Neutral Citation Number: [2010] IEHC 428

THE HIGH COURT

JUDICIAL REVIEW

2008 1020 JR

BETWEEN

FRANK HARRINGTON LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

MAYO COUNTY COUNCIL AND JAMES LEONARD

NOTICE PARTIES

Judgment of Mr. Justice Hedigan delivered the 23rd day of November 2010.

Application

1. In these proceedings instituted on 3rd September, 2008, the applicant seeks leave to apply for an order of *certiorari*, by way of judicial review, quashing the decision of the respondent (the Board), dated 11th July, 2008. The court has directed that a telescoped hearing be heard. As such, both the leave and substantive application are before the court. On 11th July, 2008, the respondent refused planning permission for the retention of replacement crushing, screening and washing plant and two ESB substations within the applicant's existing sand and gravel pit ("the quarry") within the functional area of the first-named notice party ("the council"). The Board considered that the quarry had commenced operation after 1st October, 1964, and was therefore unauthorised. The Board concluded that it would be inappropriate to grant the retention permission sought as to do so would facilitate the continuation of an unauthorised development on the site.

Parties

2. The applicant is a limited liability company having its registered offices at Kilkelly, County Mayo and is in business as the operator of a quarry at Stripe, Barnalyra, Barnacahoge, County Mayo. The respondent is an independent appellate authority, established pursuant to the Local Government (Planning and Development) Act 1976, charged with the determination of certain matters arising under the Planning and Development Acts 2000 to 2006. The first named notice party is the county council with responsibility for the administrative area of County Mayo. One of its functions is the control, registration and decision-making for new developments, in particular, through granting or refusing applications for planning permission. The second named notice party is a local resident from Killaturley, Swinford Co. Mayo who made objections against the quarry to the first named notice party and to An Taisce in 2005.

Factual Background

3. The applicant has operated a large sand and gravel operation on it's landholding at Stripe, Barnalyra and Barnacahoge in County Mayo for many years. The landholding covers an area of approximately 147 hectares. There is a dispute between the parties as to when quarrying first commenced. The applicant states that the quarry operated in the 1950's and 1960's and was used to supply sand and gravel to Mayo County Council. The Director of the applicant company Mr. Frank Harrington has also averred that he personally worked these lands with his Father in 1963.The applicant's position is that because the use had commenced well before the coming into force of the Local Government (Planning and Development) Act 1963, the quarry benefits from an exemption from planning.

The respondent concluded that quarrying in fact commenced post 1964 and therefore the quarry does not benefit from an exemption from planning. This conclusion is based on a number of factors including the fact that when the applicant made an initial application to register the quarry pursuant to s. 261 of the Planning and Development Act 2000, it stated that quarrying commenced on the site on or about May 1984. The conclusion is also supported by the fact that the respondent received responses to a s. 137 request from An Taisce and the first and second named notice parties which indicated that the quarry did not have pre 1964 status.

This case arises out of works carried out within the existing sand and gravel pit . The applicant constructed replacement crushing, screening and washing plant and two numbered ESB substations. An application was made on 19th January, 2007, to Mayo County Council for the retention of these works. On 9th March, 2007, retention permission was granted (subject to conditions). This decision was appealed to An Bord Pleanála by Mr. Peter Sweetman on behalf of the second named notice party. An Bord Pleanála's Inspector recommended that planning permission be granted to the applicant on 14th August, 2007. The Board however decided not to accept this recommendation and refused retention for the plant on 11th July, 2008. These proceedings arise from this decision.

Relief Sought

4. The applicant seeks leave to challenge the respondent's decision on a number of ground's that can be characterised as follows:

A. The Board erred in law in considering whether the quarry within which the development was located was itself an unauthorised development.

B. There was no evidence before the Board to support its view that the quarry was an unauthorised development.

C. The Board failed to have regard to the Council's registration of the quarry or the Council's "determination" that the development had commenced before 1 October 1964.

D. Section 137 notices: The Board erred in law and acted in breach of fair procedures by (i) issuing these notices, (ii) not circulating the responses to the applicant for comment and (iii) not requiring its Inspector to make a recommendation in relation to same.

E. The Board erred in law by referring in its decision to Frank Harrington rather than Frank Harrington Ltd.

F. The Board failed to give adequate reasons for its decision.

5. **Submissions of the Applicant**

5. 1 *Statutory Intention*

The applicant submits that there is clear statutory intention that in most cases such processing equipment would not even be subject to the requirement to obtain planning permission. The equipment is of a type that would ordinarily be exempt under the Planning and Development Regulations 2001 or under S.4 (1) (h) of the Planning and Development Act 2000 (as amended). The applicant further points out that the equipment in question could fall under the ambit of class 21 of the Planning and Development Regulations 2001 which provides for certain plant and equipment under a particular height to be exempt.

5. 2 *Ultra Vires*

It is submitted by the applicant that permission has been refused not because the plant was unauthorised but because of the status of the existing quarry. The applicant argues that Bord Pleanála's powers as set out under the 2000 Act do not include the power to determine that something is an unauthorised development. In these circumstances its determination is *ultra vires* and falls to be quashed by the appropriate order of *certiorari*. Section 34 (2) of the Planning and Development Act 2000 is particularly important in the context of the determination of the Board in this instance. It provides that when making its decision in relation to an application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of an area having regard to:-

(i) the provisions of the development plan

(ii) the provisions of any special amenity area order relating to the area

(iii) any European site

(iv) relevant Governmental or Ministerial policy

(v) matters referred to in subsection 4

(vi) any other relevant provision or requirement of this act and any regulations made thereunder.

Section 34(2) does not include within the ambit of matters to be considered, the issue of determining whether the development is authorised. In this regard the applicant cites the case of *McDowell v. Roscommon County Council* [2004] IEHC 396, this case was decided under a different legislative provision- s. 42 of the Planning and Development Act 2000, nevertheless it is relevant insofar as it shows that the matters which An Bord Pleanála may consider are only those matters which the Oireachtas has prescribed in the legislation.

5. 3 *Section 261 Registration*

The applicant points out that the registration of the sand and gravel pit has been recognised by the senior planning inspector's report which stated:-

> "The quarry was registered in accordance with s. 261 and as such, it would appear that the Planning Authority are generally satisfied with the nature of operations which are currently taking place on site… The Board should have regard to the nature of the application before it. Planning permission is not sought in this instance for the development of a quarry… Permission is sought in this instance for the retention of replacement plant and machinery only."

The applicant submits that the effect of the Board's decision amounts to a collateral challenge to the registration process under s. 261 and the applicant's registration. Such a collateral challenge should not be permitted. Furthermore the applicant points out that the planning authority imposed conditions on the continued operation of the quarry and such conditions may only be imposed on a validly authorised quarry. There is it is submitted, a complete disconnect in law and in fact between the determination of Mayo County Council under s. 261 (6) and the determination of the respondent in these proceedings.

A director of the applicant company Mr. Frank Harrington in his sworn affidavit has averred that he personally worked these lands with his father in 1963. The applicant says that to suggest that the quarry was operating unlawfully over many years would require the clearest of evidence and such evidence is not present in this case.

5. 4 *Rational*

The applicant maintains it cannot understand the basis or the reasoning as to how the respondent made its decision. The respondent did not have regard to the determination of its inspector, but instead chose to look for new information. This new information was not given to the inspector and the respondent gave no explanation for this. There are no reasons anywhere on the face of the documentation setting out the reasons why the respondent refused permission in this case. The respondent officer refers to a 'presenting member' who presented, it must be assumed, a report to the respondent that grounded the making of their decision. No

such report appears on the file. This, it is submitted, is an inexplicable omission on the part of the respondent.

5. 5 *Fairness*

The fact that the submissions requested from all parties were not circulated raises the issue of fairness. The principle of *audi alteram partem* applies; there was no prejudice to any party in allowing such circulation. In all of the circumstances it is submitted that the appropriate order is an order quashing the decision with the various declaratory relief that is sought.

6. Submissions of the Respondent

6. 1 *Relevance of Planning Status of the quarry*

The respondent considered that the quarry had commenced operation after 1st, October, 1964 and was therefore unauthorised. The respondent concluded that it would be inappropriate to grant the retention permission sought as to do so would facilitate the continuation of an unauthorised development at the site. Whilst the applicant contends the respondent erred by taking the planning status of the quarry into account, the respondent maintains that the planning code clearly recognises that the unlawful status of development, even when immune from enforcement has consequences. Section 34 (2) (a) (vi) of the Planning and Development Act 2000, requires Bord Pleanála, when deciding on an application for planning, to have regard to any other relevant provisions of the act and any regulations made thereunder. Article 9 (1) (viii) of the Planning and Development Regulations 2001 provides that an otherwise exempt development loses its exemption if it consists of or comprises the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use. The respondent submits that this evinces a clear legislative policy against the facilitation of unauthorised development.

It is well established that the Board is entitled to have regard to the current planning status of a site. In *Quinlan v. Bord Pleanála* [2009] IEHC 228, the applicant applied to renovate number 7 Ailesbury Road. The Board imposed a condition restricting its use to an embassy, that being the established use of the premises at and after 1964. The applicant claimed that the Board was not entitled to impose a condition limiting use in this manner, Dunne J. was satisfied that it was within the remit of the Board to consider the established use of the premises on the appointed day (i.e. October 1 1964). Hence the existing use is a relevant consideration and the respondent was entitled to determine the nature of that existing use.

In *Westwood Club Ltd v. An Bord Pleanála* [2010] IEHC 16, the Board refused permission for the retention of alterations already carried out, and further alterations to, a bar and night club, "Bar Code", within a sports and leisure centre. The Board refused permission on the basis that the alterations would facilitate an unauthorised development stating that:-

> "…it appears to the board that the proposed development relates to a site the use of which is unauthorised for use as a licensed premise… The retention of works associated with this facility, as a licensed premise would facilitate the consolidation and intensification of this unauthorised use. Accordingly, it is considered that it would be inappropriate for the Board to consider the grant of permission for this element of the development in such circumstances."

The applicant claimed that the proposed development was ancillary to the leisure centre use and that the Board had fettered its discretion by relying on a previous decision by it under s. 5 of the 2000 Act to the effect that the use was not ancillary and was therefore development and not exempted development. The Court rejected both arguments, and held that the Board had had regard to the s. 5 declaration, but had not considered itself bound by it, and had not applied it blindly. It therefore had not fettered its discretion by having regard to the declaration. Similarly in the present case the Board had regard to the planning status of the site and to the prior decision of Mayo County Council under s. 261 but did not consider itself bound by that decision, and properly determined the matter before it.

6. 2 *No evidence that the quarry was unauthorised development*

The applicant has based its application for judicial review on the irrationality test set down in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 3. This case concerned a judicial review of a decision of An Bord Pleanála which granted permission for the erection of a radio transmission station and a 300 ft mast in County Meath. The applicant sought to have the decision of the Board set aside, inter alia on grounds that it was irrational and one which no reasonable planning authority, properly exercising its discretion could have decided. In giving his judgment in that case Finlay C.J., applied the decision in *The State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 he stated:-

> "In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, Henchy J., in that judgment set out a number of such circumstances in different terms. They are: - '1. It is fundamentally at variance with reason and common sense. 2. It is indefensible for being in the teeth of plain reason and common sense. 3. Because the Court is satisfied that the decision maker has breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'.... I am satisfied that these three different methods of expressing the circumstances under which a court can intervene are not in any way inconsistent with one another, but rather complement each other and constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."

Finlay C.J., went on to cite with approval, a passage from the judgment of Lord Brightman in *R v. The Chief Constable of North Wales XP Evans* [1982] 1 WLR 1155 namely:

> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court would in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power … judicial review as the words imply is not an appeal from a decision, but a review of the manner in which the decision was made."

Finlay C.J., went on to observe

> "It is clear from these quotations that the circumstances under which the Court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare...The Court cannot interfere with the decision of an administrative decision making authority merely on the grounds that (a) it is satisfied on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by

the authority was much stronger than the case for it."

In *Meadows v. Minister for Justice* [2010] IESC 3, Denham J. recognised that the test for irrationality still applies to the decisions of An Bord Pleanála:-

> "The decision in *O'Keeffe v. An Bord Pleanála* related to a specialised area of decision making where the decision maker has special technical or professional skill. A court should be slow to intervene in a decision made with special competence in an area of special knowledge. The *O'Keeffe v. An Bord Pleanála* decision is relevant to areas of special skill and knowledge, such as planning and development."

The applicant can only challenge the Board's decision on irrationality grounds if there was no material before it capable of supporting its view. The respondents maintain there was ample evidence before the Board.

6. 3 *Failure to have regard to registration of quarry and Council's "determination" of pre-1964 status*

In its application for registration of the quarry pursuant to s. 261 of the 2000 Act the applicant stated that quarrying commenced on the site on or about May 1984. The respondent maintains that, in these circumstances the applicant is estopped from now maintaining that the quarry pre dates 1964. The respondent also points out that it received s.137 responses from An Taisce, the Council and James Leonard, which supported the argument that the applicants quarry did not have pre 1964 status. The applicant appears to contend that the council's registration of the quarry amounted to a recognition and determination that the quarry had a pre 1964 user. Section 261 of the Planning and Development Act 2000 requires planning authorities to register all quarries that either had no planning permission or had a planning permission that was greater than 5 years old, the planning authority had no discretion whether to register or not. Accordingly the respondent submits nothing of relevance can be gleaned from the council's decision to register.

6. 4 *Section 137 Notices and Responses*

Based on the inspectors report, the respondent considered that the quarrying activity might be unauthorised. The respondent decided to issue s. 137 notices to the parties. Under s. 137 of the Planning and Development Act 2000, the respondent gives the parties an opportunity to make submissions in writing in relation to a matter which the respondent proposes to take into account. The respondent refutes the applicant's claim that it had no jurisdiction to issue the notices. The applicant's assertion in the registration appeal was clearly a new issue which the respondent considered was relevant to the appeal and the respondent maintains that it was therefore correct to allow the parties comment thereon. The applicant also contends the respondent ought to have sought a recommendation from its inspector in relation to the responses to the s. 137 notices. Section 146 allows the Board to appoint an inspector to gather information and make a recommendation; thereafter there is no statutory role for an inspector unless the Board again chooses to exercise its power under s. 146. The applicant also complains that the non-circulation of the responses breached fair procedures. The respondent points out that under s. 137 responses cannot ordinarily be elaborated on. If the Board was always required to circulate submissions there could ensue an endless ping-pong sequence of exchanges between the parties that would delay and frustrate the planning process. The respondent points out that the applicant does not exhibit the documents that it maintains were so important that they ought to have been circulated for comment, nor does the applicant identify what submissions it would have made in response to any of these submissions.

6. 5 *Reference to Frank Harrington rather than Frank Harrington Ltd*.

The applicant contends that the Board's decision was *ultra vires* by reason of its reference to the applicant as Frank Harrington rather than Frank Harrington Limited. The respondent argues any error in this respect was *de minimis* and that there is no evidence of confusion as to the entities involved.

6. 6 *Reasons*

The applicant also contends that the Boards decision was not adequately reasoned. The respondent says this complaint is devoid of reality. The respondent clearly identified that it considered that the quarry was post 1964 and was therefore unauthorised. The respondent stated that it would be inappropriate to grant retention permission since to do so would facilitate the continuation of an unauthorised development. The respondent also clearly explains why it did not adopt the recommendation of its inspector. It can scarcely be contented that the applicant was prevented from knowing the basis on which the respondent reached its decision.

6. 7 *Application of European Community Law*

Finally the respondent submits that it was precluded from granting permission for the quarry by decision *C-215/06 Commission v. Ireland*. In that case the European Court of Justice held that the system of retention permission for unauthorized development in Ireland was inconsistent with the Environmental Impact Assessment Directive as it might encourage developers to avoid prior authorization requirements that lie at the heart of the Directive. In the within proceedings, the applicant was applying for retention permission of development itself alleged to be located within an unauthorized development of such a size that, if permission were sought in advance an environmental impact assessment would necessarily be required. In those circumstances, the decision of the European Court would inevitably preclude the Board from granting permission for the quarry.

7. Decision of the Court

7.1 When judicially reviewing a decision of an expert body the courts must exercise an appropriate measure of restraint. The nature of Judicial Review of expert bodies was addressed in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. Hamilton CJ stated that:-

> "It would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and argument heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

The need for restraint has been helpfully explained in the following terms:-

> "While a court must not lose sight of its unique role in determining the legality of a public decision, there are sound reasons for the exercise of restraint in the application of the review principles. If the judges overreach, they commit the error which review has been designed to prevent: they abuse jurisdiction. And in doing so, there is a practical danger that they may end up being responsible for decisions which they are not, by training or experience qualified to make. Specialist bodies are established by legislation often because their members will have particular knowledge of their fields of activity. That knowledge may often not necessarily be imparted to or rest in a judge dealing with a review application." De Blacam, *Judicial Review*, Second Edition (Dublin 2009).

The applicant contends that the Board erred in law by taking the planning status of the quarry into account. I however agree with the submission of the Respondent that the planning code recognises that the unlawful status of development has consequences. Moreover, a presumption of validity attaches to public acts generally. The onus rests with the applicant who seeks to challenge the decision of the Board to take the planning status of the quarry into account to show why the decision of the Board should be overturned.

7.2 If quarrying commenced at the quarry subsequent to 1st October, 1964, it follows that the quarry, not having the benefit of any planning permission, is unauthorised and is an unlawful development as defined in s. 2 of the Planning and Development Act 2000 which states that:-

> An unauthorised structure means a structure other than:
>
> (a) a structure which was in existence on 1 October 1964, or
>
> (b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34 of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);

7.3 Section 34 (2) (a) (vi) of the Planning and Development Act 2000 requires the Board, when deciding on an application for planning permission, to have regard to any other relevant provisions of the Act and any regulations made thereunder it states:-

> When making its decision in relation to an application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to any other relevant provision or requirement of this Act, and any regulations made thereunder.

7.4 Article 9 (i) (viii) of the Planning and Development Regulations 2001 deals with loss of exemption where unauthorised structures are added to an exempt one, the exempt looses its exemption. These legislative provisions show that the intent of the legislature is against the facilitation of unauthorised development, as one would expect.

7.5 Taking account of the apparently evident fact of the quarry being unauthorised, it seems clear the Board may and indeed must take into account the legal status of any particular development when considering an application in relation thereto. In *Westwood Club Ltd v. An Bord Pleanála* [2010] IEHC 16 the Board refused permission for retention works on the basis that they would facilitate unauthorised development. The applicant argued that the proposed works were merely ancillary to the main use. The Court rejected this argument and held that the Board was entitled to take into account the legal status of the development. The Board again took into account the legal status of a development *Quinlan v An Bord Pleanála* [2009] IEHC 228. Dunne J. held that she was satisfied that it was within the remit of the Board to consider the established use of the premises as an Embasy on the appointed day *i.e*. 1 October, 1964. The Board was therefore entitled to impose a condition restricting use of the said premises. On these authorities, the applicant's argument that the Board erred in law in considering whether the quarry within which the development was located was itself an unauthorised development does not stand up to scrutiny.

7.6 In this case An Bord Pleanála was not acting as a deciding body on whether or not the quarry was unauthorised so much as recognising an apparently evident reality i.e. the quarry was post 1964 and no planning permission existed for it. This is clear from the evidence before the Board including the applicant's initial application for registration of his quarry pursuant to s. 261 of the 2000 Act, which stated that quarrying commenced on the site on or about May 1984. Furthermore, the Board received responses to a s. 137 request from An Taisce, and the notice parties Mayo County Council and Mr. James Leonard which supported the conclusion that the applicant's quarry did not have pre 1964 status. It is clear from the cases of *Westwood Club Ltd v. An Bord Pleanála* [2010] IEHC 16 and *Quinlan v. An Bord Pleanála* [2009] IEHC 228, that the Board was obliged to take into account the legal status of the underlying development. To do otherwise would be to view the proposal out of context; moreover its decision as to what was or was not in context was a matter of planning expertise and therefore something with which, save for exceptional circumstances, the court should not be involved.

7.7 It seems clear that An Bord Pleanála can and indeed should take into account all relevant factors known to exist within the context of the application made, including the planning history of the site. It is not possible to accept that the planning status of the quarry was not a relevant factor to take into account. It clearly was. The fact it had been registered did not transmute this unauthorized base metal into the gold of authorization. I accept the submission of the respondents in this regard that its approach is in line with Article 9 (i) (viii) of the Planning and Development Regulations 2001 that unauthorized developments, even if immune, should not be extended and facilitated by the planning code. It was well within Bord Pleanála's jurisdiction to decide that this application would facilitate unauthorised development and upon that basis to refuse to authorize it.

8. As to the applicant's claim that there was no evidence that the quarry was unauthorized; and that the decision it made was therefore irrational, the test laid down for the applicant is that of *O'Keeffe v. An Bord Pleanála* 1 I.R. 39.

> "…The applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

It was confirmed in *Meadows v. Minister for Justice* [2010] IESC 3 that the O'Keeffe test still applies to tribunals such as Bord Pleanála. In that case Denham J. held:-

> "…the *O'Keeffe v. An Bord Pleanála* decision is relevant to areas of special skill and knowledge, such as planning and development."

The question is therefore whether there was relevant material before Bord Pleanála that the quarry was unauthorized. Clearly there

was. The applicant itself stated that quarrying commenced on the site in May 1984, further evidence in this regard was provided by An Taisce, Mayo County Council and Mr James Leonard. It is also to be noted that although the applicant was fully aware of the question of whether the quarry was pre or post 1964 he has failed to engage meaningfully with the question raised. The applicant had the opportunity to make submissions in writing under the s. 137 procedure which gave him the opportunity to convince the Board that the quarry was in fact pre 1964. His response was vague. The 1984 entry on the registration is simply described as a mistake. This is not an adequate answer, more information should have been provided as to how the mistake was made and by whom exactly. Reference to an employee is not enough. In relation to the 1964 use, the statement of the applicant gives no details of the extent of the land already operated, no information regarding boundaries, no information regarding the extent of the deposit, no details of continuity or extent of exploitation nor any account to show the same. Account details of lorry movements, number of workers etc, which are contained in the registration documentation refer to 2004 and not to the pre 1964 period. In the light of the applicant's failure to engage with this crucial aspect of the matters before the Board it is hard to see how it could have come to any conclusion other than that the quarry did not have a pre 1964 use.

9. The applicant complains that An Bord Pleanála failed to take account of the quarry's registration. The fact the quarry was registered does not amount to a recognition or determination that the quarry had a pre 1964 user. Section 261 of the Planning and Development Act 2000 requires planning authorities to register all quarries that either had no planning permission or had planning permission greater than five years. Section 261 (9) sets out the scope of this section and s. 261 (1) imposes the obligation on quarry owners to notify planning authorities and to register. There is no distinction between pre and post 1964 quarries and there is no discretion. Planning authorities must register such a quarry. The aim of the legislation is clearly to try to bring all quarries pre or post 1964 with no planning permission or quarries with planning permissions more than 5 years old into the control net where conditions reflecting modern approaches to quarrying may be imposed in the public interest. Nothing in the legislation provides that such registration changes unauthorized into authorized. Their separate status at best. is that they are registered but still unauthorized.

10. Section 137 of the Planning and Development Act 2000 provides as follows:-

> (1) The Board in determining an appeal or referral may take into account matters other than those raised by the parties or by any person who has made submissions or observations to the Board in relation to the appeal or referral if the matters are matters to which, by virtue of this Act, the Board may have regard.
>
> (2) The Board shall give notice in writing to each of the parties and to each of the persons who have made submissions or observations in relation to the appeal or referral of the matters that it proposes to take into account under *subsection (1)* and shall indicate in that notice -
>
> > (a) in a case where the Board proposes to hold an oral hearing of the appeal or referral, or where an oral hearing of the appeal or referral has been concluded and the Board considers it expedient to re-open the hearing, that submissions in relation to the matters may be made to the person conducting the hearing, or
> >
> > (b) in a case where the Board does not propose to hold an oral hearing of the appeal or referral, or where an oral hearing of the appeal or referral has been concluded and the Board does not consider it expedient to re-open the hearing, that submissions or observations in relation to the matters may be made to the Board in writing within a period specified in the notice (being a period of not less than 2 weeks or more than 4 weeks beginning on the date of service of the notice).
>
> (3) Where the Board has given notice, in accordance with *subsection (2) (a),* the parties and any other person who is given notice shall be permitted, if present at the oral hearing, to make submissions to the Board in relation to the matters which were the subject of the notice or which, in the opinion of the person conducting the hearing, are of relevance to the appeal or referral.
>
> 4) (a) Submissions or observations that are received by the Board after the expiration of the period referred to in *subsection (2)(b)* shall not be considered by the Board.
>
> (b) Subject to section 131 , where a party or a person referred to in *subsection (1)* makes submissions or observations to the Board in accordance with *subsection (2)(b)*, that party or person shall not be entitled to elaborate in writing upon those submissions or observations or make further submissions or observations in writing in relation to the matters referred to in *subsection (1)* and any such elaboration, submissions or observations that is or are received by the Board shall not be considered by it.

The purpose of this section is to allow the Board to have regard to matters other than those raised by the parties in submissions or observations. Where they do, absent an oral hearing, the Board must give those parties an opportunity to make submissions or observations on those matters. In this case the Boards Inspector at p. 7 of his report raised a question concerning whether the quarrying predates 1964. The inspector noted that in its application for registration of the quarry the applicant itself had stated that quarrying had commenced in March 1984. This was considered at the Boards meeting on 2nd , May, 2008. The Board considered this raised a question that the quarrying might not be authorized and that might preclude them from granting Planning Permission because that would facilitate the continuance of an unauthorized use. As a result, the board decided to issue the s. 137 notices.

10.1 Did the Board err in law in issuing those s. 137 notices? I think not. The decision to issue arises where the Board considers something new has arisen which may be relevant. It is classically a planning matter and one which therefore could only be challenged on O'Keeffe grounds. Plainly there was relevant material before it to support such a decision i.e. the applicant's entry on the registration form as outlined in the inspectors report. As frequently stated, these courts have neither the competence nor jurisdiction to make such judgements. Power to do so is conferred upon the planning authorities and this court must not usurp that power.

10.2 Should the Board have requested a recommendation from the inspector in response to the submissions received as a result of the s. 137 notices? No authority was opened to me to support any such obligation on the Board. It may well be that inspectors are all but always assigned to prepare a report for the Board but there is no obligation to do so. Section 146 of the Planning and Development Act 2000 permits the Board to appoint such an inspector to make a report to it on an application including a recommendation. Section 146 states:-

> (1) The Board or an employee of the Board duly authorised by the Board may in connection with the performance of any of the Board's functions under this Act, assign a person to report on any matter on behalf of the Board.

(2) A person assigned in accordance with *subsection (1)* shall make a written report on the matter to the Board, which shall include a recommendation, and the Board shall consider the report and recommendation before determining the matter.

(3) (a) The documents relating to any appeal or referral or to a decision of the Board under section 175 or Part XIV shall be made available at the offices of the Board for inspection by members of the public and may be made available at such other places as the Board may determine within 3 working days following the relevant decision.

(b) Copies of the documents and of extracts from such documents shall be made available at the offices of the Board, or such other places as the Board may determine, for a fee not exceeding the reasonable cost of making the copy.

(4) The documents to which *subsection (3)* applies shall be made available for a period of at least 5 years commencing on the third working day following the decision of the Board in relation to the matter.

As provided under Section 146 the Board appointed an inspector to prepare a report, nothing in the Act required the Board to instruct the inspector to report and recommend on the s. 137 responses.

10.3 The applicant complains that the Board should have circulated the responses provided to the s. 137 notice. It seems to me that to sustain this complaint the applicant should clearly demonstrate to the court what response he would have made and that these responses might well have changed the decision that was made. The applicant has not done so and therefore this objection is somewhat unreal and therefore unsustainable. In any event I would consider that the comments of Kearns J. in *Evans v. An Board Pleanála* (7 November, 2003 (HC)) are in point here.

> "I accept the respondent's contention that s. 7 of the Local Government (Planning and Development) Act, 1992 was designed to streamline the appeals process and to reduce the volume of repetitive submissions. The introduction of the measures contained in s. 7 was to bring an end to an endless ping-pong sequence of exchanges between the parties which delayed and frustrated the planning process…"

There is no point to a ping-pong situation here either. Moreover the applicant has failed to identify any new matters that were raised in the responses that might have required the Board to give him the opportunity to respond. A relevant case on the issue of failure to circulate third party submissions is that of *Westwood Club Ltd v. An Bord Pleanála* [2010] IEHC 16 at 44. In that case it was held:-

> "I am satisfied that the submissions in question raised no new issues requiring the respondent to circulate them for comment. There is no obligation on the respondent to repeatedly circulate submissions treating of the same matter…"

The applicant does not exhibit the documents that it maintains were so important that they ought to have been circulated for comment. The Board has exhibited the said responses. Nor does the applicant identify what submissions it would have made in response to any of these submissions.

11. The applicant's complaint in relation to the Board's reference to Frank Harrington rather that Frank Harrington Ltd is of no merit. There is no evidence of any confusion as to the entities involved. This error falls to be dealt with under the de minimis rule.

12. The applicant complains that the Board failed to give reasons for its decision. In reality the Board did identify that it considered that the quarry was post 1964 and was therefore unauthorised. The Board then stated that it would be inappropriate to grant retention permission since to do so would facilitate the continuation of an unauthorised development. The Board also explained why it did not adopt the recommendation of its inspector. In this case it seems to me that although terse, the reasons given are clear and precise and leave no doubt as to why the Board decided as it did.

13. The respondents submit the decision *C-215/06 Commission v. Ireland* would preclude the Board from granting permission for the quarry. In that case the European Court of Justice held that the system of retention permission for unauthorized development in Ireland was inconsistent with the EIA Directive as it might encourage developers to avoid prior authorization requirements that lie at the heart of the Directive.

In the light of the courts findings above it is not necessary for me to express any view on this aspect of the case argued by the respondents in their written submissions.

Conclusion

14. The applicant contends that it is the intent of the legislature that in most cases processing equipment would not be subject to the requirement to obtain planning permission. There is however clear legislative policy against the facilitation of unauthorised development. This can be seen from Article 9 (i) (viii) of the Planning and Development Regulations 2001, therefore processing equipment which facilitates an unauthorised development should not be permitted. There was relevant material before Bord Pleanála to indicate that this quarry was unauthorised. The applicant itself stated that quarrying commenced on the site in May 1984. The applicant then claimed that this was a mistake and that quarrying commenced prior to 1964 and so the quarry benefited from a planning exemption. The applicant could not adequately explain how this mistake was made, and its hard to see how the Board could have come to any conclusion other than the quarry did not have a pre 1964 use. The applicant complains that the Board failed to take account of the quarry's registration under s. 261 of the Planning and Development Act 2000. The fact the quarry was registered was not a determination that the quarry had a pre 1964 user. The applicant claims that the respondent had no jurisdiction to issue s. 137 notices to the parties. The decision to issue arises where the Board considers something new has arisen which may be relevant. In this case the Board considered that a relevant question arose on foot of the inspectors report as to whether the quarry predated 1964. This was a decision clearly within the Boards planning expertise and not therefore something ordinarily reviewable by this court. The Board therefore did not err in law in issuing the s. 137 notices. The applicant complains that the Board should have circulated the responses provided to the s. 137 notice but has not demonstrated to the court what response it would have made and that these responses might well have changed the decision that was made. The applicant complains that the Board should have requested a report from the inspector in response to the submissions received as a result of the s. 137 notices; nothing in the act required the Board to instruct the inspector to report on the s. 137 responses. The applicant's complaint in relation to the Board's reference to Frank Harrington rather that Frank Harrington Ltd is of no merit. The applicant complains that the Board failed to give reasons for its decision. The Board did identify that it considered that the quarry was unauthorised and that it would be inappropriate to grant retention permission as to do so would facilitate the continuation of an unauthorised development. In light of the foregoing, the Court is satisfied that the applicant in this matter is not entitled to the relief sought. The application is refused.