Neutral Citation: [2014] IEHC 382

An Ard Chúirt

The High Court

Commercial

2014/40 COM

Between

McGrath Limestone Works Limited

Applicant

and

An Bord Pleanála

Respondent

and

Ireland and the Attorney General

Respondent

and

Mayo County Council

Respondent

and

Andrew Fleming and the Human Rights Commission

Notice Parties

Judgment of Mr Justice Charleton delivered on the 30th day of July 2014

1.0 This case concerns a challenge by the applicant quarry firm McGrath Limestone Works Limited to a decision of the respondent An Bord Pleanála of 16 December 2013, upon review of a notice issued by the respondent Mayo County Council, on 17 August 2012, under section 261A of the Planning and Development Act 2000, as amended that adversely impacted on the continuation of quarrying works at a site at Cong in County Mayo between Lough Mask and Lough Corrib. This notice required that an application for substitute consent be made within 12 weeks under section 177E of the Act of 2000. Such an application must be accompanied by an environmental impact statement and an appropriate assessment, referable to the Environmental Impact Assessment Directive and the Habitats Directive. No such prior assessment had been made.

1.1 In this judicial review, as to the main points argued, the applicant McGrath Limestone Works claims: that there were no proper reasons given for either decision; that an earlier assurance by Mayo County Council on 3 April 2007 prevented the later order through legitimate expectation; that the decisions of Mayo County Council and An Bord Pleanála are irrational; that both the decisions were arrived at in breach of fair procedures; that same are an impermissible attack on property rights; that there has been a condemnation on a criminal offence without trial; and that section 261A of the Act of 2000 is unconstitutional and therefore of no effect. The respondents contend to the contrary. There is also an out of time point under section 50 of the Act of 2000.

1.2 The notice parties did not offer submissions at the hearing.

Board order

2.0 Central to every argument advanced was the decision of An Bord Pleanála of 16 December 2013. Therefore, same should be quoted. The curial part of the order is in the **following terms:**

Board Decision

The Board, in exercise of its powers conferred on it under section 261A of the Planning and Development Act, 2000, as amended, decided:

based on the Reasons and Considerations marked (1) set out below, to confirm the determination of the planning authority in respect of this development made under section 261A(2)*(a)*(i) of the Planning and Development Act, 2000, as amended, and

based on the Reasons and Considerations marked (2) set out below, to confirm the determination of the planning authority in respect of this development made under section 261A(2)*(a)*(ii) of the Planning and Development Act, 2000, as amended, and

based on the Reasons and Considerations marked (3) set out below, to confirm the decision of the planning authority in respect of this development made under section 261A(3)*(a)* of the Planning and Development Act, 2000, as amended

Matters Considered

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

Reasons and Considerations (1)

Having regard to:

(a) the provisions of the Planning and Development Acts, 2000 to 2011, and in particular Part XA and section 261A,

(b) 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 Assessment (Schedule 5) and 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),

(c) the Department of Environment, Community and Local Government – Guidelines for Planning Authorities and An Bord Pleanála and carrying out Environmental Impact Assessment, March, 2013,

(d) the submissions on file, including documentation on the quarry registration file (planning authority register reference number QY18), aerial photography, and the report of the Inspector,

(e) the nature, scale and intensity of the extraction works on the overall site, and

(f) the location of the quarry being within one kilometre of four Natura 2000 sites and the dates of designation of these European Sites ranging from 1997 to 2011,

it is considered that development was carried out after the 1st day of February, 1990 that would have required an environmental impact assessment, but that such an assessment was not carried out.

Reasons and Considerations (2)

Having regard to:

(a) Council Directive 92/43 EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, as amended

(b) the Department of the Environment, Heritage and Local Government – Appropriate Assessment of Plans and Projects in Ireland, Guidance for Planning Authorities, 2009/2010,

(c) the location of the quarry, being within one kilometre of four Natura 2000 sites and the dates of designation of two of these European Sites in particular, Lough Carra/Lough Mask Complex Special Area of Conservation (Site Code 001774) (March 1997) and Lough Corrib Special Area of Conservation (Site Code 000297) (July 1999), and

(d) the submissions on file, including documentation on the quarry registration file (planning authority register reference number QY18), aerial photography and the report of the Inspector, it is considered that the likelihood of significant effects on the candidate Special Areas of Conservation arising from development at this quarry after the 1st day of March, 1997 by itself, or in combination with other plans or projects, could not be excluded in view of the conservation objectives of the sites, and that an Appropriate Assessment would have been required.

Reasons and Considerations (3)

Having regard to the submissions on file, including documentation on the quarry registration file (planning authority register reference number QY18), aerial photography, and the report of the Inspector, the Board considered that:

(a) the quarry commenced operation prior to the 1st day of October, 1964, and that

(b) the requirements in relation to registration under section 261 of the Planning and Development Act, 2000, as amended, were fulfilled, and, therefore, the decision of Mayo County Council under section 261A(3)*(a)* should be confirmed.

Quarries

3.0 Of their nature, quarries may operate over generations. When a mineral resource is exhausted, work stops and the business closes or another nearby prospect may be sought out. Whatever the material extracted, the price that the raw product will fetch fluctuates with demand and is, in turn, dependent on economic conditions. Hence, a quarry may be very busy for some years but less so as cycles of consumption fluctuate. Some may even shut down. Old quarries may be reopened when extraction becomes worthwhile and existing quarries can intensify in use beyond what planning considerations contemplated as proportionate to what may have been authorised. In this context, 'may' is appropriate as many quarries were outside any planning controls. This situation has been changing, however. On the 1 October 1964, the Local Government (Planning and Development) Act 1963 came into force. At that stage, there were many quarries in operation and through the provisions of that legislation, existing uses and building works commenced fell outside the scope of the newly established need to seek planning permission from local planning authorities and to abide by such conditions as would be imposed on development. As the decades of regulation imposed by this enactment unfolded,

concern arose as to whether quarries were even known to local planning authorities and as to whether they were validly operating outside the scope of the law. Hence, when the Planning and Development Act 2000 replaced the earlier statute, section 261 thereof required the registration of all quarries with local planning authorities. In addition, the section drew into limited consideration the public participation in planning that characterises this form of regulation. The section enables: the imposition of fresh conditions to quarries which already operate with planning permission; conditions to be imposed on quarries which have no planning permission; and, where no planning permission has been granted, a requirement to apply for same or the imposition of conditions or the making of an environmental impact statement. Since it came into force on 28 April 2004 (as per SI No. 152 of 2004 - Planning and Development Act 2000 (Commencement) Order 2004), section 261 has been much litigated: see *O'Reilly v Galway City Council* [2010] IEHC 97; *An Taisce v Ireland* [2010] IEHC 415; *Pierson and Others v. Keegan Quarries Limited* [2009] IEHC 550; *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210; *M & F Quirke & Sons & Ors v Bord Pleanála* [2009] IEHC 426. This brings into focus the first series of points in this judicial review.

Section 261 conditions

4.0 The owners of McGrath Limestone Works Limited, the applicant, claim that on registering their quarry under section 261 that the local authority Mayo County Council, the respondent herein, by imposing conditions as opposed to exercising any other power, established a legitimate expectation that never in the future would it be required that the quarry comply with any other legal imposition. The facts relevant require concise reference. Some part of the quarry commenced operation prior to the 1 October 1964. When the issue of intensification is dealt with, further details as to the extent and nature of that operation will be referred to. McGrath Limestone Works claim that the quarry was developed continuously in a northerly direction since that date. The quarry was registered pursuant to section 261 of the Act of 2000. This was done by the submission of plans and particulars on 5 April 2005. An issue then arose whereby Mayo County Council considered whether an environmental impact statement should be required. Following on written legal representations by McGrath Limestone Works, Mayo County Council resolved not to pursue that course but, instead, decided to impose conditions. This was notified on 3 April 2007 and related detailed conditions as to noise, blasting, operating times, traffic, water quality monitoring, dust and other matters.

4.1 Section 261 has a purpose which is expressly limited by its terms and which, as such, could not create legally binding obligations on Mayo County Council outside its scope. That much is clear, in any event from the express terms of section 261, which, as amended, provides as follows:

> (1) The owner or operator of a quarry to which this section applies shall, not later than one year from the coming into operation of this section, provide to the planning authority, in whose functional area the quarry is situated, information relating to the operation of the quarry at the commencement of this section, and on receipt of such information the planning authority shall, in accordance with *section 7*, enter it in the register.
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> (2) Without prejudice to the generality of *subsection (1),* information provided under that subsection shall specify the following –
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> *(a)* the area of the quarry, including the extracted area delineated on a map,
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> (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 Act of 1963 was granted in respect of the quarry and if so, the conditions, if any, to which the permission is subject, or
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> (ii) the operation of the quarry commenced before 1 October 1964, and
>
> (iii) such other matters in relation to the operations of the quarry as may be prescribed.
>
> (3) A planning authority may require a person who has submitted information in accordance with this section to submit such further information as it may specify, within such period as it may specify, relating to the operation of the quarry concerned and, on receipt thereof, the planning authority shall enter the information in the register.
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> (4) (a) A planning authority shall, not later than 6 months from the registration of a quarry in accordance with this section, publish notice of the registration in one or more newspapers circulating in the area within which the quarry is situated.
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> (b) A notice under *paragraph (a)* shall state -
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> (i) that the quarry has been registered in accordance with this section,
>
> (ii) where planning permission has been granted in respect of the quarry, that it has been so granted and whether the planning authority is considering restating, modifying or adding to conditions attached to the planning permission in accordance with subsection *(6)(a)(ii)*, or
>
> (iii) where planning permission has not been granted in respect of the quarry, that it has not been so granted and whether the planning authority is considering—

(I) imposing conditions on the operation of the quarry in accordance with subsection *(6)(a)(i),* or

(II) requiring the making of a planning application and the preparation of an environmental impact statement in respect of the quarry in accordance with *subsection (7),*

(iv) the place or places and times at which the register may be inspected,

(v) that submissions or observations regarding the operation of the quarry may be made to the planning authority within 4 weeks from the date of publication of the notice.

(c) A notice under this subsection may relate to one or more quarries registered in

accordance with this section.

(5) (a) Where a planning authority proposes to—

(i) impose, restate, modify or add to conditions on the operation of the quarry under this section, or

(ii) require, under *subsection (7)*, a planning application to be made and an environmental impact statement to be submitted in respect of the quarry in accordance with this section,

it shall, as soon as may be after the expiration of the period for making observations or submissions pursuant to a notice under *subsection (4)(b)*, serve notice of its proposals on the owner or operator of the quarry.

(b) A notice referred to in paragraph *(a)*, shall state—

(i) the reasons for the proposals, and

(ii) that submissions or observations regarding the proposals may be made by the owner or operator of the quarry to the planning authority within such period as may be specified in the notice, being not less than 6 weeks from the service of the notice.

(c) Submissions or observations made pursuant to a notice under *paragraph (b)* shall be taken into consideration by a planning authority when performing its functions under *subsection (6) or (7).*

(6) (a) Not later than 2 years from the registration of a quarry under this section, a planning authority may, in the interests of proper planning and sustainable development, and having regard to the development plan and submissions or observations (if any) made pursuant to a notice under *subsection (4) or (5)*—

(i) in relation to a quarry which commenced operation before 1 October 1964, impose conditions on the operation of that quarry, or

(ii) in relation to a quarry in respect of which planning permission was granted under Part IV of the Act of 1963 restate, modify or add to conditions imposed on the operation of that quarry,

and the owner and operator of the quarry concerned shall as soon as may be thereafter be notified in writing thereof.

(aa) Notwithstanding any other provisions of this Act, the operation of a quarry in respect of which the owner or operator fails to comply with conditions imposed under paragraph *(a)*(i) shall be unauthorised development.

(b) Where, in relation to a grant of planning permission conditions have been restated, modified or added in accordance with paragraph *(a)*, the planning permission shall be deemed, for the purposes of this Act, to have been granted under section 34, on the date the conditions were restated, modified or added, and any condition so restated, modified or added shall have effect as if imposed under section 34.

(c) Notwithstanding *paragraph (a),* where an integrated pollution control licence has been granted in relation to a quarry, a planning authority or the Board on appeal shall not restate, modify, add to or impose conditions under this subsection relating to—

(i) the control (including the prevention, limitation, elimination, abatement or reduction) of emissions from the quarry, or

(ii) the control of emissions related to or following the cessation of the operation of the quarry.

(7) (a) Where the continued operation of a quarry—

(i) (I) the extracted area of which is greater than 5 hectares, or

(II) that is situated on a European site or any other area prescribed for the purpose of *section 10 (2)*

(c), or land to which an order under section 15, 16 or 17 of the Wildlife Act, 1976 , applies,

and

(ii) that commenced operation before 1 October 1964,would be likely to have significant effects on the environment (having regard to any selection criteria prescribed by the Minister under *section 176 (2)(e)),* a planning authority shall not impose conditions on the operation of a quarry under *subsection (6),* but shall, not later than one year after the date of the registration of the quarry, require, by notice in writing, the owner or operator of the quarry to apply for planning permission and to submit an environmental impact statement to the planning authority not later than 6 months from the date of service of the notice, or such other period as may be agreed with the planning authority.

(b) *Section 172 (1)* shall not apply to development to which an application made pursuant to a requirement under paragraph *(a)* applies.

(c) A planning authority, or the Board on appeal, shall, in considering an application for planning permission made pursuant to a requirement under *paragraph (a),* have regard to the existing use of the land as a quarry.

(d) Notwithstanding any other provision of this Act, the continued operation of a quarry in respect of which a notification under paragraph *(a)* applies, unless a planning application in respect of the quarry is submitted to the planning authority within the period referred to in that paragraph, shall be unauthorised development.

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

(f) Notwithstanding any other provision of this Act, the continued operation of a quarry in respect of which the owner or operator fails to comply with conditions attached to a permission granted in respect of an application for permission made on foot of a notification under paragraph *(a)* shall be unauthorised development.

(8)(a) Where, in relation to a quarry for which permission was granted under Part IV of the Act of 1963, a planning authority adds or modifies conditions under this section that are more restrictive than existing conditions imposed in relation to that permission, the owner or operator of the quarry may claim compensation under *section 197* and references in that section to compliance with conditions on the continuance of any use of land consequent upon a notice under *section 46* shall be construed as including references to compliance with conditions so added or modified, save that no such claim may be made in respect of any condition relating to a matter specified in paragraph *(a)*, (b) or (c) of *section 34 (4),* or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(b) Where, in relation to a quarry to which subsection (7) applies, a planning authority, or the Board on appeal, refuses permission for development under *section 34* or grants permission thereunder subject to conditions on the operation of the quarry, the owner or operator of the quarry shall be entitled to claim compensation under *section 197* and for that purpose the reference in *subsection (1)* of that section to a notice under *section 46* shall be construed as a reference to a decision under *section 34* and the reference in *section 197 (2)* to *section 46* shall be construed as a reference to *section 34* save that no such claim may be made in respect of any condition relating to a matter specified in *paragraph (a), (b) or (c) of section 34 (4)*, or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(c) Where, in relation to a quarry which commenced operation before 1 October 1964 a planning authority imposes conditions under subsection (6*)(a)(*i) on the operation of the quarry, the owner or operator of the quarry may claim compensation under section 197 and references in that section to compliance with conditions on the continuance of any use of land consequent upon a notice under section 46 shall be construed as including references to compliance with conditions so added or modified, save that no such claim may be made in respect of any condition relating to a matter specified in paragraph *(a), (b)* or *(c)* of section 34(4), or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(9) (a) A person who provides information to a planning authority in accordance with *subsection (1)* or in compliance with a requirement under *subsection (3)* may appeal a decision of the planning authority to impose, restate, add to or modify conditions in accordance with *subsection (6)* to the Board within 4 weeks from the date of receipt of notification by the authority of those conditions.

(b) The Board may at the determination of an appeal under paragraph *(a)* confirm with or without modifications the decision of the planning authority or annul that decision.

(10) Notwithstanding any other provision of this Act, a quarry to which this section applies in respect of which the owner or operator fails to provide information in relation to the operation of the quarry in accordance with subsection (1) or in accordance with a requirement under subsection (3) shall be unauthorised development

(11) This section shall apply to—

(a) a quarry in respect of which planning permission under Part IV of the Act of 1963 was granted more than 5 years before the coming into operation of this section, and

(b) any other quarry in operation on or after the coming into operation of this section, being a quarry in respect of which planning permission was not granted under that Part.

(12) The Minister may issue guidelines to planning authorities regarding the performance of their functions under this section and a planning authority shall have regard to any such guidelines.

(13) In this section—

"emission" means—

(a) an emission into the atmosphere of a pollutant within the meaning of the Air Pollution Act, 1987,

(b) a discharge of polluting matter, sewage effluent or trade effluent within the meaning of the Local Government (Water Pollution) Act, 1977, to waters or sewers within the meaning of that Act,

(c) the disposal of waste, or

(d) noise;

"operator" means a person who at all material times is in charge of the carrying on of quarrying activities at a quarry or under whose direction such activities are carried out;

"quarry" has the meaning assigned to it by section 3 of the Mines and Quarries Act, 1965.

4.2 It is not essential to rehearse the elucidation of the effect of this section which, in any event, is apparent from the cases cited. 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. In *An Taisce v Ireland* at paragraphs 8 and 9 the following observations were made by this Court:

> It is settled as a matter of law that the registration of a quarry under s. 261 does not alter its status. If the use of a quarry was unlawful before registration, that status remains afterwards. It is incumbent on the planning authority to consider, in any application under s. 261(7), whether a lawful use has been established. No burden of proof exists as to an objector in that respect. The planning process is not to be turned into a kind of adversarial system. It is an enquiry into the appropriateness or otherwise of a proposed development. Legal status, where relevant to that process, can be established by reference to the enquiry which the Board or the planning authority undertakes. If An Bord Pleanála is not satisfied with the information which it has at its disposal it can cause further enquiries to be made.
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> Even the imposition of conditions, consequent upon registration under s. 261(5), of the Act does not alter the status of a quarry. As regard is to be had under s. 261(7) of the existing lawful use of the land, it would be wrong for the planning authority or the Board to take the lawful use of the land as having been established or implied by registration. In *Pierson and Others v. Keegan Quarries Limited* [2009] IEHC 550 (Unreported, High Court, Irvine J, 8th December, 2009), at paragraph 40 Irvine J. offered the following view, with which I agree:
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> > I do not accept that a decision made by a planning authority to register a quarry subject to the imposition of conditions under s. 261 of the 2000 Act has the legal effect contended for by the respondent. If the quarry constituted unauthorised development at the start of the s. 261 process, its registration subject to conditions does not, in my view, alter its status. Neither does that decision have any legal effect on the right of a party with the appropriate *locus standi*, such as the applicants in the present case, to challenge that development as being unauthorised under s. 160 of the 2000 Act.

4.3 There is no reason why that ruling is not also applicable in this case. Further, the contention of the applicant in the *An Taisce* case was also rejected in *Shillelagh Quarries Limited v An Bord Pleanála* by Hedigan J in addition to the Pierson decision therein cited. 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.

4.4 Even were that not so, how can legitimate expectation seemingly arise from the simple steps taken by Mayo County Council? It is argued that when Mayo County Council did not direct that an application for planning permission be made pursuant to section 261(7) but, instead, imposed conditions under section 261(6), it was decided definitively that the quarry was outside the planning code by reason of use prior to October 1964. Further, it is argued that this decision also represented that its continued operation would not be likely to have a significant effect on the environment or on any European Site. Part of this argument is a contention that in the course of deciding whether a section 261(7) application for planning permission was required of any quarry owner registering a quarry, the planning authority was required to be satisfied that the user of the lands was established and that therefore the quarrying was authorised.

4.5 If there is any ground upon which the principle of legitimate expectation might apply, there would first of all have to exist at least that level of unequivocal declaration that supports estoppel in private law. This is absent on the facts of this case. Reading the correspondence, all that is apparent is that McGrath Limestone Works argues that an environmental impact assessment need not be engaged because of what are claimed to be high existing levels of environmental protection on site and suggest conditions instead. Mayo County Council made no declaration such as that they accepted this or that they had inspected the site thoroughly and that no impact on the environment or on protected habitats could possibly arise either then or into the future. It would be hard to imagine any local planning authority being inspired into any such declaration. Such a decision would be astonishing. Further, there is nothing on the facts which could amount to declaration, much less an unequivocal representation, that the status of the quarry had been decided for ever and from that point on. Nothing changed in the former status of the quarry either because of registration or because of the imposition of conditions of operation on the quarry. Any representation sufficient to have set up a legitimate expectation would, in this instance, have been a trespass into the sovereign authority of the State under Article 6 of the Constitution. It should be remembered that jurisdiction is both the conferring of power to act and is also a boundary to the exercise of that power. Under the Act of 2000, Mayo County Council had no such power as contended for here. Even were such a power exercised it would be

outside the boundary of what would be legitimate. There can be no expectation that is legitimate that an unlawful state of affairs that is expressly subject to sanction under national legislation should continue unchecked. Nor can it be expected that the legal landscape will be frozen through administrative fiat and that what the Oireachtas may see as socially unacceptable may never be provided for in legislation in the future. Even less can such an expectation arise under European law, since the need for an assessment on the effect of a project on the environment arises from that source.

4.6 In terms of national law, in *Wiley v. Revenue Commissioners* [1994] 2 IR 160, the applicant contended that he had a legitimate expectation that exemption from excise duty for motor vehicles for which he was not legally qualified would continue to be applied to him. At pages 168-169 the Supreme Court rejected this argument, with McCarthy J stating:

> Expressed somewhat differently, it may be said that having wrongly persuaded the licensing authority to exempt him under s. 43, sub-s. 1 and consequently recouped from the general body of tax payers the excise duty and the VAT that he had paid on his new car in 1983 and in 1985, that when the Revenue Commissioners became alerted to possible abuses of the scheme, he should have been notified of their change of heart. Even if this extraordinary proposition were to be accepted, it would mean that the Revenue Commissioners would have to be ordered to pay out of the Central Fund a significant sum of money to someone not entitled to any such exemption. The concept that the courts should order the Revenue Commissioners or the Minister for Finance to pay money to someone plainly not entitled to it I find unusual. If expectation existed it was an illegitimate one.

4.7 A similar decision is *Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] 2 IR 114. There, the Supreme Court rejected an argument that a developer, by reference to its previous conduct, was precluded from challenging conditions attached to a planning permission. The respondent had argued that the applicant developer had, in effect, acquiesced to the form of planning condition impugned in the proceedings in that it had failed to challenge an earlier decision imposing similar conditions. The Supreme Court rejected this argument on the basis that estoppel or waiver did not apply in cases of, in this instance, substantive, illegality by a public authority. Giving the judgment of the Court, Hardiman J endorsed the principle stated in *Re Green Dale Building Co.* [1977] IR 256 at 264 by Henchy J.

> The general rule is that a plea of estoppel of any kind cannot prevail as an answer to a well-founded claim that something done by a public body in breach of a statutory duty or limitation of function is ultra vires.

4.8 In terms of jurisdiction, the authority vested in local planning authorities can neither be exceeded and nor can the mandatory nature of what legislation requires be side-stepped. By analogy with the reasoning of the Supreme Court in that case, the planning code is one of public participation through transparency in both notification and the principles that will apply to applicants for development consent. That cannot be set aside in a manner whereby the clear provisions of the law are mandated to apply to all prospective developers but become through, on the facts of this case, some vague assumption inapplicable to whatever class may successfully contend for special treatment. This would set the democratic nature of legislation aside. It would further demean the entitlement of the public to participate in the sustainable and appropriate development of the country through the inclusivity of the planning process. As Hardiman J stated, at page 142 in *Ashbourne Holdings Ltd. v. An Bord Pleanála*:

> First, the impugned conditions are ultra vires and against that most radical form of invalidity estoppel, acquiescence or consent does not avail. It is just that this should be so, in the case of a condition, which however invalid will run with the land. Secondly, it is particularly important that this principle be maintained in the public interest, so as to assert the principle of fairness as between one applicant for an identical or analogous permission and another, and so as to safeguard the integrity and transparency of the administration of the planning code.

Section 261A

5.0 The next group of points argued on behalf of the applicant, McGrath Limestone Works, concerns the applicability of section 261A of the Act of 2000. Some legislative history is called for. In considering these contentions, however, what needs to stay uppermost in the consideration of the Court is what Henchy J, writing extra-judicially, recognised in his seminal article *"The Irish Constitution and the EEC"* and that is the supremacy of the European legal order; see [1977] DULJ 20. By virtue of Article 29.4.10°:

> No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.

5.1 Commenting on the wording of the text then applicable, Henchy J recognised that it was "necessarily inherent in the scheme of the [European Economic Community] that Community law shall have primacy over national law." This he described as a process whereby Ireland and other "member States merge their national identities in a new common law." Thus referencing the commonality of European law and recognising that a new constitutional dispensation had been declared by the people: "It is as if the people of Ireland had adopted Community law as a second but transcendent Constitution."

5.2 Section 261A came into force by insertion through section 75 of the Planning and Development (Amendment) Act 2010 and was brought into force by SI No. 582 of 2011 on 15 November 2011. Virtually every subsection has been referenced and before attempting any summary the section must be quoted, as amended. The section has been amended, by SI No. 473 of 2011 - European Union (Environmental Impact Assessment and Habitats) Regulations 2011, commenced on enactment (21 September 2011) and SI No. 246 of 2012 - European Union (Environmental Impact Assessment and Habitats) Regulations 2012, commenced on enactment (9 July 2012) and reads thus:

> (1) Each planning authority shall, not later than 4 weeks after the coming into operation of this section, publish a notice in one or more than one newspaper circulating in its administrative area and on the authority's website, stating—
>
> *(a)* that it intends to examine every quarry in its administrative area to determine, in relation to that quarry, whether having regard to the Environmental Impact Assessment Directive and the Habitats Directive, one or more than one of the following was required but was not carried out—
>
> (i) an environmental impact assessment;
>
> (ii) a determination as to whether an environmental impact assessment is required;

(iii) an appropriate assessment,

(*b*) that where the planning authority determines in relation to a quarry that an environmental impact assessment, a determination as to whether environmental impact assessment was required, or an appropriate assessment, was required but was not carried out and the planning authority also decides that—

(i) the quarry commenced operation prior to 1 October 1964, or permission was granted in respect of the quarry under Part III of the Planning and Development Act 2000 or Part IV of the Local Government (Planning and Development) Act 1963, and

(ii) if applicable, the requirements in relation to registration under section 261 of the Planning and Development Act 2000 were fulfilled, the planning authority will issue a notice to the owner or operator of the quarry requiring him or her to submit an application to the Board for substitute consent, such application to be accompanied by a remedial environmental impact statement or a remedial Natura impact statement or both of those statements, as appropriate,

(*c*) that where the planning authority determines in relation to a quarry that an environmental impact assessment, a determination as to whether environmental impact assessment was required, or an appropriate assessment was required, but was not carried out and the planning authority also decides that —

(i) the quarry commenced operation on or after 1 October 1964 and no permission was granted in respect of the quarry under Part III of the Planning and Development Act 2000 or Part IV of the Local Government (Planning and Development) Act 1963, or

(ii) if applicable, the requirements in relation to registration under section 261 of the Planning and Development Act 2000 were not fulfilled, the planning authority will issue a notice to the owner or operator of the quarry informing him or her that it intends to issue an enforcement notice under section 154 requiring the cessation of the operation of the quarry and the taking of such steps as the planning authority considers appropriate,

(*d*) that where the planning authority determines in relation to a quarry that an environmental impact assessment, a determination as to whether an environmental impact assessment was required, or an appropriate assessment, was required but was not carried out and the planning authority also determines that the development in question was carried out after 3 July 2008, the planning authority will issue a notice to the owner or operator of the quarry informing him or her that it intends to issue an enforcement notice under section 154 requiring the cessation of the operation of the quarry and the taking of such steps as the planning authority considers appropriate,

(*e*) that submissions or observations may be made in writing to the planning authority in relation to any quarry in its administrative area, by any person, not later than 6 weeks after the date of the publication of the notice under paragraph *(a)*, that no fee in relation to the making of the submissions or observations shall be payable and that such submissions or observations will be considered by the planning authority,

(*f*) that a copy of any notice that is issued to the owner or operator of a quarry under this section, directing him or her to apply to the Board for substitute consent or informing him or her that the planning authority intends to issue an enforcement notice under section 154 in respect of the quarry, shall be given to a person who, not later than 6 weeks after the date of the publication of the notice under paragraph *(a)* made submissions or observations, and

(*g*) that an owner or operator of a quarry to whom a notice is issued, and any person to whom a copy of such a notice is given, may apply to the Board for a review of a determination or a decision, or both, of the planning authority referred to in the notice and that no fee in relation to the application for a review shall be payable.

(2) *(a)* Each planning authority shall, not later than 9 months after the coming into operation of this section examine every quarry within its administrative area and make a determination as to whether—

(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.

(*b*) In making a determination under paragraph *(a)*, the planning authority shall have regard, to the following matters:

(i) any submissions or observations received by the authority not later than 6 weeks after the date of the publication of the notice under subsection (1)*(a)*;

(ii) any information submitted to the authority in relation to the registration of the quarry under section 261;

(iii) any relevant information on the planning register;

(iv) any relevant information obtained by the planning authority in an enforcement action relating to the quarry;

(v) any other relevant information.

(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.

(*b*) In making a decision under paragraph *(a)*, a planning authority shall consider all relevant information available to it including any submissions or observations received by the authority not later than 6 weeks after the date of the publication of the notice under subsection (1)*(a)*.

(*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) that 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 under subsection (2)*(a)* or the decision of the planning authority under paragraph *(a)*, and that no fee in relation to either application for a review shall be payable.

(*d*) At the same time that the planning authority issues the notice to an owner or operator of a quarry, the authority shall —

(i) give a copy of the notice to any person who not later than 6 weeks after the date of the publication of the notice under subsection (1)*(a)*, made submissions or observations to the authority in relation to the quarry,

(ii) inform that person that he or she may, not later than 21 days after the date of the notice, apply to the Board for a review of the determination under subsection (2)*(a)* or the decision of the authority under paragraph *(a)* and that no fee in relation to either application for a review shall be payable, and

(iii) forward a copy of the notice to the Board.

(4) *(a)* Where a planning authority makes a determination under subsection

(2)*(a)* and the authority also decides that—

(i) the quarry commenced operation on or after 1 October 1964 and no permission was granted in respect of the quarry under

Part III of this Act or Part IV of the Act of 1963, or

(ii) if applicable, the requirements in relation to registration under section 261 were not 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.

(*b*) In making a decision under paragraph *(a)*, a planning authority shall consider all relevant information available to it, including any submissions or observations received by the authority not later than 6 weeks after the date of the publication of the notice under subsection (1)*(a)*.

(*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 planning authority intends to issue an enforcement notice in relation to the quarry under section 154 requiring the cessation of the unauthorised quarrying and the taking of such steps as the authority considers

appropriate;

(iv) that the person may apply to the Board, not later than 21 days after the date of the notice, for a review of the determination under subsection (2)*(a)* or the decision of the planning authority under paragraph *(a)*, and that no fee in relation to either application for a review shall be payable.

(*d*) At the same time that the planning authority issues the notice to an owner or operator of a quarry, the authority shall —

(i) give a copy of the notice to any person who not later than 6 weeks after the date of the publication of the notice under subsection (1)*(a)*, made submissions or observations to the authority in relation to the quarry, and

(ii) inform that person that he or she may, not later than 21 days after the date of the notice, apply to the Board for a review of the determination of the planning authority under subsection (2)*(a)* or the decision of the planning authority under paragraph *(a)* and that no fee in relation to either application for a review shall be payable.

(5) *(a)* Notwithstanding anything contained in subsection (3) or (4), where a planning authority makes a determination under subsection (2)*(a)* and the authority further determines that subparagraph (i) or (ii) or both, if applicable, of subsection (2)*(a)* apply to the development which took place after 3 July 2008, the authority shall also decide whether—

(i) 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, and 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.

(*b*) In making a decision under paragraph *(a)*, a planning authority shall consider all relevant information available to it, including any submissions or observations received by the authority not later than 6 weeks after the date of the publication of the notice under subsection (1)*(a)*.

(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 of the planning authority under subsection (2)*(a)* and the reasons therefor;

(ii) the determination of the planning authority under paragraph*(a)* that subparagraph (i) or (ii) or both, if applicable, of subsection (2)*(a)* apply to the development which took place after 3 July 2008, and the reasons therefor;

(iii) the decision of the planning authority under paragraph *(a)* and the reasons therefor;

(iv) that the planning authority intends to issue an enforcement notice in relation to the quarry under section 154 requiring the cessation of the unauthorised quarrying and the taking of such steps as the authority considers appropriate;

(v) that 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 under subsection (2)*(a)*, the determination of the planning authority under paragraph *(a)*, or the decision of the planning authority under paragraph *(a)*, and that no fee in relation to any application for a review shall be payable.

(*d*) At the same time that the planning authority issues the notice to an owner or operator of a quarry, the authority shall —

(i) give a copy of the notice to any person who made submissions or observations to the authority in relation to the quarry not later than 6 weeks after the date of the publication of the notice under subsection (1)*(a)*, and

(ii) inform that person that he or she may, not later than 21 days after the date of the notice, apply to the Board for a review of subparagraph (i) or (ii) or both, if applicable, of subsection (2)*(a)* apply to the development which, the determination of the planning authority under paragraph *(a)* that the development the subject of the determination under subsection (2)*(a)* took place after 3 July 2008 or the decision of the planning authority under paragraph *(a)*, and that no fee in relation to any application for a review shall be payable.

(6) *(a)* A person to whom a notice was issued under subsection (3)*(a)*, (4)*(a)* or

(5)*(a)*, or a person to whom a copy of such a notice was given under subsection (3)(*d*), (4)(*d*) or (5)(*d*), may not later than 21 days after the date of the notice so issued or given to him or her, apply to the Board for a review of one or more than one, of the following, referred to in the notice:

(i) a determination under subsection (2)*(a)*;

(ii) a decision of the planning authority under subsection (3)*(a)*;

(iii) a decision of the planning authority under subsection (4)*(a)*;

(iv) a determination of the planning authority under subsection (5)*(a)* that the development the subject of subparagraph (i) or (ii) or both, if applicable, of subsection (2)*(a)* apply to the development which took place after 3 July 2008;

(v) a decision of the planning authority under subsection (5)*(a)*.

(*b*) Where an application for a review is made to the Board under paragraph *(a)* any person may make submissions or observations not later than 21 days after the date of the notice issued under subsection (3)*(a)*, (4)*(a)* or (5)*(a)*, as the case may be.

(*c*) Where an application for a review is made under paragraph *(a)*, the Board shall inform the planning authority and shall request the planning authority to furnish to it such information as the Board considers necessary to make a decision in relation to the review, and the planning authority shall comply with that request within the period specified in the request.

(*d*) The Board in making a decision on an application for a review under paragraph *(a)* shall consider any documents or evidence submitted by the person or persons who applied for the review, any submissions or observations received under paragraph (*b*) and any information furnished by the planning authority under paragraph (*c*).

(e) The Board shall make a decision as soon as may be whether to confirm or set aside the determination or decision of the planning authority to which the application for a review refers.

(*f*) As soon as may be after the Board makes its decision under paragraph

(*e*) it shall give notice of its decision to the person or persons who applied for the review, and to the planning authority concerned, and the giving of the notice shall, for the purposes of this section be considered to be the disposal, by the Board, of the review.

(*g*) The application to the Board for a review under paragraph *(a)* shall have the effect of suspending the operation of a direction contained in a notice issued under subsection (3)*(a)* until the review is disposed of.

(*h*) Where the decision of the Board is to set aside a determination under subsection (2)*(a)* a direction to apply for substitute consent contained in a notice issued under subsection (3)*(a)* shall cease to have effect.

(7) Where in relation to a quarry in respect of which a notice has been issued under subsection (3)*(a)*—

(a) either no application has been made to the Board for a review of a determination under subsection (2)*(a)* or the Board in making a decision in relation to such a review has confirmed the determination of the planning authority, and

(b) either no application has been made to the Board for a review of a decision of the planning authority under subsection (3)*(a)* or the Board in making a decision in relation to such a review has confirmed the decision of the planning authority, the person to whom the notice was issued under subsection (3)*(a)* shall apply to the Board for substitute consent under section 177E not later than 12 weeks after the date of the giving of the notice of its decision under subsection (6)(*f*) by the Board, or such further period as the Board may allow, save that where no application for review was made to the Board the person to whom the notice was issued under subsection (3)*(a)* shall apply to the Board for substitute consent within the period specified in that notice.

(8) Where in relation to a quarry in respect of which a notice has been issued under subsection (3)*(a)*—

(a) either no application has been made to the Board for a review of a determination under subsection (2)*(a)*, or the Board in making a decision in relation to such a review has confirmed the determination of the planning authority, and

(b) the Board in making a decision in relation to a review of a decision of the planning authority under subsection (3)*(a)* has set aside the decision of the planning authority, the direction to apply for substitute consent contained in the notice issued under subsection (3)*(a)* shall cease to have effect and the planning authority shall, as soon as may be after the date of the giving of the notice of its decision by the Board under subsection (6)(*f*), issue an enforcement notice under section 154 requiring the cessation of the unauthorised quarrying and the taking of such steps as the planning authority considers appropriate.

(9) Where in relation to a quarry in respect of which a notice has been issued under subsection (4)*(a)*—

(a) either no application has been made to the Board for a review of a determination under subsection (2)*(a)* or the Board in making a decision in relation to such a review has confirmed the determination of the planning authority, and

(b) either no application has been made to the Board for a review of a decision of the planning authority under subsection (4)*(a)* or the Board in making a decision in relation to such a review has confirmed the decision of the planning authority, the planning authority shall, as soon as may be after the expiration of the period for applying for a review or the date of the giving of the notice of its decision by the Board under subsection (6)(*f*), as the case may be, issue an enforcement notice under section 154 requiring the cessation of the unauthorised quarrying and the taking of such steps as the planning authority considers appropriate.

(10) Where in relation to a quarry in respect of which a notice has been issued under subsection (4)*(a)*—

(a) either no application has been made to the Board for a review of a determination under subsection (2)*(a)* or the Board in making a decision in relation to such a review has confirmed the determination of the planning authority, and

(b) the Board in making a decision in relation to a review of a decision under subsection (4)*(a)* has set aside the decision of the planning authority, and

(c) either no application has been made to the Board for a review of a decision of the planning authority under subsection (4)*(a)*(i) that the quarry commenced operation prior to 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, or the Board in a review of such a decision has decided that 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

(d) either no application has been made to the Board for a review of a decision of the planning authority under subsection (4)*(a)*(ii) that if applicable, the requirements in relation to registration under section 261 were fulfilled, or the Board in a review of such a decision has decided that, if applicable, the requirements in relation to registration under section 261 were fulfilled, the planning authority shall, as soon as may be after the date of the giving of the notice of its decision by the Board under subsection (6)(*f*), issue a notice to the owner or operator of the quarry directing him or her to apply to the Board for substitute consent 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 issued by the planning authority under this subsection or such further period as the Board may allow.

(11) Where in relation to a quarry in respect of which a notice has been issued under subsection (5)*(a)*—

(a) either no application has been made to the Board for a review of a determination under subsection (2)*(a)* or the Board in making a decision in relation to such a review has confirmed the determination of the planning authority, and

(*b*) either no application has been made to the Board for a review of a determination of the planning authority under subsection (5)*(a)* that subparagraph (i) or (ii) or both, if applicable, of subsection (2)*(a)* apply to the development which took place after 3 July 2008 or the Board has confirmed the determination of the planning authority under subsection (5)*(a)*, the planning authority shall, as soon as may be after the expiration of the period for applying for a review or the date of the giving of the notice of its decision by the Board under subsection (6)(*f*), as the case may be, issue an enforcement notice under section 154 requiring the cessation of the unauthorised quarrying and the taking of such steps as the planning authority considers appropriate.

(12) Where in relation to a quarry in respect of which a notice has been issued under subsection (5)*(a)* and—

(a) either no application has been made to the Board for a review of the determination under subsection (2)*(a)* or the Board in making a decision in relation to such a review has confirmed the determination of the planning authority, and

(*b*) the Board, in making a decision in relation to a review of such a notice has set aside the determination of the planning authority under subsection (5)*(a)* that subparagraph (i) or (ii) or both, if applicable, of subsection (2)*(a)* apply to the development which took place after 3 July 2008, and

(*c*) either no application has been made to the Board for a review of a decision of the planning authority under subsection (5)*(a)*(i) that the quarry commenced operation prior to 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, or the Board in a review of such a decision has decided that 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

(*d*) either no application has been made to the Board for a review of a decision of the planning authority under subsection (5)*(a)*(ii) that if applicable, the requirements in relation to registration under section 261 were fulfilled or the Board in a review of such a decision has decided that if applicable, the requirements in relation to registration under section 261 were fulfilled, the planning authority shall, as soon as may be after the date of the giving of the notice of its decision by the Board under subsection (6)(*f*), issue a notice to the owner or operator of the quarry directing him or her to apply to the Board for substitute consent 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 issued by the planning authority under this subsection, or such further period as the Board may allow.

(13) Where in relation to a quarry in respect of which a notice has been issued under subsection (5)*(a)*—

(a) either no application has been made to the Board for a review of the determination under subsection (2)*(a)* or the Board in making a decision in relation to such a review has confirmed the determination of the planning authority, and

(*b*) the Board, in making a decision in relation to a review has set aside the determination of the planning authority under subsection (5)*(a)* that subparagraph (i) or (ii) or both, if applicable, of subsection (2)*(a)* apply to the development which took place after 3 July 2008, and

(*c*) either—

> (i) no application has been made to the Board for a review of a decision of the planning authority under subsection (5)*(a)*(i) that the quarry commenced operation on or after 1 October 1964 and no permission was granted in respect of the quarry under Part III of this Act or Part IV of the Act of 1963, or the Board in a review of such a decision has decided that the quarry commenced operation on or after 1 October 1964 and no permission was granted in respect of the quarry under Part III of this Act or Part IV of the Act of 1963, or
>
> (ii) no application has been made to the Board for a review of a decision of the planning authority under subsection (5)*(a)*(ii) that if applicable, the requirements in relation to registration under section 261 were not fulfilled, or the Board in a review of such a decision has decided that, if applicable, the requirements in relation to registration under section 261 were not fulfilled,

the planning authority shall, as soon as may be after the date of the giving of the notice of its decision by the Board under subsection (6)(f), issue an enforcement notice under section 154 requiring the cessation of the unauthorised quarrying and the taking of such steps as the planning authority considers appropriate.

(14) Where an application for substitute consent is required to be made under this section it shall be made in relation to

that development in respect of which the planning authority has made a determination under subsection (2)*(a)*.

(15) The provisions of Part XA shall apply, as appropriate, to an application for substitute consent made in accordance with a direction under subsection (3), (10) or (12).

(16) On or before 15 August 2012, notwithstanding sections 177C and 177D, the Board shall refuse to consider, in respect of a quarry, an application for leave to apply for substitute consent under section 177C made to the Board during the period commencing on 15 November 2011 and ending on 15 August 2012 and shall return any such application to the person who makes the application.

(17) Nothing in subsection (16) shall prevent the Board from considering, in respect of a quarry, an application for leave to apply for substitute consent under section 177C made to the Board after 15 August 2012.

(18) *(a)* The Board, before considering any application, in respect of a quarry, for leave to apply for substitute consent under section 177C shall make enquiries and request information of the applicant or planning authority concerned as to whether one of the following has occurred:

(i) the planning authority, under this section, has decided that no notice is required to be issued in respect of the quarry concerned;

(ii) a notice was issued by the planning authority under subsection (4) or (5) and no application was made to the Board for a review of such notice within the period specified in subsection (6)(a);

(iii) a notice was issued by the planning authority under subsection (3), (4) or (5) and an application was made to the Board for a review of such notice within the period specified in subsection (6)(a);

(iv) an enforcement notice was issued by the planning authority under subsection (8), (9), (11) or (13), which notice has or has not been complied with.

(b) When the information requested at paragraph (a) has been received by the Board it may proceed to consider the application for leave to apply for substitute consent, save that where a notice under subsection (3), (4) or (5) has been referred to the Board for a review under subsection (6), it may not proceed to consider the application for leave concerned until it has made a decision on the application for a review under subsection (6).

(c) The Board shall, when considering an application for leave to apply for substitute consent in relation to a quarry, in addition to any matter referred to in sections 177C and 177D, take into account the matters referred to at paragraph (a) including any decision made by the Board under subsection (6) on an application for a review of a notice issued by a planning authority referred to it under that subsection.

(19) Section 177D(5) shall apply in relation to an application, in respect of a quarry, for leave to apply for substitute consent subject to the modification that it shall be read as if in that subsection the following subparagraph were included and subject to any other necessary modifications:

"(aa)6 weeks after the Board has received information following enquiries under section 261A(18) or 6 weeks after the Board makes a decision on an application for a review under section 261A(6) of a notice issued by a planning authority whichever shall be later,".

5.3 The obligations referred to were introduced by two Council Directives. The first of these is Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5.7.1985, p. 40 which came into force on 3 July 1988. Ireland, however, was late in implementation. This Directive, the "EIA Directive" was given effect in Irish Law by SI No. 456 of 2011 - European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011. The second is Council Directive 92/43/EEC of 21 May, 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7 which came into force on the 10 June, 1994. This second Directive, "the Habitats Directive" was given effect in Irish Law by SI No. 94 of 1997 - European Communities (Natural Habitats) Regulations, 1997. Hence subsection 2 of section 261A of the Act of 2000, sets dates well after the relevant times set out in the two Directives, namely February 1990 in respect of the former and February 1997 for the latter. In part this was because of late implementation by Ireland.

5.4 Even absent the European law obligation, there would have been nothing wrong with local planning authorities examining whether businesses had been complying with the regulations implementing those Directives. In addition, the date set out of 3 July 2008 in subsections (1), (5), (6), (11), (12) and (13) requires that development carried out after that time be responded to by the local planning authority. This may require an enforcement notice. As regards the EIA Directive, quarries with an extraction area of more than 5 hectares, pursuant to national law, are required to have an impact study done before authorisation is possible. As regards the Habitats Directive, the test is whether a project is likely to have a significant effect on a European site. The applicability here of both is difficult to elide. This quarry is situated directly between Lough Corrib and Lough Mask, thus taking in two sensitive sites in counties Galway and Mayo. Both are a significant tourist resource as well as being of environmental significance. In argument, no party to this case has doubted the applicability of the relevant Directives. What is urged by McGrath Limestone Works, instead, is that the quarry is outside planning control due to pre-October 1964 use and any ruling which questions that status effectively amounts to a condemnation.

5.5 The relevant notice by Mayo County Council here was issued on 17 August 2012. The operative part refers to an examination appropriate to section 261A of the Act of 2000, as amended, and that Mayo County Council has determined:

(i) Development was carried out after 1 February 1990 which was not authorised by a permission granted under part IV of the Act of 1963, prior to 1 February 1990, which development would have required, having regard to the Environmental Impact Assessments Directive, an environmental impact assessment or a determination as to whether an environmental impact assessment was required, and that such an assessment determination was not carried out or made.

(ii) Development was carried out after 26 February 1997, which was not authorised by a permission granted under part IV of the Act of 1963 prior to 26 February 1997, which development would have required, having regard to the Habitats Directive, an appropriate assessment, and that such an assessment was not carried out.

5.6 The reasons for this were cited as follows:

1. The quarry claims to have commenced before 1st of October 1964.

2. The quarry was registered under section 261 of the Planning and Develop and Act 2000.

3. It is considered that development is carried out after 1st February 1990 which would have required, having regard to the Environmental Impact Directive, an environmental impact assessment, or a determination as to the adverse impacts on the environment in terms of noise, dust, traffic and potential water pollution at this location.

4. It is considered due to the uncertainty of the potential impacts the quarry would have had on the Natura 2000 sites in the area namely, Lough Carra/ Lough Mask Complex [candidate special area of conservation]… and Lough Corrib [candidate special area of conservation]… that development carried out after 26th of February 1997, having regard to the Habitats Directive, would have required an Appropriate Assessment, but that such an assessment was not carried out.

5.7 The operative part of the notice was thus:

You are therefore directed to apply to An Bord Pleanála for substitute consent in respect of the quarry under section 177E of the Planning and Development Acts 2000-2010, not later than 12 weeks after the date of this notice, or such further period as the Board may allow.

The application for substitute consent shall be accompanied by a Remedial Environmental Impact Statement and an Appropriate Assessment.

5.8 While section 261A changed the law, it was not locally inspired. The alteration in the planning code that section 261A of the Act of 2000 is came about because of lax planning considerations in Ireland that led to case C-215/06 *Commission v Ireland* [2008] ECR I-4911. This concerned a widespread practice whereby local planning authorities granted planning permission after buildings had been built or quarries opened up or extended, and despite no environmental assessment or appropriate assessment being done, to developers who had never applied for planning permission. It was ruled by the Court of Justice of the European Union that the granting of retention permission for developments bypassed those situations where a project required an appropriate assessment or an environmental impact assessment under the European legislation enabling them to be authorised subsequent to completion. Under both Directives, however, projects that commenced before the passing of the legislation were allowed, as an exception, to run to completion. In this case that argument too has been run. Here, the claim that a use dating back prior to 1964 came within that exception in both Directives becomes distinctly unattractive in the light of the factual analysis conducted both by Mayo County Council and, on review, by An Bord Pleanála. In the light of the actual facts, the argument that the development started before the law came into force is untenable. Similar observations are inescapable as regards claims that pre-1990 and pre-1997 developments are being wrongly captured; which is an argument in addition in national law. As might be observed, following on from the analysis of Henchy J referenced earlier, European law requires the judicial system to effectively cooperate in the establishment of a single European legal order. That obligation embraces all organs of administration, government and legislation in every Member State. In *Commission v Ireland* there was unrestrained condemnation of a legal order which having not detected projects deleterious to the environment, because they were not reported by developers, could subsequently authorise these without the need for any assessment as to their effects on either protected habitats or on the environment. Thus paragraphs 58 to 61 set out the then existing legal deficit at the time of the judgment on 3 July 2008:

58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59 Lastly, Ireland cannot usefully rely on *Wells*. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60 This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61 It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

5.9 On the issue of whether the then legal status involving retention permission and the proper transposition and implementation of the environmental impact Directive, the Court commented at paragraphs 74-77 as follows:

74 It is undisputed that, in Ireland, the absence of an environmental impact assessment required by Directive 85/337 as amended can be remedied by obtaining a retention permission which makes it possible, in particular, to leave projects which were not properly authorised undisturbed, provided that the application for such a permission is made before the

commencement of enforcement proceedings.

75 The consequence of that possibility, as indeed Ireland recognises, may be that the competent authorities do not take action to suspend or put an end to a project that is within the scope of Directive 85/337 as amended and is being carried out or has already been carried out with no regard to the requirements relating to development consent and to an environmental impact assessment prior to issue of that development consent, and that they refrain from initiating the enforcement procedure provided for by the PDA, in relation to which Ireland points out that the powers are discretionary.

76 The inadequacy of the enforcement system set up by Ireland is accordingly demonstrated inasmuch as the existence of retention permission deprives it of any effectiveness, and that inadequacy is the direct consequence of the Member State's failure to fulfil its obligations which was found in the course of consideration of the first two pleas in law.

77 That conclusion is not affected by the fact that, according to Ireland, the enforcement regime must take account of the various competing rights held by developers, landowners, the public and individuals directly affected by the development. The need to weigh those interests cannot in itself provide justification for the ineffectiveness of a system of control and enforcement.

5.10 It is difficult to know how the necessity for Ireland to react through legislation could be doubted. Instead of being an imposition on quarries, as is contended by McGrath Limestone Works, the legislature, in implementing the strictures of this condemnation, have enabled every quarry to be what is, in effect, a special case: a complete exception to the strictures of what European law requires. In that context, requiring a quarry owner to which that section applies to seek substitute consent and in doing so fulfil the European law obligations which is part of the Irish legal order is entirely reasonable. As to the argument that the notice from Mayo County Council constituted a condemnation and was, therefore, somehow unlawful, such is untenable when set against the background of transparency through public participation that mirrors other provisions of the planning code. 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. That situation was always more than dubious given the absence of an appropriate environmental impact assessment and, as with any situation considered undesirable, the Oireachtas is entitled to legislate in respect of it even had no European obligation arisen.

5.11 In so far as arguments have been addressed to the procedures under the section, these must be judged in the light of the full entitlements set within the statute, including the entitlement should there be a need, of An Bord Pleanála as the body reviewing the decision, to hold an oral hearing pursuant to section 134A of the Act of 2000, as inserted by the Planning and Development (Strategic Infrastructure) Act 2006 (commenced on 31 January 2007 by the Planning and Development (Strategic Infrastructure) Act 2006(Commencement) (No. 3) Order 2006 (SI No. 684 of 2006), should it consider same necessary or expedient. Further, there was ample opportunity for representation by the quarry owner. This was skilfully availed of. There is no need to resort to either the presumption of constitutionality or to the principles of constitutional construction or implementation since the detailed terms of section 261 and of section 261A were followed both by Mayo County Council and by An Bord Pleanála in a manner that, no doubt from long experience, was regarded as fulfilling the statement of Walsh J in *East Donegal Co-operative Livestock Market Ltd. v Attorney General* [1970] IR 317 at 341.

> [T]he presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts.

5.12 Here, there was no want of fair process. Interested parties had the chance to plead their points of view as to the facts. Had a question of law arisen, it could have been referred by An Bord Pleanála to the High Court under section 50(1) of the Act of 2000. The issue raised as to constitutionality is properly considered only at the end of this judgment.

Improper analysis

6.0 Moving from the constitutional point the issue arises as to whether there was or was not a proper analysis by Mayo County Council or by An Bord Pleanála. The Court has considered the facts carefully. There was a thorough and accurate analysis at both levels. That analysis was not concerned with condemnation and was not geared towards possible enforcement proceedings; instead it was entirely concerned with the implementation of section 261A of the Act of 2000 in a manner consistent with the European law obligations of the State. This point is best seen in the context of the overall analysis as to what use, lack of use, intensification of use, planning permissions granted, buildings constructed and accretion of land holding had been made at the quarry site in question.

Reasons

7.0 Multiple written decisions on the duty to give reasons, and of what quality, abound on the Courts Service website, www.courts.ie, overtaking even cases on quarries. The reasons of An Bord Pleanála have been earlier set out in this judgment.

7.1 A rational approach to legal principles as to what reasons those faced with administrative or judicial decisions have an entitlement to should not mistake the surface that is the declaration of why a decision was made for the underlying comprehension that may accompany such a person. Laconic reasons from a judge for dismissing a civil case, such as that he or she could not possibly believe the plaintiff, seem inadequate if put on paper for analysis by a person who had not been party to the case, but look entirely different where the person hearing them had sat throughout the case in court and witnessed a series of incredible statements from that source. Accordingly, any response to reasons must take into account the relevant context. In *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 at 76 Finlay CJ said:

> What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons.

7.2 In planning matters, the entire file of application papers and observations on the project is publicly available. On appeal, the report of an inspector becomes available only after the decision. There may, as mentioned earlier, also be an oral hearing with full participation and public observation. It is in that context that argument as to the adequacy or otherwise of reasons is to be considered.

7.3 On behalf of the applicant McGrath Limestone Works, it is argued that An Bord Pleanála are required under section 34(10) of the Act of 2000 to give the main reasons and considerations for their decision. It is claimed that the reasons given are inadequate.

Further, it is said that the express terms of section 261A require a review of the decision of Mayo County Council by An Bord Pleanála and that there was no consideration of that at all. It is further said that the statutory inspector appointed was wrongly concerned with the quarry and its history, and not the decision of Mayo County Council.

7.4 Section 34(10) of the Planning and Development Act 2000 constitutes a statutory code whereby a planning authority, which includes on appeal, An Bord Pleanála, is required to state reasons for its decisions. It reads:

> (10) (a) A decision given under this section or *section 37* and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions, provided that where a condition imposed is a condition described in *subsection (4),* a reference to the paragraph of *subsection (4)* in which the condition is described shall be sufficient to meet the requirements of this subsection.
>
> (b) Where a decision by a planning authority under this section or by the Board under *section 37* to grant or to refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in -
>
> (i) the reports on a planning application to the manager (or such other person delegated to make the decision) in the case of a planning authority, or
>
> (ii) a report of a person assigned to report on an appeal on behalf of the Board,
>
> a statement under *paragraph (a)* shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission.

7.5 In *Grealish v. An Bord Pleanála* [2007] 2 IR 536, at 553, Ó Néill J described the legal duty arising under section 34(10) of the 2000 Act as "a very light one, one could even say almost minimal". A classic statement of the relevant principles arises from the decision of Kelly J in *Mulholland v. An Bord Pleanála* (No.2) [2006] 1 IR 453. This is incorporated in the analysis conducted by Hedigan J in *O'Neill v An Bord Pleanála* [2009] IEHC 202 at paragraphs 34 and 37 where he held, with specific regard to the section 34(10)(b) situation that:

> There was no obligation to provide detailed reasoning equivalent to the highly professional and highly detailed report of the inspector herself. Only the main reasons were required and, in my opinion, they were amply provided… The respondent was not required to deliver a discursive judgment nor to engage in a full re-evaluation of the inspector's report.

7.6 At paragraphs 27-33, Hedigan J set out a most useful summary of the law on reasons in administrative decisions as follows:

> First, it is well-established as a general rule that reasons need not be discursive. This was made clear by Murphy J in the decision of *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750. He stated at page 757:-
>
> > "It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of [its] deliberations."
>
> However, this principle is not without limits and it is apparent that a standardised or formulaic decision will not suffice. Indeed, in *O'Donoghue*, Murphy J went on to state, also at page 757:-
>
> > "[T]he need for providing the grounds of the decision… could not be satisfied by recourse to an uninformative if technically correct formula."
>
> The respondent, therefore, is not obliged to engage in a lengthy review or analysis of its own reasoning when communicating its decision. Furthermore, and of particular relevance for present purposes, section 34(10)(b) only requires that the respondent should explain its decision to differ from the overall recommendation of an inspector, as opposed to the specific conditions suggested by him or her. In *Dunne v. An Bord Pleanála* [2006] IEHC 400, McGovern J stated as follows:-
>
> > "It seems to me that the submission of the first respondent is correct and that there is no obligation on the first named respondent to give reasons why it disagreed with its planning inspector on a particular condition which was recommended by the inspector to be imposed."
>
> The second principle of general application is that the adequacy of reasons should be assessed from the perspective of an intelligent person who has participated in the relevant proceedings and is appraised of the broad issues involved. This requires that the respondent's decision should not simply be read in isolation but rather in conjunction with any conditions attached thereto. In *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39, Finlay CJ stated the following:-
>
> > "I am satisfied that there is no substance in the contention made on behalf of the plaintiff that the Board should be prohibited from relying on a combination of the reason given for the decision and the reasons given for the conditions, together with the terms of the conditions. There is nothing in the statute which would justify such a rigid approach and it would be contrary to common sense and to fairness."
>
> … The third and final general principle is that the reasons should provide a certain minimum standard of practical enlightenment. In *Mulholland v. An Bord Pleanála* [2006] 1 IR 453, Kelly J held at page 465 that a statement of reasons must:-
>
> > "(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;
> >
> > (2) arm [the applicant] for such hearing or review;

(3) [enable the applicant to] know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and

(4) enable the courts to review the decision."

The decision of *Fairyhouse Club Limited v. An Bord Pleanála* [2001] IEHC 106 also bears relevance to this principle. In that case, Finnegan P held that even in circumstances where the reasons provided in support of a determination were terse, the decision maker would not have acted unlawfully unless the applicant had been prejudiced in some way. The Court must therefore consider whether its role, or indeed the position of the applicant, has been appreciably hampered by the respondent's formal decision.

7.8 Hedigan J regarded it as an additional principle that while some might argue that because an applicant had been able to commence judicial review proceedings because of that fact alone the action should fail. Rather, he said, the "true question is whether the applicant has suffered any prejudice arising out of the brevity of the respondent's rationalisation…" Indeed it was acknowledged in *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59 that circumstances can exist where it is not necessary for the reasons to accompany the decision itself. This emerges from paragraph 66 of the judgment of Fennelly J:

The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.

7.9 Turning away from planning law and into the filed of data protection, it is perhaps worth noting that similar considerations animate what is or is not an adequate set of reasons for a decision. In *EMI Records (Ireland) Limited v Data Protection Commissioner* [2013] IESC 34 the Supreme Court upheld the determination of the High Court that inadequate reasons had been given for putting an end to a graduated response type solution to copyright theft over the internet. Clarke J gave the judgment of the Court and his approach to the analysis of this issue does not depart from the stated principles but rather elucidates them by drawing together the various strands.

7.10 The function of An Bord Pleanála under section 261A was to review and then to confirm or set-aside the determinations reached under section 261A(2)*(a)* and section 261A(3)*(a)*. The reasons given in respect of section 261A(2)*(a)*(i) and (ii) are transparent from the relevant wording. Such are even more transparent when read in conjunction with the report of the inspector. A similar comment applies in respect of section 261A(3)*(a)*: the reasons are entirely clear. This Court can find no defect in the reasoning of An Bord Pleanála or inadequacy in the reasons stated for same. A reasonable person reading the planning file, or indeed a reasonable person without the planning file, would readily understand what the decision of An Bord Pleanála was and would also comprehend the reasons underpinning that decision.

Reasonableness and intensification of use
8.0 In relation to the claim that An Bord Pleanála acted unreasonably, the burden of proof in that regard is born by the applicant McGrath Limestone Works. In *Weston Limited v An Bord Pleanála* [2010] IEHC 255, this Court attempted an outline of what the assumption of that burden required at paragraphs 11 and 12:

11. The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. Furthermore, where, as a colourable device, a reason is chosen for refusing permission which does not give rise to an entitlement to compensation under the legislation, the burden of proving that a decision choosing such an incorrect reason for that improper purpose rests on the applicant. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal on a non-compensatory ground is sufficient to support the lawfulness of a decision. Of course, in an appropriate case, it might be possible to prove that a decision was made for an improper purpose or that a conclusion or recommendation in an inspector's report was not arrived at in good faith. That burden however, rests on the applicant for judicial review who seeks to impugn such a decision. Some material ground, upon which such an attack might reasonably be regarded as being capable of being mounted, must be shown in evidential terms before even leave to argue such ground would be granted. In accordance with the legislative circumscription of judicial review appeals against planning decisions, substantial grounds would have to be shown to justify granting leave on such a point.

12. In *Lancefort Limited v. An Bord Pleanála* (Unreported, High Court, McGuinness J, 12th March, 1998), the following passage on the burden of proof, at pp. 21-22, which applies as much to a planning authority as to An Bord Pleanála appears:-

"Counsel for the Notice Party also submitted that where the evidence as to whether a statutory body entrusted by the legislator with a particular function did not exercise its statutory duties, there is a presumption of validity in favour of the decision under attack Finlay P in *re Comhltas Ceolteorí Éireann* (High Court unreported 14th December, 1977) said (at pages. 3-4 of the transcript of his Judgment):

> "A planning authority is a public authority with a decision making capacity acting in accordance with statutory powers and duties. In my view, there is rebuttable presumption that its acts are valid."

It appears to me that this submission is wellfounded. The onus of prove [*sic*] in establishing that An Bord Pleanála did not consider the question of environmental impact assessment and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant. That burden of proof, it seems to me, has not been fully discharged.

In addition, the Court has discretion in regard to Orders sought by way of judicial review. In this case, the Board [sic] had before it ample material on which to make its decision. The report of the inspector raises and refers to many of the matters which would also be covered in a environmental impact assessment. Finally, no participant in the oral hearing suggested that an environmental impact assessment was required. Bearing all these matters in mind I would be reluctant to exercise my discretion in favour of the Applicant on this point".

8.1 These principles are applicable here. But, it has often been asked: what intensification of use brings a pre-planning code business inside the scope of the Act of 2000? This has led to multiple cases. Of these, the one which is most often cited is also most debated; *Waterford County Council v John A Wood* [1999] 1 IR 556. This Supreme Court decision concerned a quarry in Kilgrainey. Since October 1964, it had expanded by the addition 36 acres of extra lands, previously leased from a man called Looby, in 1972, and the purchase of another 96 acres in 1986 from a man called Doyle. While the entitlement to remain outside the planning code allowed the continuation of the existing use of lands, and in the case of a quarry its completion, it did not permit intensification. According to the Supreme Court, any analysis of what was permitted to be continued required an examination of all of the established facts in order to adjudicate what might reasonably have been anticipated in light of the works taking place as of October 1964. Both a distinct operation and a different phase from the works being carried out on entry into force of the planning code in 1964 required planning permission. With a view to arriving at a correct view of the decision, it is of interest to quote the arguments of counsel as summarised in the judgment of Murphy J at pages 560-561:

> Counsel on behalf of the Respondents contended, first, that quarrying of the seam of limestone having commenced before and continuing at the appointed day there was no obligation to obtain planning permission for the continuation of those works even if they were to continue for many years and over a very substantial area. Alternatively, the Respondents contended, they are entitled to continue works which were "a natural and logical extension of the development which existed before the appointed day". This was an expression taken from views expressed by the late Eamonn Walsh when a senior counsel and author of an authoritative book on planning law but before his appointment to the Bench. In the views expressed by him and adopted by counsel on behalf of the Respondents he went on to explain that what he meant by the expression aforesaid was "that it could also have been reasonably anticipated that the development would progress to this point". He pointed out that one would have to disregard the apparent change of use in the sense that land which had formerly been used for agricultural purpose was being swallowed up by the advance of the extraction programme.
>
> However, Mr Justice Walsh in the views expressed by him did state that some limitation must be imposed on the extent to which works that had started might be continued. He suggested that the deposit being worked must be the same deposit; that there could be no leapfrogging over major roads, rivers or other developments so as to reach what was essentially a new seam. He thought that one could cross a minor road but that a major barrier would present a development terminus. Again, his view was that there could be no substantial intensification of user without permission being obtained.
>
> Counsel on behalf of the applicant likewise contended for either an extreme interpretation of section 24 or a more moderate one. He submitted that quarrying operations in existence on the appointed day could not be continued at all thereafter without the developer obtaining planning permission. That argument was based on the fact that every quarrying operation - certainly every lateral extension of a quarry - would appear to involve a material change of use of the surface area from - in the present case - farming to excavation works. Indeed, Mr Gallagher's argument found support in the typically colourful phrase of Lord Denning in *Thomas David . v. Penybont RDC* [1972] 3 All ER 1092 when he said of quarrying that: "In my view every shovel full is a mining operation."

8.2 These widely differing views were rejected by the Supreme Court. A definite decision was reached by Murphy J on the issue of how to adjudicate on whether a particular user constituted an intensification of use or constituted merely the completion of what could reasonably be regarded as the same business at the coming into force of the planning code. Here are pages 561-563:

> It seems to me that the extreme views contended for by either party must be rejected. Not for the nature of the views in themselves but for the fact that they do not represent a proper interpretation of s. 24 of the 1963 Act as construed within the general framework of that legislation. Section 24 of the 1963 Act having expressly excluded works from the need to obtain permission - which term expressly includes "any act or operation of ..... excavation....." - necessarily permits the continuation of such works even where they involve a material change in the user of adjoining ground. If s. 24 had not contained a provision so as to exclude existing uses and works from the new planning code serious and perhaps unconstitutional injustice might have been imposed upon those who had invested time, money and resources in such developments. 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. In my view the answer to the question posed by the learned Judge of the High Court requires the examination of all of the established facts to ascertain what was or might reasonably have been anticipated at the relevant date as having been involved in the works then taking place. It is clear that in some cases particular factors may be of decisive importance whereas in others those factors may be of little or no consequence. It has been argued, for example, that the fact that the property rights of the respondents were confined to the original Looby lands at the appointed date is not a decisive factor. Whilst that may be so, I doubt that the converse would be correct. If the respondents had acquired the ownership of the eighty acres for the purpose of extracting limestone before the relevant date and had commenced work on part of those lands I would have thought that the acquisition of the lands would have been of decisive importance in determining what might have been reasonably anticipated as the consequences of continuing the works commenced before the operative date. In the context of building works, presumably, plans prepared or contracts entered into by the developer would give very considerable guidance as to the nature and extent of the building works which might be anticipated. In relation to mining, the extent of the ore body would necessarily place a limitation on what could be achieved. If work had commenced on the extraction of ore from a small ore body the fullest extent of the rights preserved by s. 24 would be the extraction of that ore body. It could not be argued successfully that work on a different ore body had been commenced before the operative date. In the present case some importance should be attached to the roadways running along the northern and southern boundaries of the combined properties. I would also attach some but by no means decisive importance to the boithrín separating the Looby lands from the Doyle lands. The fact that the limestone deposit is substantial and continues from the Looby lands into the Doyle lands is of very great significance but perhaps the very extent of the deposit makes it a less valuable guide than might otherwise have been the case. I doubt that anybody viewing the works in progress in October 1964 would have contemplated or anticipated that they could or might at any stage involve or extend to quarrying operations at a distance of five or six miles from the operations then being carried on. In the present case I would in fact attach the greatest significance to the extent of the property under the control of the respondents. The only lands in the areas over which they had any rights - so far as the findings reveal - were limited to the eight acres comprised in the original Looby lands. Of course the respondents could seek - as they subsequently did - to acquire

further lands or rights in the neighbourhood but they had not done so on the appointed date. The works that were being carried out involved quarrying for limestone on the original Looby lands. No evidence was produced to show that the respondents were aware of the extent of the limestone deposits of which their quarry formed part. It may be reasonable to speculate that as their quarry became exhausted the respondents would examine the possibility of discovering limestone in the adjoining lands and explore the possibility of acquiring rights over such lands. It is not, however, in my view proper to assume that limestone of appropriate quality would be discovered in lands which could and would be acquired on terms acceptable to the respondents. Indeed, the fact that the respondents were compelled to acquire fifty acres of land from Mr Doyle in excess of their requirements is indicative of the problems which one might have expected to arise if and when the respondents decided to expand their operations. It seems to me that the proper inference is that the quarrying works on the Doyle lands were a distinct operation or at the very least a different phase from the works which were being carried on when the 1963 Act came into operation. Those works are not, in my opinion, the continuation of the original quarrying operations and therefore do not fall within the exclusion or exempting provisions contained in s. 24 of the 1963 Act. Accordingly, those works require planning permission. I would therefore answer the question posed by the learned Judge of the High Court in the affirmative.

8.3 Cases on intensification of use abound in the decisions of the courts. In *Weston Limited v An Bord Pleanála* [2010] IEHC 255, at issue was the continual slow development of an airfield into an aerodrome and then into an airport and a consequential increase in aircraft movement which was not authorised. This is a difficult issue. Multiple cases were cited. At paragraph 33, this Court attempted a summary of the relevant case law as of that point. That analysis is repeated here bearing in mind that what is involved is an issue of law that is strongly fact dependent:

(1) If a different product is being produced, the object of the operation may have changed to the extent that an unauthorised intensification of use may have occurred. In *Butler v. Dublin Corporation* [1999] 1 IR 565 at p. 593, Keane CJ referred to a particular use being "so altered in character" that an unauthorised intensification might be found. Within that context, he was referring to volume. In *Patterson v. Murphy* [1978] ILRM 85, Costello J had found that the production of four inch stone blocks was so different in character to the previous production of shale so as to amount to intensification. The instances where intensification has been found merely on this basis, however, seem to be rare.

(2) A change in the method of production, whereby a low level of production is geared into an industrial scale, through the application of chemicals or machinery, may lead to a finding of intensification. In *Patterson v. Murphy* [1978] ILRM 85 blasting had replaced manual extraction. In addition, stone crushing and grading plant and machinery had been introduced. The labour force had also expanded. These factors may be identified as important

(3) The most common complaint of intensification of use, amounting to an unauthorised development, arises in a comparison of the scale of operations at the time when an application is brought to injunct that level of use pursuant to s. 160 of the Planning and Development Act 2000 as amended, as compared with the prior use. Here, as I have previously said, some reasonable, but not extensive, level of variation should be seen as integral to any business. This should not be used, however, as an excuse to circumvent planning controls through gradual accretion. If the base line is a pre-1964 use, 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. If there was a grant of planning permission, after a pre-1964 use or independently, then what might objectively be regarded as authorised is a point of comparison. Using a motor racing track every day is an intensification of use, as compared to a planning permission which authorises it on a weekend, or during a particular part of the year; so is using screeching drag racing cars in place of quieter motor vehicles; *Lanigan v. Barry*, [2008] IEHC 29 (Unreported, High Court, Charleton J., 15 February, 2008). Markedly increasing extraction from a quarry so that there is substantial increase in the toeing and froing of lorries can also amount to an intensification; *Cork County Council v. Slaterry Pre-Cast Concrete Limited* [2008] IEHC 291 (Unreported, High Court, Clarke J, 19 September, 2008). A material change by increase in production process can amount to an intensification of use: *Galway County Council v. Lackagh Rock Limited* [1985] IR 120.

(4) Since the concept of intensification of use is one which relates to considerations of proper and sustainable planning, the Court has regard to "the effects in planning or environmental terms of such intensification in order to assess whether there has been a material change for planning purposes"; per O'Sullivan J in *Molembuy v. Kearns* [1999] IEHC (Unreported, High Court, O' Sullivan J, 19 January, 1999). A more successful use of particular land, which has a low impact in terms of such planning considerations as traffic, visual amenity, appropriateness to the area, strain on infrastructure and sustainability, will not necessarily be found to be an intensification of use; *Dublin County Council v. Carty Builders and Company Limited* [1987] IR 355. In *Cork County Council v. Slattery Pre-Cast Concrete*, Clarke J at para. 7.5 stated:-

> "The assessment of whether an intensification of use amounts to a sufficient intensification to give rise to a material change in use must be assessed by reference to planning criteria. Are the changes such that they have an effect on the sort of matters which would properly be considered from a planning or environmental perspective? Significant changes in vehicle use (and in particular heavy vehicle use that might not otherwise be expected in the area) or one such example, changes in the visual amenity or noise are others".

The nature of the activity in question is therefore vital. An airport can be regarded as causing high environmental stress and, from the point of view of the community living in its vicinity, a close need for appropriate regulation. Whereas it might be thought that an increase by a chicken farm in the number of eggs or live birds produced might be within the range of appreciation that is integral to the law in this area, a much smaller increase in the traffic to an airport is to be regarded from a planning perspective as considerably more serious. As the *de minimus* rule is the only exception to full compliance with a planning permission, it is hard to see how substantial deviation from an established use can be regarded as consistent with the legislative intent enshrined in the Planning and Development Act 2000, as amended, that any development be subject to proper scrutiny. I do not see intensification, either gradual or sudden, openly or by stealth, as capable of being lawfully used to avoid planning controls.

(5) If there is a planning permission in an intensification of use claim, then it must be construed objectively as to what it permits. If there is pre-1964 use, then the gathering of evidence by way of ordinance survey photographs and the testimony of those in the area is a useful way of finding the historically appropriate level of usage. In principle, both pre-1964 use and existing planning permission construction are the same. The question is: what is permitted by law on this site? The intensification of the use of development which is already subject to planning permission can give rise to a material change in use. What one has regard to in these instances is the documents lodged in support of planning permission, the nature of the permission granted, and any conditions attached thereto. As is pointed out in Simons

> '*Planning and Development Law'* (2nd Ed., 2007) at para 2- 64, even if no use is formally specified, the letter in support of planning and the documentation accompanying the planning application, will imply "the level or scale at which the development is to be carried on". That statement is correct. In the planning permissions referred to here and, as I understand from Simons, it is "almost a universal condition of all planning permissions that the development be carried out in accordance with the plans and particulars lodged with the application, or as part of a response to any request for further information". Therefore, a court adjudicating on whether there has been a material intensification of use looks, in the context of existing planning permission, to what has been allowed, seen against the backdrop of what has been sought. It seems to me to follow that where an industrialist has lawfully carried on an activity of manufacturing with twenty machinists, that a grant of planning permission for a factory accommodating 200 such machinists is, of the nature of that process, an authorisation of intensification of use. Older applications used to be less detailed, so what was permitted is harder to construe from them. This issue of the implication of use from the grant of planning permission will rarely cause problems in the context of modern applications. Detailed applications are appropriately made to planning authorities asking for a development in order to do something like live in a bigger house, or operate a pharmaceutical factory, or process fish in a massive factory. If there are any areas of uncertainty the planning authority can ask questions both as to the physical development and what is to be done on site. Both are within planning controls. If there is ambiguity as to what is sought, the planning authority should ask appropriate questions. The purpose for which planning permission is sought, and its relationship to the development plan for the area, is integral to the planning process. Thus, in the last example given, no industrialist would seek permission to build an empty factory. That flies in the face of common sense. Rather, it is specified in the planning application what is proposed to be done there and how many people will be employed in that activity. It is possible that earlier planning permissions, when the process was less precise, will have to be construed closely so as to seek out, by reasonable and necessary implication, what it is that was permitted.

8.4 Elsewhere, this Court has referred to proportionate use as a shorthand for the minute analysis that properly is conducted in these cases in order to determine if there has been a pre-planning code use that has been legitimately continued; *An Taisce v Ireland* [2010] IEHC 415. In addition, it must be repeated that use prior to the coming into force of the relevant Directives in national law, expressly puts the project outside their scope. This was put as follows in the foregoing case at paragraph 3:

> Quarries which are proposed to be developed with an extraction area of 5 hectares or more are subject to a requirement under the Act of 2000 to submit an environmental impact study when applying for planning permission. That did not apply, up to the Act of 2000, to existing quarries, proportionately carrying on a pre-1 October 1964 use. Further, it is clearly established both in relation to Council Directive 85/337/EEC of 27 June, 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L 175, 5.7.1985 ("the EIA Directive") and Council Directive 92/43/EEC of 21 May, 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. L 206, 22.7.1992 ("the Habitats Directive"), that projects which had already commenced when these directives were transposed into Irish law were not then subject to the restrictions later made possible under s. 261(5) and (7) of the 2000 Act; see *Haarlemmerliede en Spaarnwoude and others v. Gedeputeerde Staten Van Noord-Holland* (Case C-81/96) [1998] E.C.R. I-3925 *Stadt Papenburg v. Bundesrepublik Deutschland* (C-226/08) (Unreported, European Court of Justice, 14th January, 2010).

8.5 These exceptions under the Directives are also expressly provided for in the text of section 261A. The factual analysis is now turned to. As in many of these cases, the matter has been argued as if it is within the power of the High Court to overturn a decision as unattractive. There is no such function vested in the High Court. Instead, what is considered in a judicial review is the procedure of the administrative body, its jurisdiction and whether in any administrative or quasi-judicial assessment of the facts determined flew in the face of fundamental reason and common sense. In the first place, An Bord Pleanála had a seriously researched report of its appointed inspector before it. That contained material upon which An Bord Pleanála was entitled to conclude on this review that Mayo County Council had made no identifiable error but was correct in what it determined. A short quote indicates the direction of the analysis of the inspector. At page 15 of that report it is stated:

> I am satisfied that a small quarry existed in the E section of the review site by the early 1900s, that small-scale quarrying took place in parts of the S section of the overall review site up until the 1950s, that the owner/operator has a long established family history of quarrying in the area, that permission was granted to open a quarry in the SW section of the review site in 1973 and that the lands were eventually amalgamated into a single landholding in the preceding years by the current owner/operator. However an examination of the aerial photographs from 1995, 2000, 2005 and 2010 indicate that the quarry was mainly located in the S section up until 2005 and that it expanded into part of the N section sometime after 2005.
>
> The nature, scale and intensity of the works undertaken on the overall site could not have been reasonably envisaged in 1964 and a material change of use has taken place on lands in the N section that were in agricultural use up until c.2005 (based on aerial photography). The quarrying works in the N section are not covered by a bona fide pre 1964 use / authorisation, they do not have the benefit of a valid planning permission and the works are therefore unauthorised. However, it should be noted that quarrying has not taken place over the entire northern section and a substantial area has been retained as a tree nursery pending future extraction, for which planning permission will have to be sought.

8.6 In the report, the inspector dealt with both the scale and intensity of the relevant operations and the issue of what could reasonably be regarded as envisaged from the use of the quarry in 1964. Fundamental to this is the huge extension of operations to the north. The views expressed in this regard were reasonable. While this Court's view can in no way be germane to the process that is judicial review, it is merely noted that a detailed analysis of land ownership, transfer and use through maps and aerial photographs shows that the views expressed by the inspector and the conclusions reached by Mayo County Council and An Board Pleanála were supported by an underlying factual analysis. All or most of the lands in this quarry seem to have had their ownerships originally in the Land Commission. One particular portion of land, marked D on the map, came from that ownership through families called Morrins, Varley and O'Neill into a licence to the McGrath family in 1987. Another portion, marked E, shows an original historic quarry which was on Ordinance Survey maps prior to 1923. This is very small. Portions within this division came into the ownership of the family called Glynn and thence into the McGrath family in 2005. A portion, marked F, possibly also came from the same source and seems to have been bought by the McGrath family in 1996. Another portion, marked G, is of unknown provenance. It was not unreasonable to mark a very substantial portion of the northern lands as being worked after 1990 and 1997. The only relevant planning permission is Reg. Ref.73/1614, which is a portion marked B and C on the relevant map. This was for extraction and crushing and was purchased, as to B, in 2008 by the McGrath family and, as to C, in 1987. In addition there are planning permissions for various buildings and it is to be remarked that these do not include planning permissions for what the inspector on behalf of An Bord Pleanála or Mayo County Council considered as expansion into what must be regarded, at the very least, as new phases.

8.7 Calling to mind the that decision of particular relevance to this quarry development is *Waterford County Council v John A Wood*, there has been nothing unreasonable about this analysis. Nor is it vitiated by any error of law. On the contrary, the law was clearly

properly applied both by Mayo County Council and by An Bord Pleanála on review and the factual analysis was based on tenable material.

Time point
9.0 There is no reason for the time point raised by Mayo County Council against the challenge of McGrath Limestone Works to succeed. Planning legislation has been progressively tightened so that any step may and must be challenged and not only a final decision. Section 50(2), as amended, of the Act of 2000 provides:

> 50(2) A person shall not question the validity of any decision made or other act done by –
>
> *(a)* a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,
>
> (*b*) the Board in the performance or purported performance of a function transferred under Part XIV, or
>
> (*c*) a local authority in the performance or purported performance of a function conferred by an enactment specified in section 214 relating to the compulsory acquisition of land, otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order').

9.1 The strict time limits for judicial review, which characterise the planning code, are imposed by section 50(6):

> (6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(*a*) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.

9.2 There is some flexibility here since subsection 8 empowers the High Court to grant an extension of time for "good and sufficient reason" and where the reason for the failure to make the application for leave within the period of eight weeks was "outside the control of the applicant for the extension". This section cannot be read on its own or outside the specific legislative context in which it occurs. The process under section 261A is different; the decision of Mayo County Council is not appealed, it is reviewed. This is not an appeal, which under the legislation constitutes a fresh appraisal by An Bord Pleanála. Instead the planning process is complete only when An Bord Pleanála fulfils its function under the section. Ordinarily, a person must challenge each step and not await a final decision if what they wish to review before the High Court is a distinct decision; *McMahon v An Bord Pleanála* [2010] IEHC 431. But the facts of what happened there were entirely different. Here, the decision that is challenged is that of Mayo County Council as reviewed by An Bord Pleanála. Both were made by notice parties and the date of the decision of An Bord Pleanála is the date from which time runs because it is this decision and not any intermediate step with which the applicant McGrath Limestone Works has an issue. It would also be absurd for the legislature to provide for a review of a decision and when that might be successful on judicial review to have an applicant told: okay, you have won against An Bord Pleanála but now you are saddled with the local planning authority decision that you reviewed. If ambiguity renders a provision in a statute obscure or ambiguous, a construction must be given that reflects the intention of the legislator from the context and purpose of the legislation. While this cannon is preserved in section 5 of the Interpretation Act 2005 (No. 23 of 2005) it is also expanded and strengthened. It is provided that if a literal interpretation causes an absurdity or an apparent meaning which undermines the intention that is clear from the context of the legislation, such a result is to be avoided in favour of one which reflects the plain intention of the legislation. Section 5 of the Interpretation Act 2005 is thus:

> (1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)-
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
>
> (i) in the case of an Act to which *paragraph (a)* of the definition of "Act" in *section 2 (1)* relates, the Oireachtas, or
>
> (ii) in the case of an Act to which *paragraph (b)* of that definition relates, the parliament concerned, the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.
>
> (2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction) –
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,
>
> the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment.

9.3 The time point is not valid here.

Section 261A: Constitutionality
10.0 Lastly, the Court is required to deal with arguments as to constitutionality. Such constitutionality is presumed. Legislation must also be construed in a constitutional way where its text so permits. Central to the arguments as to unconstitutionality advanced by McGrath Limestone Works is that section 261A of the Act of 2000 is an impermissible imposition upon the property rights of that company and its promoters. It is also argued that an existing situation can never be legislated for but must be placed inside only future legislative regimes. Essentially, while addressing argument on this discreet aspect of the case, counsel for the Attorney General contends that the supra constitutional effect of Ireland's obligations to the European legal order constitutes a complete answer to all

these claims.

10.1 Article 15.5.1º of the Constitution provides:

> The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.

10.2 This Article applies both to criminal and civil wrongs; *Magee v Culligan* [1992] 1 IR 233. To create a new civil form of action, effectively a statutory tort, and apply the definitional elements to past action, thereby creating liability in the future where none existed at the time of the actions in question, infringes the Article; Dublin *Heating Co v Heffernon* [1993] 3 IR 177. There are limits to the constitutional prohibition. A suggestion as to where the line is to be drawn is set out in Kelly – The Irish Constitution (4th edition, Dublin, 2003, Hogan and White) at paragraph 4.2.1 which tentatively summarises the case law by stating that "retrospective legislation dealing with essentially procedural, remedial and adjectival matters falls outside the scope" of the Article. But, for the constitutional prohibition to apply, there must be, through legislation, the creation of a situation whereby natural and artificial persons under the protection of the Constitution are enmeshed in criminal or civil responsibility for actions which the law through inattention, tacitly or explicitly, declares lawful at the time of their commission by reason of future legislation that retrospectively penalises them or establishes civil responsibility. Section 261A does no such thing. The entire code of planning placed existing structures and enterprises outside its scope through the borders set on the Local Government (Planning and Development) Act 1963 that set outside control such works as had commenced and such businesses as were in operation as of 1 October 1964. But, thereafter, putting an extension on a house, if not exempted expressly under the terms of the legislation, changing a corner shop into an office or intensifying the use of an airfield into an airport was subject to stringent controls. That level of control, its application, the remedies for breach, the means of participating in it and the categories of development that require particular treatment have been in a state of less than gentle flux since then. Were McGrath Limestone Works capable of showing a continual, proportionate and gradual use of existing land in accordance with a pre-planning control use, there would an argument to be made. But, what should not be lost sight of is that this argument is one as to the scope of legislation. No person or enterprise can expect that, as regards the environment or the entitlement of the people of Ireland to participate in the planning of its built infrastructure and land use, the law will never change. It changed here. The result was remedial. Quarries had, firstly, to be registered, and partly regulated despite a pre planning code use and, secondly, as care for the environment became perceived as more important, impact on natural habitats was to be analysed, assessed, commented on through inclusive participation, and then regulated. None of that gave rise to retrospective criminal or civil liability. Mayo County Council in their actions on this matter made this as clear as could be. By the legislation, for the future, the environment is to be considered and conditions may be appropriately imposed or actions may be appropriately prohibited. That is entirely within the scope of the legislative power of the Oireachtas as limited by Article 15.5.1º.

10.3 Another set of arguments was addressed to the alleged deprivation of property rights of McGrath Limestone Works and what was said to be an unjust attack under Article 40.3 and an impermissible deprivation under Article 43 of the Constitution. While Article 43 acknowledges the natural right to private property and prohibits the State from passing any law that attempts to abolish that right or the "general right to transfer, bequeath, and inherit property", Article 43.2 also recognises that such rights ought to be "regulated by the principles of social justice." Accordingly Article 43.2.3º provides:

> The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

10.4 In National Assets Management Agency v Downes [2014] IEHC 71, this Court commented, at paragraph 40, on the proper approach to attacks on the constitutionality of a legislative measure on the basis of a contention that it was an impermissible undermining of a property right:

> Having regard to the decision of the Supreme Court in *Re Health (Amendment) (No.2) Bill 2004* [2005] 1 IR 105 (at p. 201), in an analysis of any unjust attack on property rights the Court must, firstly, examine the nature of the property rights at issue; secondly, it should consider whether the impugned sections consist of the regulation of those rights in accordance with the principles of social justice and whether the legislation seeks to delimit those rights in accordance with the exigencies of the common good; and, thirdly, having considered these issues, it must determine whether injustice is the touchstone of the result, which may emerge in the lack of balance as between the common good and the necessary vindication of the relevant rights.

10.5 While the Local Government (Planning and Development) Act 1963 (No. 28 of 1963) contained extensive provisions as to compensation, these have largely disappeared in the restatement and refinement of the law in the Act of 2000. It is hard to know how it was thought that democratic participation and expert adjudication of development projects as to their effect on local communities, and more widely on the community in general, could generate a right to compensation simply because a property owner was not allowed to follow through on his or her plans. But, then, that was the thinking at the time. That entitlement in some circumstances to compensation was, however, a statutory right and one applied to situations that did not involve the removal of actual property rights. There is nothing unlawful in prospective developers being restricted as to how they will use their premises where that restriction is reasonably and fairly arrived at for the proper planning and sustainable development of a neighbourhood. It is simply a development of the law of tort to provide that citizens have a stake in how their town or city is developed and how that development is regulated. The principle is of wider application. The community at large, even where they do not live in the immediate area, have a stake in how their countryside, their cities, their towns and their environment develop. That arises by virtue of the interrelatedness of economic use whereby the ruination of the countryside, for instance in Galway, Clare or Mayo, would mean that travel companies based in Dublin, or hospitality centres along the way, would be diminished in their return because of tourists turned against visiting what they were led to believe was a pleasant landscape but found something else. Could it seriously be said that people in Dublin have no interest in the potential pollution of Lough Corrib or that hoteliers anxious for business might not be against lining rural roads in Ireland with suburban houses, or that those concerned with road safety might not legitimately have a concerned view that rural speed limits continue to apply when, in effect, an entire rural area has been made into a suburb by a profusion of housing? Even in tort law, neighbours had an interest in fumes, in smells, in noise, in light but not in views. As is well known, spite walls, including the famous terrace of houses in Clontarf, did not interfere with protected rights. Planning law incorporates elements of the existing law but corrects the defects in the law of torts, among others against not having rights to a view, and introduces in the place of expensive individual litigation an entitlement in the community to realise that stake in what individual neighbourhoods and the country generally should do to organise building and business through the right to participate, by making open representations to an independent planning authority. It is hard to see what is wrong with the refusal of plans of development for sufficient and proportionate planning reasons and why such an exercise should give rise to a right to be compensated. Taking what a person already has, as in compulsory acquisition of land or buildings, is different entirely.

10.6 The issue as to whether the legislature is entitled to impose new regulations and restrictions on existing quarrying activities was considered in *M & F Quirke & Sons v An Bord Pleanála* in the context of section 261 of the Act of 2000. This concerned a quarry in

Castleisland County Kerry. There the local planning authority imposed serious restrictions pursuant to conditions under section 261. These included restrictions on blasting. One of the arguments was that since a quarry had adopted a mode of working for decades, this established a right, something akin to prescription, to continue. The analysis of Ó Néill J of the interaction of property rights and the legislature, from paragraph 7.14, in the context of planning restrictions, is instructive:

> 7.14 It is well settled that property rights, as protected by the Constitution, are not absolute. The power of the State to regulate the use of land has been recognised in a number of cases. For example, in *Central Dublin Development Association v. Attorney General* [1975] ILTR 69 Kenny J stated as follows at p.90:-
>
> > "[Article 43.2.1] does not require that the exercise of the rights of property must in all cases be regulated by the principles of social justice. It recognises that the exercise of these rights ought to be regulated by these principles and that the State accordingly may delimit (which I think means restrict) by law the exercise of the said rights with a view to reconciling it with the exigencies of the common good."
>
> The Supreme Court in *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321 upheld a restriction on property rights in the form of a requirement that a developer cede up to 20% of the land in a particular development at agricultural use value rather than market value.
>
> 7.15 There is no provision for the payment of compensation in s. 261 of the Act of 2000. The presence or absence of such a provision is of relevance in considering whether an interference with property rights is justified or not. As Kenny J, in the *Central Dublin Development Association* case stated at p.84:-
>
> > "The State pledged itself by Article 40.3.2 by its law to protect as best it may from unjust attack the property rights of every citizen and while some restrictions on the exercise of some of the rights which together constitute ownership do not call for compensation because the restriction is not an unjust attack, the acquisition by the State of all the rights which together make up ownership without compensation would in almost all cases be such an attack."
>
> It is clear from the above that not all interferences with property rights will require compensation to be paid to ensure constitutional legitimacy. Compensation will be required in circumstances where property is wholly expropriated or where the bundle of rights which constitute ownership are substantially taken away but lesser interferences with the right to private property would not require compensation. Murray CJ adopted a similar view in Re *Article 26 and the Health Amendment (No.2) Bill 2004* [2005] 1 IR 105 at p.201 when he stated:-
>
> > "…where an Act of the Oireachtas interferes with a property right, the presence or absence of compensation is generally a material consideration when deciding whether that interference is justified pursuant to Article 43 or whether it constitutes an 'unjust attack' on those rights. In practice, substantial encroachment on rights, without compensation, will rarely be justified."
>
> 7.16 As noted above, the first two cases involve existing use rights predating the 1st October, 1964, and in the third case stemming from a planning permission granted in 1983. Inevitably, over the years, changes will have taken place in the lands quarried, in the surrounding area and in science and technology. Any argument to the effect that because a quarry was being operated in a certain way over forty years ago, that it should continue in the same manner must be untenable. For example, in the third set of proceedings several of the conditions imposed treat of matters that could not have been addressed in 1983 when planning permission was first granted for example, the fact that the nearby River Blackwater was designated as a special area of conservation in the 1990s. 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 statue would have been unregulated or unrestricted before the enactment of that type of legislation.
>
> 7.17 Section 261 of the Act of 2000 introduced a fresh regulatory scheme for the control of all quarries, those which operated before 1964 and thereafter. The power granted to the respondent under this section is to restate, modify, add to or impose conditions on the operation of a quarry. In the absence of a description of the types of conditions to be imposed in s. 261(6) and in light of the wide criteria under which conditions may be imposed (i.e. *"in the interests of proper planning and sustainable development"*) I am satisfied that the conditions that can be imposed on the operations of quarries can encompass the wide spectrum of the various normal planning concerns as these are or are likely to be affected by the works carried on at a given quarry in its particular location. To suggest that a condition which required the obtaining of planning permission at some stage in the future was *per se ultra vires* s. 261(6) is, in my judgement, to impermissibly restrict the scope of sec. 261(6), in effect, adding to the language of the subsection words of restriction which are clearly not there, and, therefore, not intended to be there by the Oireachtas. In my view, whether one adopts a literal approach or a purposive approach to the interpretation of s. 261(6), the result will be the same.

10.7 This is a statement of high authority. There is no reason advanced in this case to depart from it. Then there are the European law obligations. Apart from national regulation, there is the duty of effective cooperation with the laws of the European Union cast on Ireland and on all governmental, judicial and administrative organs of the State.

10.8 In the aftermath of the decision of the Court of Justice of the European Union in *Commission v Ireland*, it is beyond doubt that section 261A became necessitated by Ireland's membership of the European Union. This legislation was critical. As Barrington J put the general principle in *Crotty v An Taoiseach* [1987] IR 713 at 727:

> [T]he Constitution could not now be invoked to invalidate any measure which the State was directed by the institutions of the [European Union] to take arising out of the exercise of their powers, nor to invalidate any regulation or any

decision of the European Court which had direct effect within this State by virtue of the provisions of the Treaties.

10.9 This is not a case where the issue as to principles and policies of the underlying Habitats and EIA Directives could possibly be argued to have been left so bare as to require primary legislation; as in the plea advanced in both *Lawlor v Minister for Agriculture* [1990] 1 IR 356 and in *Meagher v Minister for Agriculture* [1994] 1 IR 329 or, later, in *Maher v Minister for Agriculture and Food* [2001] 2 IR 139. Both Directives are replete with fine detail. The implementing national measures mirror those provisions. It has not been argued that there is some defect in legislating through statutory instrument or amending through that means or commencing various sections in that way. Very little in the way of discretion was left to the Oireachtas. Rather, the genesis of section 261A of the Act of 2000 arose in the most direct way from the decision in case *Commission v Ireland*. Primary legislation was properly regarded as necessary to rectify a glaring, though unwitting, deviation from Ireland's duty in European law whereby major projects could proceed unknown to local planning authorities but could be, and were, despite having potentially major effects on European sites of conservation, or despite having major impacts on local environments, could simply be approved in retrospect by a retention permission without any assessment being conducted or any environmental impact statement being submitted. That being the case, implementation by necessity of what Henchy J described as the "second but transcendent Constitution" is established.

Result

11.0 Consequently and for the reasons given, the application for judicial review is refused.