 hectares, or where the lands are either in an area designated under Council Directive 92/42 EEC of 21 May, 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. 206/7 22.7.1992 ("the Habitats Directive"), in another prescribed area, or are lands to which ss. 15, 16 and 17 of the Wildlife Act 1976, apply.

6. Registration of the Quarry was completed in respect of an area comprising 28.35 hectares. By notice of the 9th June, 2005, and in the exercise of its statutory power, the local authority required that the notice party make a planning application and prepare an Environmental Impact Statement (EIS) in respect of part of the registered area, and approximately 8 hectares were excluded.

Quarries: a special factual nexus

7. There has been much litigation in this jurisdiction with regard to quarrying activity. A particular difficulty arises from the fact that the nature of the activity can change because of economic factors which impact on demand for the product produced by a quarry. Advances in extraction methods also mean in many cases that the nature of the activity has changed. Quarries furthermore are complex in terms of their characterisation, and involve both use development and works development.

The planning applications before Clare County Council: ref P06-1353

8. The application for planning permission in respect of c. 20 hectares was lodged on the 16th June, 2006. Further information was sought by the local authority on 10th August, 2006 arising from a report from the planning Inspector. The Inspector had noted a concern that the excavation which was stated to be conducted at 10m OD was "at or below" the water table. A reply was served to this notice on 9th February, 2007, accompanied by a report as to the ground water management

9. The local authority sought further information on 4th April, 2007, and a reply was received on 12th February 2008.

10. The local authority then engaged the services of Barry & Partners ("Barrys"), consulting engineers, to advise, especially in light of the suggestion that it was proposed to excavate below minus 10m OD. The report from Barrys of 30th March, 2008, showed the excavation at 3m OD and below the water table in August 2007, and suggested that it was not desirable to allow excavation below the proposed level of minus 10m OD. Barrys considered the most desirable approach would be to allow planning permission in part of the Quarry and the practical effect of this would be that the quarrying activity on the subject lands would thereby be limited or cease.

11. The executive planner of the local authority prepared a report of 4th April, 2008, where the grant of permission subject to conditions was recommended.

12. Permission was granted on 7th April, 2008 subject *inter alia* to condition 7 that excavation not fall below minus 10m OD.

Other relevant planning permissions and refusals
13. The County Council had already made a determination that part of the lands lying on the east of the subject site, comprising c.8.02 hectares, was not capable of being considered by it under s. 261, but was to be treated as an unauthorised development. Permission in respect of this area was refused under ref PL03.227554, primarily because of the decision of the European Court of Justice in *Commission v. Ireland* C-215/06 in which the Commission argued successfully that Irish provisions relating to retention permission were not in conformity with European law.

14. Planning permission was granted for retention and quarrying works at lands on the southwest of the application site comprising two lots of 9.56 hectares and 6.64 hectares respectively. The conditions attached to this permission included a condition that no quarrying activity should commence until planning permission had been granted in respect of the application site under the s.261 procedure.

15. Other parts of the development, including the tarmacadam and concrete plants have separate planning permissions.

The Planning Applications before an Bord Pleanála: ref PL.03.229040
16. An appeal was lodged to the Board on 4th June, 2009 and an oral hearing was requested. The applicant was a third party appellant in that process.

17. The Board appointed Conor McGrath to act as Inspector and he produced three reports. The first report of 9th December, 2008, recommended refusal of planning permission, with specific regard to the absence of an adequate and authorised system for the management of run-off from the lands, and because application for permissions in respect of infrastructural works, surface water treatment and disposal on lands to the east (the 8 hectare site referred to at para. 14 *ante* removed from the s.261 process) was not yet determined.

18. The Board issued a s. 137 notice on 7th March, 2011, seeking submissions on the issue of water discharge, noting that the management of an authorised water management system might cause unacceptable environmental pollution.

19. A response of 4th April, 2011, by the solicitors for NAMA, who had by then appointed a statutory receiver to Whelans, makes the argument that as the application area had been registered by the local authority pursuant to s. 261, such registration imported, as a matter of law, a finding that the activity was authorised. Clare County Council replied, rejecting that suggestion, on 1st April, 2011.

20. The Board held a meeting on 30th May, 2011, to consider the retention application in ref *PL03.227554* (the 8 hectare site), and the subject application, at which it determined to refuse the application for retention permission. The effect of this decision was that the proposed servicing of the subject site by the ground and surface water management infrastructure proposed on that site was no longer lawfully possible. Accordingly, the Board decided to request a revised EIS to deal with the water management issue and on 3rd June, 2011, it served a notice to this effect under s. 132. This notice was reissued on 26th August, 2011.

21. Whelans then indicated they would manage water within the subject site. Submissions and observations were sought on this proposal. A revised EIS was submitted by Whelans on 3rd September, 2011, and submissions were made by the applicant on 21st November, 2011 in which it was, *inter alia*, argued that the EIS did not deal with the total extracted area.

22. The Inspector then prepared his second report dated 9th December, 2011, in which he expressed himself unhappy with the new proposals for water treatment on the site. He noted a concern with regard to protected habitats and recommended that the Board seek further proposals.

23. The Board issued a further request for information under s. 132 on 18th January, 2012, with regard to surface water management and habitats. A reply, from Whelans, was sent on 13th March, 2012, and circulated to the relevant parties. The applicant made no further submission but a response was made by Clare County Council.

24. The Inspector then issued his third report dated 22nd May, 2012, in which he recommended that permission be granted subject to conditions. He took the view that the revised water management proposals were satisfactory and recommended that the excavation be confined to minus 10m OD, and that drawings be lodged to reflect the up to date position.

25. The Board determined the appeal and granted permission subject to 28 conditions on 23rd August, 2012.

The modular issue: one question
26. The question I must determine in this modular issue is whether the Board was "correct" in coming to a determination that the relevant part of the Quarry did have the benefit of an established pre-1964 user. This is not the simple question of whether the quarry was in operation before 1964, and clearly part of the subject lands were in operation as a quarry before the operative date, but whether the present activity carried out on the site is an intensification of that use or activity, such that the current use could be said to be a continuation of the previous use as envisaged by s.24 of the Local Government (Planning and Development) Act 1963 (the "Act of 1963").

27. Some argument was had as to my precise role in determining the modular question. Counsel for the applicant contends that I must engage with the facts and come to a determination as to the factual question whether the Board was correct, as a matter of fact, that the activity was pre-1964. Counsel for the respondent contends that my role is to determine the matter in the light of the test in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, or at least in the framework established for the purpose of a judicial review of a decision of the Board.

28. I consider that, as the modular issue arises in two separate judicial review proceedings, and as the s. 160 proceedings are stayed, I cannot be a finder of fact, and my jurisdiction is confined to the established jurisdiction of the Superior Courts on a review of any decisions of the Board, viz was the Board correct in the manner it engaged in answering the question posed. I consider that it is appropriate for me to consider whether the Board applied the correct legal test in the way in which it engaged with the factual evidence it had.

The use was established?
29. It is not in dispute that commercial quarrying activity was in operation on part of the site before the appointed day. The area then in use was a matter of some disagreement between the parties, but for the present, I merely note that the operation was carried on in an area very much smaller in area than that now employed. The Quarry has been registered but the issue of whether the use of the Quarry is lawful having regard to its pre-1964 status remains to be resolved.

30. The first report of the Inspector concludes that permission was acceptable in principle "having regard to the existing use as the land as a quarry". Under the heading "procedural issues", he addressed the question whether the application was validly brought under s.261, or whether it was to be characterised as an application for retention not validly made by reason of the decision in *Commission v Ireland*. His conclusion at page 22 bears repeating:-

> "While the subject application does not refer to the retention of works, which is authorised by reason of their pre-1964 status, this assessment is made more difficult in that the subject lands have been extensively altered as a result of the quarrying process conducted to date."

He considered that the correct approach was to treat the planning status of that part of the development which had pre-1964 use as not being an application for retention permission, and not impacted by the European Court of Justice decision.

31. One ground of appeal of the applicant Mr. Hehir was that the Board was required to "make an objective judgement as to whether or not the quarry is authorised before granting permission", and in his second report the Inspector did not address the question of the correct approach to the question of pre-1964 use. At para. 5.1 of his concluding assessment of the arguments the Inspector said:-

> "While I note third party submissions on the status of the application, it can be argued that the ruling of the European Court of Justice in C-215/06 is not directly applicable to this development which commenced pre-1964, as such development was authorised at the time of implementation of the EIA Directive".

32. In his third report, the Inspector made reference on a number of occasions to the fact that pre-1964 user was "established", although he noted that some of the land was acquired post 1964. He did not address the means by which the nature and extent of pre 1964 user be assessed. That is the question which is engaged in this judgment.

The test: a comparison
33. In considering an application under the special statutory regime, the planning authority is obliged to first determine whether the activity in respect of which that application was made was the same or substantially the same activity as that carried out in 1964, whether, to use the shorthand found in the authorities, the pre-1964 user was "established". Section 24 of the Act of 1963 is the starting point in understanding the intention of the legislature to confer a class of exemption on pre-1964 works and development. The section permitted the continuation to completion of particular works commenced before the appointed day at an identified location

34. In *Waterford County Council v. John A. Wood Limited* [1999] 1 I.R. 556, the applicant sought an order pursuant to section 27 of the Local Government (Planning and Development) Act 1976 restraining the respondent from carrying out quarrying activities on certain lands. The matter came before the Supreme Court by way of a case stated by the High Court on appeal from the Circuit Court. The question posed was whether the quarrying operations being carried on by the respondent were *development requiring planning permission*. The resolution of that question depended on whether or not the quarrying operations then carried on were or were not development commenced before the appointed day. The Supreme Court held that section 24 of the 1963 Act necessarily permitted the continuation to completion of the works commenced before the appointed day at an identified location, even where they involved a material change in user of the adjoining ground. Murphy J., who delivered the judgment of the Supreme Court, set out the principles to be applied in resolving such an issue in the following terms at pages 561 to 562:-

> *"It seemed to me to be clear that the purpose of s. 24 was to permit (among other things) a developer to continue works which he had commenced before the appointed day without the necessity of seeking a planning permission which might not be forthcoming and the application for which would at the very least involve significant delay.*
>
> *On the other hand it is, in my view, equally clear that the right to continue works commenced before the appointed day does not give to the developer an unrestricted right to engage in activities of the nature commenced before the relevant date. The exclusion from the operation of s. 24 could not be invoked so as to confer on the particular developer a licence to carry on generally the trade or occupation in which he was engaged. The section merely permits the continuation to completion of the particular works commenced before the appointed day at an identified location."*

35. The key phrase in the case law is the expression "*completion of the particular works*". This involves a test described by the Supreme Court (at page 562), as:-

> *"the examination of all of the established facts to ascertain what was or might reasonably have been anticipated at the relevant date as having been involved in the works then taking place."*

36. It is long established in the jurisprudence that quarries which were already in operation on the appointed day had an entitlement to continue the operation provided the continued activity was "proportionate". The case law also evolved the concept of "intensification", i.e. whether current activity is similar to or broadly similar to that engaged pre-1964. The language employed by the courts in the various decisions of the Superior Courts, including *Waterford County Council v. John A Woods Ltd, An Taisce v. Ireland* [2010] IEHC 415, *Galway County Council v. Lackagh Rock Ltd* [1985] I.R. 120 and *Michael Cronin (Readymix) Ltd. v. An Bord Pleanála* [2009] IEHC 553, explained that what was required was, on a proper analysis by the relevant planning authority, it be established that the quarry use was not continued at a level of intensity "*so as that intensification of use amounted to a change of use*" (per Charleton J. in *An Taisce v. Ireland*).

37. It is instructive to bear in mind the following dicta in paragraph 3 of the judgment of Charleton in *An Taisce v. Ireland:-*

> *"Ordinarily, the use of land prior to 1 October 1964 is outside the scope of planning control, once a building exists since before that day or a use has been established and, proportionate to that use, carried on after that date… Quarrying is, of its nature, an activity that must be carried out over many years. Upon the coming into force of the planning code on the 1st October 1964, there were many quarries which had an entitlement to continue with their operation in a proportionate fashion."*

38. Accordingly, the point of departure is that a quarrying activity that commenced prior to 1 October, 1964, may lawfully be continued and indeed expanded in a proportionate manner thereafter. As the learned judge noted:-

> *"[a] mineral extraction operation must, of its nature, expand either down into the ground or up into a mountain, in the case of mining operations, or outwards from an original area of operation in the case of a quarry or open-cast mine".*

As long as such activities commenced before 1 October, 1964, however, and the expansion thereof constitutes a proportionate increase in output and a natural working out of the planning unit, it does not constitute unauthorised development.

39. In his later judgment in *McGrath Limestone Works Ltd. v. An Bord Pleanála & Ors* [2014] IEHC 382 Charleton J. identified the characterisation of the "*nature of the activity*" as vital to the assessment of whether an intensification of use had occurred, and stressed that the correct approach required an objective analysis of the evidence of pre-1964 use which would then be compared with existing use on site. The word "*proportionate*" is as he put it (at para. 8.4):-

> *"shorthand for the minute analysis that properly is conducted in these cases in order to determine if there has been a pre-planning code use that has been legitimately continued".*

40. Finlay Geoghegan J. in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210 clarified the use of the phrase "*intensification of use*" (at para. 43):-

> *"'intensification of use' is not a term of art or indeed intended to have any special meaning. It is simply a factual description of what may have occurred on the lands since 1964. Further, it is properly intended as a description of the factual change which has occurred in the use of the lands. Hence, whilst, as I have already indicated, some of the judgments indicate that intensification of use may amount to a material change of use, that is a short way of saying more precisely that intensification of use may amount to a change in use in the lands and if such intensification i.e. change in use is material for planning purposes, then it will amount to a material change in use. Whether or not there has been intensification of use such as to amount to a change in the use of the lands, is the issue which arises for determination under the first question which I have identified above and which must be determined independently of any planning considerations."*

Discussion on nature of the approach

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

42. For the purposes of the analysis in the light of the authorities, and also as a matter of logic, a decision-maker before making a determination that an activity enjoyed the benefit of pre-1964 user would need to come to a decision on, and have sufficient evidence in regard to, both the activity carried out or intended to be carried out before 1964 and current activity. The exercise is a comparative analysis, and engages the facts at the two relevant times. It involves the determination of the nature of the original baseline activity on the appointed day, and of current activity.

43. I consider that the correct approach was that explained by Finlay Geoghegan J. in her judgment in *Roadstone Provinces Ltd. v. An Bord Pleanála* at paragraph 34, namely that the factual question must first be answered:-

> *"the first issue which must be determined is the factual issue as to whether what is planned does constitute a change in use of the lands. Where, as on the facts of this reference, it is contended that there will be a change in a pre-1964 use, then the relevant question is whether the planned use constitutes a change from the pre-1964 use. I have further concluded that the applicant is correct that this is a question of fact which must be determined independently of planning considerations. Planning considerations only arise if a change in use is identified and it becomes necessary to consider and determine the materiality for planning purposes of such identified change in use. It is the change in use which, if material, constitutes the act of development as distinct from simply the future use of the lands even if such future use is material for planning purposes." (Emphasis in the original)*

44. Quarries raise particular difficulty in a comparative analysis and, as she put it at para. 48:-

> *"The difficulty which arises with use as a quarry and which has been addressed in a number of cases of alleged intensification of use, is that whilst land may be said to be used as a quarry prior to the appointed day and also now used as a quarry, there may be such significant differences in the type of use or type of quarry between the two dates as to amount to a change in use of the lands. The differences will normally be evidenced or indicated by the difference in the operations or works being carried on in the quarry. Therefore, it may well be useful to consider whether the current operations or works are ones which might have been reasonably contemplated or anticipated as the continuation of the operation or works being carried out prior to the appointed day, as indicated by the Supreme Court in Waterford County Council v. John A. Wood Ltd. [1999] 1 I.R. 556 for the purpose of determining whether there has been any change in the use of the land comprising the quarry since the appointed day."*

45. Accordingly, the first issue required to be addressed by the Board was whether, as a matter of "fact" and without reference to planning matters, there has been a change in the use of the lands. I turn now to a consideration of the matters on which the Board made its decision.

The matters on which the Board made its decision

46. Following the issue of a Direction on 8th August, 2012, the Board made its decision on 23rd August, 2012, and granted permission subject to conditions for seven stated reasons, four of which are relevant to the question before me, the other three relating to planning considerations. The relevant reasons are, using the lettering in the decision:-

> "a) The established use of the lands as quarry, and the registration of the quarry by Clare County Council under s. 261 of the Planning and Development Act 2000
>
> b) The planning history of the site and adjoining lands and the licensing history of the site under Water Pollution Act 1977 (as amended)
>
> f) The submission and observations on file
>
> g) The reports of the Board's Inspector."

47. The applicant says that the Board in coming to the determination that the Quarry enjoyed the benefit of a pre-1964 user did not look to any of the matters identified by Charleton J. in *An Taisce v. Ireland* as the relevant matters that must be considered by the Board. It is argued that the Board fell into error in making an assumption that once there was a quarrying activity in 1964, it did not have to look to see whether the activity now being carried out was substantially similar or proportionate to that being carried out pre-1964.

48. I consider that while the Board did not expressly state in its decision that the development enjoyed the benefit of pre-1964 user, it determined the application was an application for "continuation of quarrying activities", and that approach presumes that the existence of pre-1964 user was accepted. Such finding is explicit in the Board's Direction of the 8th August, 2012 that "the authorised status of the use of the lands, has been established". One of the five notes in The Direction is relevant:-

> a. "Note 1: The Board completed an Inquiry into the planning status of the quarry, taking into account the Inspector's analysis, (including in section 3.0 of his May 2012 Report) and having regard not just to the evidence on this file of substantial pre-1964 quarrying activities on the site, but also to the planning history of the site including the substantial planning application and appeal (which included an oral hearing) under file reference PL03.216138. The Board agreed with the Inspector's conclusion, that the authorised status of the use of the lands as a quarry had been established. The Board therefore proceeded in its consideration of this application for continuation of quarrying activities arsing from s. 261 of the Planning and Development Act."

49. I reject the argument of counsel for the applicant that the Board effectively acted on a *prima facie* assumption that pre-1964 user was established. I consider that it did engage some evidence, primarily the three reports of the Inspector, the third of which, that of 22nd May 2012, was expressly referred to in the Board's Direction, and which contains the most detailed analysis of the facts. The section of his report expressly mentioned by the Board is s.3, headed "Assessment", and there the Inspector dealt with what he described as "legal issues", namely the pre-1964 status of the quarrying activity. He identified a number of elements which bear repeating:-

> a) The planning authority had accepted that the use was established prior to the appointed date.
>
> b) The applicant submitted newspaper clippings from 1955 relating to the establishment of commercial rock extraction and processing activities on the lands.
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> c) An aerial photograph showed the extent of extraction in 1973.
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> d) Maps showing folio numbers and the dates of purchase were submitted.
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> e) A letter from Clare County Council dated the 9th November, 1999 indicated that operations had been established in the 1950's.
>
> f) The eight hectare lands comprised in PL03.227554 had been excluded.
>
> g) The pre-1964 user had been considered previously by the Board under reference PL03.216138 (the lands to the south east).

50. The balance of the Inspector's third report, and the bulk of his first and second reports, concerned what I might describe as general planning considerations and deal with identified concerns relating to groundwater, discharges from the site, vibration from blasting, dust emissions, operating hours, depth of excavation etc. These are not matters that analyse current and pre-1964 user, and do not concern me in this module.

51. There is also mentioned in the Direction the report of Carmel Greene, senior executive planner, given by way of an oral statement to the hearing on the 19th July, 2006, in relation to PL03.216138 (the lands lying to the south east of the subject lands), in which she correctly identified the test at the hearing as to whether the user was "*a natural and logical extension*" of existing pre-1964 user. She also considered the history of other planning permissions which I have referred to above.

52. Ms. Greene, in her report of 4th August, expressed a view that the activity on the site "would appear to be a natural and logical extension of the Quarry and there appears to be no natural and significant obstruction to the continuation of the quarry works in this area".

53. She pointed to 1999 aerial photographs, and ones from the year 2000.

The evidence before the Board

54. The Board therefore had the evidence of the three reports of its Inspector, the report of Carmel Greene, expert and other submissions, and four particular factors were regarded by it as specific evidence of pre-1964 user as follows:-

> 1) The 1955 newspaper clippings,
>
> 2) Aerial photographs of 1973 and 1995,

3) A letter from Clare County Council of the 9th November, 1999, by which it accepted that the Quarry commenced operations in the 1950's and "certainly pre-1964" but, which did not identify the location or nature of that user, save that the activity was quarrying, and by which it confirmed that no planning permission exited or was "required",

4) A map showing the land acquisition, and various folios, which identified the acquisition of part of the subject lands by Whelans in 1973, and other lots in the 1980s, 1990s and 2000s,

5) The planning files related to the quarry development as a whole.

How is a comparison to be made?
55. I turn to consider whether the exercise by the Board of the comparative analysis in which it was required to engage was sufficient to satisfy the test for such analysis that has been identified in the case law and considered at paras. 33 to 45 above. In particular, I ask whether there was an examination and finding concerning pre-1964 user and a comparison of that user, as properly characterised, against the current user. For that purpose there must a finding in regard the nature and extent of use before 1964 and of the present use. The history of activity between these relevant dates may inform the analysis but the true comparison must be one between the pre-1964 user and present user.

The analysis carried out by the Board
56. The Quarry has had a long planning history and, in all, twelve applications were made for planning permission. By way of illustration planning permission was sought in respect of roads (1980 and 1981), office development and curing sheds and a septic tank (2000), and laboratory and offices (2003). The Board had before it information concerning these applications, and in regard to seven applications by neighbours for residential developments where the existence of the Quarry in some cases was a reason to refuse permission.

57. In *McGrath Limestone Works Ltd. v. An Bord Pleanála & Ors*. the court said that what was required by way of correct analyses was an examination of the established facts to ascertain the nature of the use. If the base line is a pre-1964 use then:-

> *"a historical comparison of what was then done, and what was then possible, in terms of technology, labour force and output is a right point for comparative purposes to the date of proceedings"*

58. I turn now to consider the relevant factors that might require comparative analysis in the case of extractive use and how they were engaged by the Board.

The first factor: the extraction rate
59. This was identified in *An Taisce v. Ireland* and in *Waterford County Council v. John A Woods* as a factor of importance. The extraction rate was identified in the newspaper feature in 1955 as 2,000 tons per week pre-1964, 3m tons per annum. The evidence was that the extraction rate was 370,000m³, (1,000,000 tons or 20,000 tons a week) in 2006, a tenfold increase in extraction rates. This had dropped, presumably because of the economic crash, to 120,000m³ in 2011. The rate of extraction and whether the increase or decrease is attributable to factors other than normal or reasonably anticipated variations by reason of fluctuations in levels of demand, economic activity etc must also be considered. In *An Taisce v. Ireland* the court identified the analysis as one to ascertain whether there was an increase or "*a marked increase"* in extraction rates.

60. The relevant rates of extraction for the two relevant times were identified, but no analysis of what, at least in terms of the arithmetic, appears to be a very large difference in the extraction rates was carried out by the Board, nor did it consider the reasons for the changes in the rate of extraction, and whether these reasons were indicative of a change in the nature of the activity, or whether they arose as a result of natural and normal fluctuations in demand or from other factors

The second factor: the history of land acquisition
61. The history of land ownership was identified as a factor in *McGrath Limestone Works Ltd. v. An Bord Pleanála & Ors.* where Charleton J. held that the Board had incorrectly ignored the land ownership history in coming to the conclusion that the development had occurred in distinct phases. It was also identified as a factor in *An Taisce v. Ireland* and in *Waterford County Council v. John A. Woods. Therein* the Supreme Court held that the quarrying activities were not a continuation of the original quarry operations that had commenced before 1 October, 1964, stating that it believed it to be of "*decisive importance*" that the respondent was carrying on quarrying operations from lands that it had acquired *after* the appointed date.

62. It is necessary for the purpose of the comparative analysis that the nature and extent of land owned or operated pre-1964 be identified and for the Board to also determine whether other lands not then owned or occupied by the Quarry operator could reasonably have been regarded as part of the Quarry.

63. A company known as Clare Lime had a lease on part of the lands the subject matter of this application comprised of Folio 8923F Co. Clare. The lease has not been furnished to the court nor was it available to the local authority. It seems however, that Whelans is not an assignee of the interest of the lessee in that lease. No conclusion was drawn by the Board as to the import, if any, of the chain of title.

64. In 1974, the area operated as a quarry was 3.07 hectares, and in 1982, it was 7 hectares. In 1993, there had been an expansion to the south and west but the precise area of work was unclear. In 2000 the area was c. 21.5 hectares and in 2004 c. 37.2 hectares. Again, the difference in the area in use is arithmetically large, and the Board did not state whether it considered the difference to be a proportionate or a reasonable extension of the area under extraction. Factors such as the intention of the operator and the nature of the material deposits are relevant, and were not engaged. No finding was made that the current works are "the same works" or "a different phase of the works" as those pre-1964 (the phrase used in *Waterford County Council v. John A. Woods*), and this is a factor of particular importance when the area under extraction was expanded.

The third factor: the nature of the activity:
65. The nature of the extraction activity, the infrastructure required, the machinery employed, the method of productions, and whether for example it was at a low level or "industrial", are factors identified in *McGrath Limestone Works Ltd. v. An Bord Pleanála* and in *Patterson v Murphy* [1978] 1 ILRM.

66. As noted above at para. 59 the extraction rates were markedly different pre 1964 and currently. The quarry has a long planning history and permission exists for much of the infrastructure. That permission, while it may assist the operation on the subject part of

the Quarry, does not thereby render it lawful, and this is evident from the approach taken by Clare County Council to the application in regards to the 8 hectare site.

67. In my view, the Board failed to address and make findings on whether current activity is the same or broadly similar in its nature to that carried out pre-1964.

The fourth factor: employment
68. Whelans employed 150 persons at the date of the decision and the number of employees was 15 in 1955, with an anticipated increase identified in the newspaper article to 28. This increase may have a number of consequences for the characterisation of current activities. No analysis was carried out as to the effect of mechanisation; modern extraction methods might suggest that fewer persons are required. The comparative analysis required the Board to address the difference and make findings as to any relevance that difference in methods of extraction might have for the characterisation of the activity at the relevant times, and no such analysis was engaged in by it.

The fifth factor: infrastructure
69. The evidence is that there are currently 1,000 traffic movements per week. No findings were made as to the likely traffic activity pre-1964 nor was analysis carried out as to the fact that the available figures were for August 2006, a month when one would expect quarry activity to be possibly at its lowest.

The sixth factor: the scale of the operation
70. There was also to be compared the scale of the current and pre-1964 activity operation and whether the difference is a "*reasonable, but not extensive, level of variation*" *per* Charleton J. in *McGrath Limestone Works Ltd. v. An Bord Pleanála & Ors.*

71. The area originally comprising the Quarry contained c.3 hectares and that part of the site is still in use. It is argued by the applicant that the area now developed is c. 28 hectares, almost a tenfold increase. The respondents contend that the true characterisation shows quarrying on approximately 10 hectares. It is for the Board to resolve that conflict, but I am not persuaded that it has, in its decision, adequately dealt with the comparison. The fact also that counsel each make coherent arguments as to the true extent of current operations arises because the Board did not itself make a determination as to this aspect of the dispute, one which to my mind is central to the comparative analysis.

The seventh factor: extraction methods
72. The methods of extraction are also a relevant factor. It is clear from the evidence before the court that there was industrial and commercial quarrying activity being carried out in this site as early as 1955. This was not a case, as was found in *Patterson v. Murphy*, of the quarrying activity being a "horse and cart" operation pre-1964. The infrastructure does have planning permission and there was extensive evidence before the Board as to the history of planning applications for the Quarry in general, and there was planning permission for a batch plant (1979), a tarmacadam plant, (1981) offices *etc*. and all of these were scheduled in the report of Carmel Greene which was before the Board. Some of the use on the site was in fact already authorised by existing planning. The infrastructure is primarily concentrated in the north of the site, the quarry face itself lying to the south and running more or less north east/south west. There was evidence of continued use in the 1970s. It is accepted that there is a gap of some nine years on either side of the operative date, but there is evidence of substantial activity both before and after that date. The evidence is that pre-1964 activity primarily involved extraction with small machinery and the removal of the stone on small and perhaps not even mechanically driven vehicles. The respondent argues that extraction method proposed in 1964 is the same as that now used and that the deposits continue to be extracted through benches, such that the cliff face will be removed or cut back to level.

73. Again, I am of the view that the Board did not make findings or analyse those findings in the light of the test identified above.

The eighth factor: depth
74. The newspaper clipping from 1955 showed that the site was 300 feet above sea level and showed a clear intention to exploit the seam for commercial purposes. The Board, and before it the local authority, was sufficiently concerned about questions of the depth of excavation to, in each case, insert a condition to deal with the depth of excavation.

75. The Board's condition six required that the Quarry not be excavated below minus 10m OD.

76. The Board however, whilst it did deal in some detail with the question of the depth of excavation, did not find objectively what was in contemplation of the parties in 1964, and whether it could have been in the contemplation of the parties in 1964 that the levels would fall to current levels of minus 20m OD or even minus 30m OD. These are relevant factors to be considered before the Board could come to determine the application as one that fell within s.261.

Conclusion on how the Board conducted the comparison
77. It has long been recognised that it is often difficult to obtain useful and clear contemporaneous evidence as to the nature of activity being carried out on the appointed date. The Board had the newspaper article in 1955, the letter in 1999, the full planning history of the entire site and the fact that parts were authorised, and further parts rejected from the s. 261 process itself. It also had a land ownership history, the tables prepared by Ms. Greene and also various applications by neighbours as far back as 1976 for planning permission to build one off housing where Messrs. Whelans actively opposed such housing development in the vicinity of the quarry by reference to the fact that the "natural extension" of the quarry would cause difficulty for the persons living in those houses.

78. This was a somewhat unusual quarry in that there was planning authority and Board intervention and enforcement on a number of occasions over the years. There were also many instances noted by the Inspector where the planning authorities either did not move to enforce planning requirements, or was out of time to do so. It is fair to say the unlimited use of the land or a gross intensification has been stopped and the planning authorities have constrained and limited the use of the entire site and reduced the area which it accepted could be brought under s. 261(7). In that regard the actions of the planners can be distinguished from what happened in *An Taisce v. Ireland*.

79. The Board was obliged as a matter of law once there was a claim that this Quarry had the "benefit" of pre-1964 user to determine as a matter of fact whether that user continued to the present time. Whether such continuation occurred required the Board to be satisfied that it had sufficient information to make the comparison, and that the information lead it to a conclusion that the quarrying activity was a continuation of or not a material intensification of that user.

80. At note one of the Board Directions, the Board referred to its agreement with the conclusion of the Inspector "that the authorised status of the use of the land as a quarry had been established". By that somewhat elusive phrase the Board accepted that there was

pre-1964 user, and that it could in those circumstances come to deal with the planning application under s. 261 of the Act. What the Board omitted to do however, in my view and for the reasons outlined above, was to then engage in the comparative analysis by which it compared that the nature and extent of pre-1964 user with the current user.

Duty to give Reasons
81. While the primary focus of the arguments at the trial of the issue was the nature

of the comparative analysis, some argument was also had as to whether the Board complied with its statutory requirement under s. 34(10) of the Act of 2000 to give reasons for its decisions. Reasons that can be considered as being adequate for this purpose must be seen in the context of the considerations discussed above, and in the light of my view that the Board did not adequately engage with the comparative process mandated as a matter of law and of logic, and, as the Board failed to identify its analysis of intensification, I consider for the reasons stated above that this submission is correct.

Conclusion
82. The question before me must be considered in the context of the test explained in *O'Keeffe v An Bord Pleanála* and whether the Board adopted the correct approach to the exercise it engaged in when determining whether the Quarry had the benefit of pre-1964 user and was therefore authorised or, to use the language in the decision, established.

83. The question in the modular issue must, in my view, be answered in the negative as I consider that the Board did not determine the nature of the pre 1964 use, and compare it to present use to ascertain whether that use could properly be called a continuation of an established or authorised use. It did not establish as a fact the pre 1964 baseline capacity, or what was reasonably proportionate to that activity. It did not therefore have a sufficiently detailed baseline for comparative purposes.

84. I consider that no proper inquiry was conducted and no comparative analysis engaged with regard to the history of land ownership, the rate or method of extraction, the use that was in contemplation on the appointed date and whether the current use was proportionate to that use. I consider that the Board did not correctly engage in the minute and detailed analysis envisaged by Charleton J. in *An Taisce v. Ireland* and in *Waterford County Council v. John A Woods Ltd*.