Neutral Citation Number: [2010] IEHC 97

THE HIGH COURT

2006 1481 JR

BETWEEN

Michael O'Reilly

Applicant

And

Galway City Council

Respondent

JUDGMENT of Mr. Justice Charleton delivered on the 26th day of March, 2010

1. The applicant owns a quarry. It never was subject to planning permission. He asks that a decision of the respondent of the 11th October, 2006, should be quashed. This required him to apply for planning permission in respect of his quarry at Anglinham, Menlo, almost on the shores of Lough Corrib, in the County of Galway, and, in that regard, to submit an environmental impact statement. He never before either had planning permission for his quarry, or as a matter of law, needed it.

2. The applicant principally complains that the requirements of s. 261 of the Planning and Development Act 2000 (hereinafter referred to as the Act of 2000) have not been complied with. Without strict compliance with the statutory regime therein set out, the applicant argues that the decision made is unlawful. The applicant claims that the respondent was at sixes and sevens in its purported implementation of the section; not following the appropriate steps as they are set out in the section, making varied attempts to apply different subsections, and proceeding in a way which was out of the order as to time contemplated by the legislation. In the result, the applicant argues, the decision of the respondent of the 11th October, 2006, is bad. In consequence, the applicant claims to be entitled to pursue his quarrying activity at that site untrammelled by any planning restraints and without the necessity to submit to environmental controls of any kind. The applicant pleads that the requirements under s. 261 of the Planning and Development Act 2000 are mandatory and not directive; since they impose a burden on his property rights they are to be construed in accordance with the form in which they are expressed which, of their nature, does not allow the court to overlook error in favour of substantial compliance.

3. The respondent pleads not only substantial compliance but, in the event of error, says that the court should find an absence of actual prejudice by reason thereof and, even if a case in law is made out, should proceed to refuse the application on the discretionary ground of the undesirability of a quarry operating within a stone's throw of Lough Corrib, without planning conditions relating to the proper planning and sustainable development of this important area.

4. Section 261 of the Planning and Development Act 2000 came into force on the 28th April, 2004. Prior to that time, new quarries were required to obtain planning permission under Part IV of the Local Government (Planning and Development) Act 1963. This came into force on the 1st October, 1964. Many quarries are, however, of ancient origin. This is said to be one of them, with a history going back to the 17th Century. Prior to the implementation of the Act of 1963, planning controls were few. Existing developments were exempt from any application of the Act of 1963. For whatever reason, in respect of quarries, this was considered undesirable. In consequence, s. 261 of the Planning and Development Act 2000 has a legislative purpose of enabling local authorities to decide to bring quarries within planning control for the first time. This means that quarries would, in effect, have planning conditions imposed on them, be required to submit a planning application accompanied by an environmental impact statement, or to have existing planning conditions modified. The first point raised in this application relates to the jurisdiction being exercised by the court. The respondent claims that the applicant is out of time in making this application and that it is, in consequence, to be dismissed. The respondent further claims, notwithstanding the full exchange of pleadings and affidavits, that what is before the court is an application for leave to commence judicial review proceedings. The applicant counter argues by observing that as a matter of law the application is made within time and is one for a final order.

Time Limit

5. The relevant decision was made on the 11th October, 2006. Under S.I. 525 of 2006, s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006 was brought into force. Section 50 of the Principal Act, which has been substituted by s. 13, now provides as follows:-

> "Judicial review of applications, appeals, referrals and other matters.
>
> 50- (1) Where a question of law arises on any matter with which the Board is concerned, the Board may refer the question to the High Court for decision.
>
> (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').

(3) Subsection (2)(a) does not apply to an approval or consent referred to in Chapter I or II of Part VI

(4) A planning authority, a local authority or the Board may, at any time after the bringing of an application for leave to apply for judicial review of any decision or other act to which subsection (2) applies and which relates to a matter for the time being before the authority or the Board, as the case may be, apply to the High Court to stay the proceedings pending the making of a decision by the authority or the Board in relation to the matter concerned.

(5) On the making of such an application, the High Court may, where it considers that the matter before the authority or the Board is within the jurisdiction of the authority or the Board, make an order staying the proceedings concerned on such terms as it thinks fit.

(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.

(7) 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)(b) or (c) applies shall be made within the period of 8 weeks beginning on the date on which notice of the decision or act was first sent (or as may be the requirement under the relevant enactment, functions under which are transferred under Part XIV or which is specified in section 214, was first published).

(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension

(9) References in this section to the Order shall be construed as including references to the Order as amended or replaced (with or without modification) by rules of court.

Section 50: supplemental provisions.

50A- (1) In this section—

'Court ', where used without qualification, means the High Court (but this definition shall not be construed as meaning that subsections (2) to (6) and (9) do not extend to and govern the exercise by the Supreme Court of jurisdiction on any appeal that may be made);

'Order ' shall be construed in accordance with section 50;

'section 50 leave ' means leave to apply for judicial review under the Order in respect of a decision or other act to which section 50(2) applies.

(2) An application for section 50 leave shall be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave)—

(a) if the application relates to a decision made or other act done by a planning authority or local authority in the performance or purported performance of a function under this Act, to the authority concerned and, in the case of a decision made or other act done by a planning authority on an application for permission, to the applicant for the permission where he or she is not the applicant for leave,

(b) if the application relates to a decision made or other act done by the Board on an appeal or referral, to the Board and each party or each other party, as the case may be, to the appeal or referral,

(c) if the application relates to a decision made or other act done by the Board on an application for permission or approval, to the Board and to the applicant for the permission or approval where he or she is not the applicant for leave,

(d) if the application relates to a decision made or other act done by the Board or a local authority in the performance or purported performance of a function referred to in section 50(2)(b) or (c), to the Board or the local authority concerned, and

(e) to any other person specified for that purpose by order of the High Court.

(3) The Court shall not grant section 50 leave unless it is satisfied that—

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject of the application, or

(ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being development which may have significant effects on the environment, the applicant—

(I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under section 37(4)(c), would have to satisfy by virtue of section 37(4)(d)(iii) (and, for this purpose, any requirement prescribed under section 37(4)(e)(iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls).

(4) A substantial interest for the purposes of subsection (3)(b)(i) is not limited to an interest in land or other financial interest.

(5) If the court grants section 50 leave, no grounds shall be relied upon in the application for judicial review under the Order other than those determined by the Court to be substantial under subsection (3)(a).

(6) The Court may, as a condition for granting section 50 leave, require the applicant for such leave to give an undertaking as to damages.

(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

(8) Subsection (7) shall not apply to a determination of the Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution.

(9) If an application is made for judicial review under the Order in respect of part only of a decision or other act to which section 50(2) applies, the Court may, if it thinks fit, declare to be invalid or quash the part concerned or any provision thereof without declaring invalid or quashing the remainder of the decision or other act or part of the decision or other act, and if the Court does so, it may make any consequential amendments to the remainder of the decision or other act or the part thereof that it considers appropriate.

(10) The Court shall, in determining an application for section 50 leave or an application for judicial review on foot of such leave, act as expeditiously as possible consistent with the administration of justice.

(11) On an appeal from a determination of the Court in respect of an application referred to in subsection (10), the Supreme Court shall—

(a) have jurisdiction to determine only the point of law certified by the Court under subsection (7) (and to make only such order in the proceedings as follows from such determination), and

(b) in determining the appeal, act as expeditiously as possible consistent with the administration of justice.

(12) Rules of court may make provision for the expeditious hearing of applications for section 50 leave and applications for judicial review on foot of such leave."

6. The operative words require an application for judicial review to be made within eights weeks of the "decision made or other act done by a planning authority, a local authority or the board in the performance or purported performance of a function under [the Planning and Development Act 2000]" (as quoted from s. 50(2)(a) of the Planning and Development Act 2000, as substituted by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006). In contrast, the version of section 50 that was in force at of the date of this decision carries the time limit set out in O. 84 of the Rules of the Superior Courts, 1986, namely six months for *certiorari,* and refers not to quarry registration or control but to planning, specifically to "an application for permission (s. 50(2)(a)(i) of the Act of 2000, as amended) … or a decision of the Board on any appeal or referral …"(s. (2)(b)(i) of the Act of 2000, as amended).

7. This is not a judicial review about an application for planning permission, or an appeal in that regard. It concerns a decision by a local authority purporting to perform a new function under s. 261 of the Planning and Development Act 2000. Therefore, on the face of it, the old time limit under s. 50, as it existed prior to the 17th October, 2006, is operative in this case. The respondent, however, points to the absence of any saving provision in the Planning and Development (Strategic Infrastructure) Act 2006 whereby existing rights are preserved, as in s. 265 of the Planning and Development Act 2000, which provides as follows:-

"265.—(a) Nothing in this Act shall affect the validity of anything done under the Local Government (Planning and Development) Acts, 1963 to 1999, or under any regulations made under those Acts.

(b) Any order, regulation or policy directive made, or any other thing done, under the Local Government (Planning and Development) Acts, 1963 to 1999, that could have been made or done under a corresponding provision of this Act, shall not be invalidated by any repeal effected by this Act but shall, if in force immediately before that repeal was effected, have effect as if made or done under the corresponding provision of this Act, unless otherwise provided.

(2) The continuity of the operation of the law relating to the matters provided for in the repealed enactments shall not be affected by the substitution of this Act for those enactments, and—

(a) so much of any enactment or document (including enactments contained in this Act) as refers, whether expressly or by implication, to, or to things done or falling to be done under or for the purposes of, any provision of this Act, shall, if and so far as the nature of the subject matter of the enactment or document permits, be construed as including, in relation to the times, years or periods, circumstances

or purposes in relation to which the corresponding provision in the repealed enactments has or had effect, a reference to, or, as the case may be, to things done or falling to be done under or for the purposes of, that corresponding provision,

(b) so much of any enactment or document (including repealed enactments and enactments and documents passed or made after the commencement of this Act) as refers, whether expressly or by implication, to, or to things done or falling to be done under or for the purposes of, any provision of the repealed enactments shall, if and so far as the nature of the subject matter of the enactment or document permits, be construed as including, in relation to the times, years or periods, circumstances or purposes in relation to which the corresponding provision of this Act has effect, a reference to, or, as the case may be, to things done or deemed to be done or falling to be done under or for the purposes of, that corresponding provision.

(3) Section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, as amended by section 69(1) of the Act of 1963 shall, notwithstanding the repeal of section 69 of the Act of 1963 by the Act of 1990, apply to every case, other than a case under this Act or the Act of 1990, where any compensation assessed will be payable by a planning authority or any other local authority.

(4) In the case of any application to a planning authority, or any appeal or any other matter with which the Board is concerned which is received by the planning authority or the Board, as the case may be, before the repeal of the relevant provisions or the revocation of any associated regulations, the provisions of the Local Government (Planning and Development) Acts, 1963 to 1999, and regulations made thereunder shall continue to apply to the application, appeal or other matter notwithstanding the repeal of any enactment or revocation of any regulation."

8. The relevant time limits were amended by s.3 of the Local Government (Planning and Development) Act 1992, as they applied on the 11th October, 2006 in respect of judicial review applications in relation to planning permission. Section 21(1)(c) of the Interpretation Act 1937 provides that a change in legislation is to be construed so as not to:

> "affect any right, privilege, obligation, or liability acquired, accrued, or incurred under the statute or portion of a statute so repealed…"

9. Whether a statute is to be construed as altering existing rights in civil law depends upon a complete reading of its contents and the legislative intention derived therefrom. A distinction may also be drawn between the alteration of substantive rights as opposed to changes in the mode of procedure for the purpose of enforcing those rights. I am, in effect, being asked to decide that as the applicant is six days out of time in making the initial application for judicial review, pursuant to the revised form of s. 50 of the Planning and Development Act 2000, as amended, that within the six days between the 11th October, 2006, and the change in the section on the 17th October, 2006, that the applicant should then have asserted his rights under the amended form of procedure. I am not impressed by that. In *Child v. Wicklow County Council* [1995] 2 I.R. 447, the issue was the application of a new time limit which would apply retroactively to deprive the plaintiff of their entitlement to challenge a decision which was made before new time limits became operative. There are strong parallels between the situations in that case and in this one. Without reviewing the relevant authorities in any further detail, I am prepared to follow the decision of Costello P. in that case, as enunciated at p. 451 of the judgment:-

> "It is claimed that the provisions of the Local Government (Planning and Development) Act, 1992, require that proceedings be instituted by way of judicial review and that they proceed within two months from the date of a decision of a planning authority. It is said that these proceedings are invalid because of the provisions of the Act of 1992 but I do not think that that claim succeeds. The construction of the Act of 1992 … would be unconstitutional because it would, I think, mean that persons who had obtained a proprietary right or who had a constitutional right, namely, to challenge a decision, would be deprived of their right to apply to the court. I do not think that the Act of 1992 should be construed so as to produce an unconstitutional result. I think that it should be construed to be consistent with the Constitution. It seems to me that the Act of 1992 applies to decisions made since the enactment of the Act. As this decision was made before the enactment of the Act, the plea under the Act fails."

10. I would therefore hold that the application was made in time. Further, since the earlier form of s. 50 of the Planning and Development Act 2000 (before its substitution by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006 applies, this is a final hearing.

The Section

11. Section 261 of the Planning and Development Act 2000 is difficult to understand. I now propose to set out the entirety of s. 261 and then to give my understanding of the various manoeuvres that are required under it:

> "261.—(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.
>
> (2) Without prejudice to the generality of subsection (1), information provided under that subsection shall specify the following—
>
> (a) the area of the quarry, including the extracted area delineated on a map,
>
> (b) the material being extracted and processed (if at all),
>
> (c) the date when quarrying operations commenced on the land (where known),
>
> (d) the hours of the day during which the quarry is in operation,

(e) the traffic generated by the operation of the quarry including the type and frequency of vehicles entering and leaving the quarry,

(f) the levels of noise and dust generated by the operations in the quarry,

(g) any material changes in the particulars referred to in paragraphs (a) to (f) during the period commencing on the commencement of this section and the date on which the information is provided,

(h) whether—

(i) planning permission under Part IV of the Act of 1963 was granted in respect of the quarry and if so, the conditions, if any, to which the permission is subject, or

(ii) the operation of the quarry commenced before 1 October 1964,

and

(i) 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.

(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.

(b) A notice under paragraph (a) shall state—

(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.

(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 , 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.

(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.

(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) (a) A quarry to which this section applies in respect of which the owner or operator fails to provide information in relation to the operations of the quarry in accordance with subsection (1) or in accordance with a requirement under subsection (3) shall be unauthorised development.

(b) Any quarry in respect of which a notification under subsection (7) applies shall, unless a planning application in respect of the quarry is submitted to the planning authority within the period referred to in that subsection, 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."

12. In addition to that I note that the definition of a "European site" is as set out in s. 2 of the Act of 2000. This was, in turn, modified by s. 75 of the Wildlife (Amendment) Act 2000, amended the European Communities (Natural Habitats) Regulations, 1997 (S.I. No. 94 of 1997),and by further regulations to which I shall later refer. The only sensible way to deal with s. 261 is to split it up into digestible portions.

Registration

13. I propose to initially deal with the first three subsections. From the 28th April, 2004, the date on which s. 261 of the Act of 2000 came into force, a positive obligation has been cast on quarry owners and operators to register their quarry. It is only when proper particulars, in accordance with the first three subsections, have been received, that details are to be entered in the planning register kept under s. 7 of the Act of 2000. There is no positive obligation cast upon local authorities to search out quarry owners, to appraise them of the contents of s. 261, to supply a form for registration, to hunt down the relevant particulars, or to persist in pursuing for necessary details to enable the registration generally. The party bearing that burden is the quarry owner or operator. Where s. 261 (1) of the Act of 2000 refers to "information relating to the operation of the quarry", the specification of particulars in subs. 2 are given "without prejudice" to the obligation to supply what must be construed as all relevant information. This means all relevant information which would enable the planning authority to exercise any of its functions under ss. 4, 5, 6, 7 or 8. Because the planning authority is entitled to modify an existing planning permission under subs. 4 or 5, or to require the making of a new planning application under the same subsections, it is clear that the information to be provided must be fulsome. That information falls short of that required for a planning application in respect of any ordinary new development which may be granted or refused subject to conditions under s. 34 of the Act. The information must be enough to enable the planning authority to make a decision as to whether further conditions may be necessary for the operation of a quarry in a sustainable manner, or to be properly planned, or that it may be required for the proper and sustainable planning and development of the area in which the quarry is situated, that a fresh planning application should be made by old pre-1964 quarries, or that a planning application should be made for the very first time. In that regard, s. 261(2) gives some guidance: A map is required showing the area from which ore, or some other substance, has been extracted; that which has been taken from the quarry needs to be specified. When this extraction begins the working hours of the quarry need to be set out; vehicle trips to and from the quarry must be particularised; noise levels are required to be measured at relevant times of working; the dust thrown up by the workings of the quarry should be measured; and, where planning permission has been granted, that permission must be referred to in a manner inclusive of the relevant conditions. Furthermore, subs. 2 (h) (iii) allows a local authority to specify any other additional matter in relation to the operation of a quarry that might reasonably arise in the context of a proper and sustainable planning and development of the area in which the quarry is situated. The entitlement of the planning authority under subs. 3 to require a quarry owner "who has submitted information" to make a further submission of information is a wide ranging power. If, acting reasonably and in good faith, the planning authority is not satisfied with the information so far specified, as fully particularised under subs. 2, or in accordance with its general entitlement to information under subs. 1, they may require further information. It is only when this entire process has been concluded that registration is to be made under s. 7 of the Act.

14. I pause here. A dispute has arisen between the parties as to whether registration occurred by reason of the applicant filling in a form on the 22nd April, 2005, which was received some five days later by the respondent, or whether their demand for further information resulted in the quarry only being registered on the 14th October, 2005. Since my decision on the construction and application of the rest of s. 261 depends upon findings of fact in this regard, I turn to that issue.

15. I have no doubt that the registration form sent in by the applicant and signed by him on the 25th April, 2005, was deficient. It does not give the applicant's address, but instead refers to another party. The address given for the applicant is that of the quarry and in the name of a different party. I need to return to that later. No loading hours are given. Vague reference is made to additional opening times necessary to service the exceptional needs of customers. No map was supplied. In consequence, there is no delineation in relation to the extracted area and the working area of the quarry. Whereas the applicant says that he supplied "99% of the information required", it is obvious that he did not. In reading the applicant's affidavit I am not at all satisfied that he is, as has been claimed by the respondent, engaging in a less than complete account of these events. However, I find it very hard to see how it is even possibly arguable that the quarry was registered in April, 2005, or in July, 2005, an alternative date argued for by the applicant, in the light of the fact that on the 5th July, 2005, the applicant was advised that his registration was incomplete. Further information was supplied on the 14th July, 2005. Further information was to be submitted by him because, in order to find such information as was relevant, he had had to make an application under freedom of information legislation to the respondent in order to discover part of the history of the quarry. On the 7th October, 2005, the firm of Leo Wilson, Consulting Engineers, wrote to the respondent telling them that they had been appointed by the respondent, the owner of the quarry to act on his behalf. They invited contact in the event of any further queries but they were not the contact address in the registration from. Substantial information was supplied with that letter. This was considered by the planning officials. On the 14th

October, 2005, the quarry was registered. I have no doubt that this decision was correct and that the quarry could not have been legally and properly registered before then.

16. An issue has arisen as to whether the letters from the respondent seeking further particulars were ever received by the applicant. I am not prepared to assume that they were not. As previously noted, the applicant chose to put in as his address, the address of the quarry, uninhabited under the name of a different person. The applicant lives in Clarinbridge, in the County of Galway. There was no reason why he could not have put in his own address, as the form clearly stated. I have no idea why he did not. If post went astray then this happened because it was being addressed to an uninhabited quarry. That is not the fault of the respondent. Insofar as they engaged with the applicant, it must be remembered that the duty to register the quarry was entirely his. Insofar as the respondent facilitated him, then that is to the benefit of both parties. It would only be, however, where the respondent engaged in some mischief that the clear duty imposed by law on the applicant to register the quarry could have been displaced. That did not happen. I am therefore satisfied that the date of registration is the 14th October, 2005.

17. Subsections 4, 5, 6 and 7 of s. 261 of the Planning and Development Act, 2000 are mutually inter-dependent. As between ss. 7 and 6 a choice must be made: it is one or the other. As regards that choice, however, the procedures set out in ss. 4 and 5 must first be followed. Ss. 4, 5, 6 and 7, in essence, require the following:-

> (1) Firstly, the quarry must be registered under section 34.
>
> (2) Within six months of that registration a notice has to be published in a newspaper where it is commonly taken in the area of the quarry, stating that the quarry has been registered; that, where planning permission has been granted, the planning authority is considering modifying some conditions; or where planning permission has never been granted that the authority is considering imposing conditions for requiring the making of a planning application.
>
> (3) Submissions resulted from this are to be within four weeks and then considered by the council.
>
> (4) Then, the planning authority must make up its mind that it proposes to, but not necessarily has decided to, impose different conditions where planning permission already prevails, or, where this is an old quarry, to acquire the owners for the first time to apply for planning permission and to submit, in that regard, an environmental impact statement.
>
> (5) The planning authority will then write to the owner inviting his comments, in pursuit of natural justice, before it makes a final decision. It is not required under the section that the observations made by the public should be forwarded to the quarry owner. However, that would be good practice. What is required under the section is that the substance of why such a proposal is made should be notified to the quarry owner so that he or she can reply. That may include arguments made by the public, or it may be that the arguments made by the public have already been considered by the planning authority and incorporated into the notice.
>
> (6) Then, the planning authority can make a decision, not later than two years from the registration of the quarry, to impose planning conditions on a quarry which has never before being subject to planning regulation, or to make changes to the conditions imposed on a quarry which is already regulated by planning permission. In the alternative, where the conditions for subs. 7 are met, a quarry which is an old quarry can be asked to apply for planning permission and to submit an environmental impact statement.

18. I perhaps need to look at these subsections in a little more detail.

Publication and Notification

19. Subsection 6 enables the planning authority, within two years of the date of registration of any quarry, to impose conditions for the operation of a quarry, where the quarry as a development existed before the 1st October, 1964, or where a quarry has an existing planning permission, to impose new conditions. These would then be treated as a permission subject to conditions under s. 34 of the Act of 2000. Where the conditions are more restrictive than those already existing in respect of an existing planning permission then, under subs. 8, an owner may claim compensation, provided of course the conditions are ones which allow for compensation under the Act. Under subs. 9 any decision to impose conditions on a quarry which did not need a planning permission, because it commenced operation before the 1st October, 1964, or to impose more onerous conditions on a quarry which was granted a planning permission, may be appealed to An Bord Pleanála. The power of the Board, in that regard, will be that contained in chapter III of the Act.

20. The consequence of failing to follow the procedures set out in s. 261 may be twofold. From the point of view of a quarry owner, a failure to register means that the quarry becomes an unauthorised development. This leaves the quarry open to enforcement proceedings and its owner the potential subject of a criminal prosecution. From the point of view of the planning authority, however, if they do nothing within two years from the date of registration of the quarry, then it may continue its operations unrestricted by planning controls. Of course, it will be subject to the common law of nuisance and any relevant statutory offences concerning pollution by noise, smells or dust.

21. As a matter of fact, in this case, the planning authority decided on the 24th April, 2007, to impose nineteen conditions under s. 261 (6) of the Act of 2000. The letter to the applicant read:-

> "You are hereby advised on a without prejudice basis that Galway City Council intend imposing conditions in relation to the continued operation of the quarry as per the attached schedule and would welcome any comments you wish to make by 23rd April, 2007. This does not prejudice Galway City Council varying or adding to these conditions in its formal decision under s. 261 (6) (a) (i) of the Planning and Development Act 2000."

22. As the applicant did not reply to this letter, the nineteen conditions were imposed "without prejudice". These included conditions as to the operation of the quarry during particular hours, the restriction of blasting, dust and water monitoring and that an application for planning permission should be made five years hence. This decision is not impugned in these judicial review proceedings.

23. I now turn to subsection 7. For some reason, where the conditions for the operation of this subsection exist, a planning authority is required not to impose conditions on the operation of a quarry under subsection 6. Under subsection 7, not later than one year after the registration of the quarry, the owner may be required to apply for planning permission and submit an environmental impact statement. The newspaper notice, public time for submissions, and notice of proposal provisions would seem to be contemplated during the year after the registration of the quarry. Then the subs. 7 procedure has to happen within six months of that. Subsection 6 and 7 cannot be used together: hence, the "without prejudice" order under s. 261 (6) (a) (i) made by the planning authority on the 24th April, 2007. If the order of the 11th October, 2006, fails, then that order will come into operation. It is clear from subss. 6 and 7 that orders under each subsection cannot exist simultaneously with the other. In deciding on a planning application under subs. 7, the planning authority must have regard to the existing use of the land as a quarry. Where, however, a quarry which commenced operations before the 1st October, 1964, would be likely to have significant effects on the environment, and has an extracted area of greater than 5 hectares, or is situated on a European site, or any other area prescribed because of conservation protection of the environment, including archaeological and natural heritage, or land preserved for wild life purposes, the planning authority may require, within one year of the date of registration, the owner to apply for planning permission and to submit an environmental impact statement. It is not necessary under this subsection for the planning authority to publish a notice in a newspaper stating that they are contemplating such an action. This quarry is a quarry to which subs. 7 applies.

24. I now need to proceed through the chronology of events which occurred between the registration of the quarry on the 14th October, 2005, and the decision made by the planning authority under subsection 7. On the 10th January, 2006, two events occurred. The planning register was amended with a note that the continued operation of the site required a planning application and an environmental impact study. Both subsections 5 and 7 mention an environmental impact study being made a requirement of a planning application. A notice of a proposal is to be sent to the owner under subs. 5 "as soon as may be after the expiration of the period for making observations or submissions pursuant to a notice" under subsection 4.

25. The issue here is whether that was done. I return therefore to the document. The first submission made is that the cart came before the horse. By a letter dated the 10th January, 2006, the respondent wrote to the applicant telling him that a planning application and an environmental impact statement were required for the continued operation of the quarry. It also said that the continued operation of the quarry would be likely to have significant effects on the environment, as specified in subsection 7. The applicant was given six weeks to submit observations. The applicant claimed not to receive the letter. If he did not, as I already held, it was his own fault. There was therefore compliance with the Act. However, a notice had not first been published. This appeared in the Galway Advertiser two days later, probably having been sent on or before the 10th January, 2006. The notice was published to the public generally, including to the applicant. It referred specifically to s. 261 (7) of the Act of 2000. It told the public that they had four weeks to make observations. As a matter of fact some observations were received. Then, as it appears to me, the horse went into the traces again, this time in front of the cart. On the 28th April, 2006, Mr. Clarke, who had previously written on behalf of the applicant on the 7th October, 2005, again wrote to the respondent. He pointed out that the letter was wrongly addressed. He said in a conversation with the respondent, that he knew about it in consequence of inspecting the planning register. This seems likely as he had been retained by the applicant to act on his behalf. He then added to his letter:-

> "In view of the mistake by the Council our client wishes to be given the opportunity to respond to the letter of 10th January, 2006 and for the response to be included in consideration of the registration."

26. No submissions were received from the applicant. This was despite a letter from the respondent dated the 16th June, 2006, giving additional time up to the 28th June, 2006, for the making of submissions. The only submission made was a protest letter dated the 22nd June, 2006, which was followed up by a further protest letter dated the 3rd October, 2006, both from the solicitor for the applicant, claiming, in effect, that a default from the provisions of s. 261 of the Planning and Development Act 2000 had occurred.

27. Since part of the protest made by the applicant was that he had not enough time to make submissions, the respondent wrote to him on the 22nd September, 2006, asking for submissions by the 6th October, 2006. These were not made. This concession was not necessary.

Substance
28. The substance of these events is, as I construe it, the following:

- o The applicant did not make a sufficient effort to register his quarry in April 2005;
- o If any post went astray from the respondent to the applicant, and I am not satisfied it did, it was entirely the fault of the applicant;
- o The respondent, as planning authority, was within its rights to require further information from the applicant in relation to the operation of the quarry;
- o In consequence, the relevant information was not received until October, 2005. The correct registration date for the quarry is therefore the 14th October, 2005.
- o The respondent has published a notice in a newspaper as to its proposal to require an application for planning permission and an environmental impact study in accordance with s. 261 (4) of the Planning and Development Act 2000. This happened on the 12th January, 2006. This was within six months of the registration of the quarry, as the subsection requires.
- o The advertisement in the newspaper only notified the public that the respondent was considering requiring the applicant to apply for planning permission and to submit an environmental impact study. Thereafter, the respondent had to propose to do so and write to the applicant asking him to make observations. The relevant section does not require that the public observation on the matter under consideration should be forwarded to the quarry owner. Where that is done, it is both convenient and helpful administratively.

o On the applicant's own case, he did not receive the letter of the 10th January, 2006, whereby the respondent was proposing to require a planning application and the submission of an environmental impact statement. I am not convinced this is probable. Notice of the proposal was made to his agent Mr. Clarke on the 26th April, 2006, when he discovered the letter on the planning file. On the facts of his case, however, the applicant had elected for a strange and uninhabited address, that was not his home address, and he is therefore to be fixed with reasonable notice of the proposal within a reasonable time of the newspaper advertisement.

o The relevant time limits are that the planning authority has six months to publish the relevant notice in the newspaper. The public then have four weeks in which to make observations. Then the planning authority, if it proposes to require a planning permission application and the submission of an environmental impact statement, must "as soon as may be" thereafter serve a notice by way of letter. Then the owner has six weeks to reply. This notification in fact occurred either when Mr. Clarke discovered the letter of the 10th January, 2006, on the planning register, or when a new letter was issued thereafter. He never replied;

o The advice given to the applicant was understandable, because of the extraordinarily complication in the drafting of s. 261 of the Planning and Development Act 2000. However, it was not a compliance with the section. The applicant had an entitlement to make observations as to the facts but chose, instead, to claim an entitlement to some kind of default exemption from the planning code.

Decision

29. My decision therefore is that a newspaper notice has been validly published in accordance with s. 261 (4) of the Planning and Development Act 2000. This took place on the 12th January, 2006. Valid notice of a proposal to require the applicant to make a planning application and to submit an environmental impact statement was properly made under subsection 7. This was communicated under subs. 5 to the applicant in a manner which, at first did not accord with the strict provisions of s. 261 of the Act of 2000. In substance, however, and as a matter of fact, this defect was cured by the applicant's agent discovering the letter on the planning file in April, 2006. It was followed up by strict compliance with subs. 5 through correspondence exchanged between the planning authority and Mr. Clarke and the applicant as and from the 28th April, 2006. Whether the applicant had six weeks from that date or, as I would hold, six weeks from a reasonable time after the expiry of four weeks from the publication of the notice on the 12th January, 2006, does not matter. The applicant chose not to make submissions on the proposal of the respondent but, instead, to claim a default exemption. The respondents were correct in proceeding to a decision. The Court would regard what occurred between April and October, 2006 as being similar to what occurred between April and October, 2005. There were many delays by the applicant and the motivation for them has not been explained. The decision of the 11th October, 2006, requiring the applicant to apply for planning permission and to submit an environmental impact statement was made well within time under subs. 7, being one year from the date of registration of the quarry.

30. In applying the law on the application of s. 50 of the Act of 2000, I have held that the form in which it then was, governed the rights and liabilities of the applicant in applying for judicial review at the time when that application was made. The same situation applies in relation to subsection 7. I judge the state of affairs as of the time in which they occurred. Once the newspaper notice had been published, and once notification of a proposal had been given to the applicant, a quarry owner, the respondent had the choice of exercising its powers either under subs. 6 or subs. 7 of s. 261 of the Act of 2000. As I have said, both cannot be done together. In this instance, however, the operation of subs. 6 was done on a without prejudice basis on the 24th April, 2007. The implementation of subs. 7, the decision under review here, was undoubtedly correct as of the time when it was made. The only information which is before the Court is that contained in the affidavit of John Doody, dated the 16th February, 2007. At the time when the quarry was registered, and at the time when the respondent made a decision under s. 261 (7) of the Act of 2000, part of this quarry site was contained within a candidate scenic area of conservation, which was a European site as defined in s. 2 of the Planning and Development Act 2000, as amended. Section 6 of the Planning and Development (Strategic Infrastructure) Act 2006 amends s. 2 of the Principal Act, though not by changing the definition of a European site. Under s. 75 of the Wildlife (Amendment) Act 2000, the European Communities (Natural Habitats) Regulations 1997 (S.I. 97 of 1997) were amended by defining a European site as one which is notified for the purposes of Regulation 4 or transmitted to the Commission "but only until the adoption in respect of the site at the decision by the Commission under Article 21 of the Habitats Directive". The clear reference to time in that amendment makes it clear to me that I should judge this case as of the time when these facts occurred. It appears that the area was de-listed as a European site on the 27th November, 2006, but this was after the decision made by the respondent.

31. In the result, I find that there was compliance with s. 261 of the Planning and Development Act 2000 in the requirement made of the applicant pursuant to subs. 7 that he should apply for planning permission and submit an environmental impact statement. I understand that a further nine month period is to be given by the respondent from the date of this judgment for the applicant to comply with this requirement before the respondent makes its final decision.