Neutral Citation Number: [2010] IEHC 479

THE HIGH COURT

JUDICIAL REVIEW

2010 756 JR

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

LACKAGH QUARRIES LIMITED

APPLICANT

AND

GALWAY CITY COUNCIL

RESPONDENT

Judgment of Ms. Justice Mary Irvine, dated the 21st day of December, 2010

1. The within proceedings concern the lawfulness of a decision made by the respondent on the 16th April, 2010, ("the decision") whereby it refused an application made by the applicant pursuant to s. 42 of the Planning and Development Act 2000, as amended, ("the 2000 Act") to extend the life of a planning permission granted earlier by An Bord Pleanála on the 9th October, 2000.

2. By way of notice of motion dated the 9th June, 2010, the applicant sought leave of the court pursuant to s. 50 of the 2000 Act to seek to challenge the lawfulness of the aforementioned decision. When the matter came before the court it was agreed that it would be in the interest of both parties if the court could, having considered whether or not the respondent had made out substantial grounds to challenge the decision, then proceed to consider its judgment on the substantive issues in what is now commonly described as a type of rolled-up hearing. This, the court agreed to do.

Decision of An Bord Pleanála, the 9th October, 2000

3. Following an appeal from the decision of the respondent dated the16th April, 2000, on the 9th October, 2000, An Bord Pleanála ("the Board") granted the applicant planning permission for certain quarrying works at lands located at Coolagh, Ballindooley, on a site of circa 24 hectares.

4. Condition No. 2 of the aforementioned planning permission provided as follows:-

> "This permission is for a period of ten years. At the end of this period, works shall cease and the site shall be decommissioned and landscaped in accordance with details to be submitted to and agreed with the planning authority, unless before the end of that period, permission for the continuance of the use beyond that date shall have been granted."

5. The reason attaching to the aforementioned condition was stated as follows:-

> "To enable the effect of the development on the amenities of the area to be reviewed, having regard to the circumstances then prevailing."

6. An application for the extension of the "appropriate period" under s. 42 of the 2000 Act was received by the planning authority on the 24th February, 2010. On the 16th April, 2010, that application was refused by way of Manager's Order No. 58895 for reasons which I will now summarise, but which are set out in full in the Schedule attached thereto. Four reasons were given, namely:-

> (i) That the extension of the appropriate period would be in conflict with the terms of and reasons behind Condition No. 2 of the original planning permission.
>
> (ii) That an extension to the appropriate period would be in conflict with the planning authority's obligations under Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended, Council Directive 92/43/ECC on the conservation of natural habitats and of wild fauna and flora, as amended, and the European Communities (Natural Habitats) Regulations 1997 (S.I. No. 94/1997), as amended.
>
> (iii) That the terms of a High Court order made in the context of proceedings under s. 160 of the Planning and Development Act 2000, precluded the consideration of an extension to the appropriate period.
>
> (iv) The planning authority was not convinced that the quarry could be exhausted within a "reasonable period" as required under s. 42 of the 2000 Act.

The Applicant's Submissions

7. The applicant maintains that the circumstances in which a planning authority must consider an application for an extension of the life a planning permission are tightly controlled by the provisions of s. 42(1) of the 2000 Act and the Regulations made thereunder. They rely upon a number of decisions commencing with that of Gannon J. in *State (McCoy) v. Dun Laoghaire Corporation* [1985] I.L.R.M. 533, wherein the learned trial judge determined that, once an applicant had complied with the requirements of the relevant section, in that case s. 4(1) of the Local Government (Planning and Development) Act 1982 ("the 1982 Act"), the planning authority

had no residual discretion and was obliged to extend the life of the planning permission.

8. Relying upon the aforementioned decision, the applicant maintains that the first three reasons furnished by the respondent for refusing to grant the extension were irrelevant considerations, thus affording it substantial grounds to contend that the decision is invalid.

9. In relation to the reliance by the planning authority upon Condition No. 2 of the planning permission of the 9th October, 2000, it is submitted that a planning authority cannot, by the imposition of a condition, remove a statutory entitlement such as that provided for in s. 42 of the 2000 Act as that would amount to an impermissible encroachment upon the legislative power of the Oireachtas. Accordingly, Condition No. 2 should be interpreted in light of the availability of the statutory entitlement.

10. The applicant submits that the second reason for the refusal, namely environmental considerations, were matters that could only be taken into account at the time of an application for planning permission and were not open for a consideration under the process provided for in section 42(1).

11. As a fallback argument, the applicant submits that if the planning authority was entitled to take into account the environmental considerations referred to, it failed to comply with the principles of natural justice in that it did not afford the applicant any opportunity to comment or make any submissions in respect of those concerns prior to reaching its decision.

12. In relation to the High Court order referred to in Reason (iii), the applicant submits that that order did not curtail the right of the planning authority to grant its application. That order merely restrained the applicant from carrying out any works, save in accordance with its original planning permission or any later permission.

13. In relation to the fourth reason for its refusal, the applicant maintains that the planning authority asked itself the wrong question when considering whether the applicant had satisfied it regarding the provisions of s. 42(1)(c)(iii). It is submitted that it must be inferred from the use of the word "exhausted" in its reasoning that the respondent considered the time that would be required to remove reserves from areas beyond the confines of the original planning permission.

14. Finally, the applicant maintains that if the decision is unlawful it is now automatically entitled, under the provisions of s. 42(2), to an extension of the appropriate period which should be deemed to have been granted on the last day of the eight week period commencing on the date it lodged its application.

Respondent's Submissions

15. The respondent firstly maintains that the application made was invalid as the applicant failed to state its legal interest in the lands, as required by art. 42(d) of the Planning and Development Regulations 2006 (S.I. No. 685/2006) ("the 2006 Regulations").Further, it maintains that it did not have any power to grant the extension sought and that s. 42 applies only to a permission granted under s. 34 or s. 37(g) of the Planning and Development Acts 2000 – 2010 and does not apply to the permission the subject matter of the within proceedings which was granted under the Local Government (Planning and Development) Acts 1963 – 1999, since repealed.

16. The respondent submits that, regardless of the apparent lack of discretion enjoyed by it when dealing with an application for an extension of the appropriate period under s. 42, it was nonetheless entitled to refuse the application due to the conditions attached to the original planning permission. Those conditions limited the applicant's right to quarry the relevant lands to a ten year period, unless a fresh application for planning permission was made prior to the expiry of that period.

17. Regarding the second reason given for refusing the application, the respondent maintains that it was obliged to have regard to a number of the EU Directives. These include: Council Directive 92/34/EEC on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 97/62/EC, Regulation (EC) No. 1882/2003 of the European Parliament and of the Council of the 29th September, 2003 and Council Directive 2006/105/EC, ("the Habitats Directive"), and the European Communities (Natural Habitats) Regulations 1997, as amended by the European Communities (Natural Habitats) (Amendment) Regulations 1998 and 2005; Council Directive 79/409/EEC on the conservation of wild birds, codified by Council Directive 2009/147/EC on the conservation of wild birds, ("the Birds Directive"), and the Wildlife Acts 1976 – 2000; and Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC and Council Directive 2003/35/EC ("Environmental Impact Assessment Directive" or "EIA Directive"). . The respondent further maintains that under s. 28 of the 2000 Act it is required, when performing its functions, to have regard to relevant ministerial guidelines. In this regard, it relied upon a number of circular letters and also upon "guidance for planning authorities" issued by the relevant department.

18. The respondent denies that in rejecting the applicant's application under s. 42, based upon environmental considerations, it failed to comply with the rules of natural justice and fair procedures. It maintains that it was under no obligation to alert the applicant to the fact that it was considering its application against the backdrop of the environmental regulations and guidelines referred to in the preceding paragraph. The respondent submits that the ongoing dealings between the parties, prior to the respondent's application under s. 42, meant that the applicant was well aware of the respondent's concern as to the environmental impact of any continued quarrying on the relevant site after the expiry of the ten year period provided for in the planning permission.

19. The respondent maintains that the terms of a High Court order made on the 12th December, 2006, in proceedings brought by the respondent against the applicant under the provisions of s. 160 of the Planning and Development Act 2000, precluded the planning authority from considering an extension to the appropriate period under s. 42 of the 2000 Act.

20. The respondent refutes the applicant's assertion that in considering the s. 42 application it applied the wrong test when deciding, as required by s. 42(1)(c)(iii), whether or not "the development will be completed within a reasonable time". It maintains that it used the words "completed" and "exhausted" interchangeably and that the use of the word "exhausted" in its decision does not justify the applicant's assertion that it applied an incorrect test.

21. Without prejudice to the aforementioned arguments, the respondent submits that the court enjoys a substantial discretion as to whether or not to grant the relief sought, even if it concludes that the applicant, in reaching its decision, acted *ultra vires*. The respondent argues that there are significant factors in the present case that justify the refusal of the relief sought.

22. The respondent argues, firstly, that the applicant has available to it an adequate alternative remedy, namely a right to apply for planning permission for continued quarrying on the relevant site. Secondly, having regard to Condition No. 2 of the planning permission of the 9th October, 2000, the respondent maintains that it would be unjust that the applicant, having accepted a planning permission with a defined life of ten years and having agreed to reapply for planning permission should it wish to continue quarrying beyond that

period, would be permitted to circumvent those conditions. Thirdly, at all stages the applicant conducted itself in the manner consistent with Condition No. 2 and this is evidenced by exchanges between the parties throughout 2009, and in particular by the scoping request made on the 12th June, 2009, which was stated to be in aid of an intended application for planning permission for the continuation of quarrying operations. Finally, the court was urged to consider the long history of this quarry and the conduct of the applicant in respect of unauthorised development, as outlined at length in the affidavit of Caroline Phelan, as a further reason for refusing to grant what is a discretionary remedy.

Leave to Apply for Judicial Review
23. Having regard to the submissions of the applicant, I am satisfied that it has established substantial grounds justifying this Court granting it leave to apply for judicial review to seek the reliefs set out at para. D in its statement required to ground the application for judicial review on the grounds set out at paras. E(1) – (15) thereof. At the opening of the proceedings, counsel for the applicant conceded that the substantial argument which the applicant wished to make was confined to these grounds and that it was not necessary for the court to embark upon a consideration of the additional grounds pleaded.

24. I will briefly deal with the relevant statutory framework prior to considering the arguments advanced by the parties in support of their respective positions.

Statutory Framework
25. Section 42 of the 2000 Act provides a mechanism whereby the planning authority may extend the life or duration of a planning permission. I will add emphasis to the provisions of particular relevance to this decision. The section provides as follows:-

> "(1) *On application a planning authority shall,* as regards a particular permission, *extend the appropriate period*, by such additional period as the authority considers requisite to enable the development to which the permission relates to be completed, *if* ***each*** *of the following requirements is complied with* –
>
> (a) *the application is in accordance with such regulations under this Act as apply to it;*
>
> (b) any requirements of, or made under, those regulations are complied with as regards the application;
>
> (c) *the authority is satisfied in relation to the permission that* –
>
> (i) the development to which the permission relates commenced before the expiration of the appropriate period sought to be extended,
>
> (ii) substantial works were carried out pursuant to the permission during that period, and
>
> (iii) *the development will be completed within a reasonable time*;
>
> (d) the application is made prior to the end of the appropriate period.
>
> (2) Where –
>
> (a) an application is duly made under this section to a planning authority,
>
> (b) any requirements of, or made under, regulations under section 43 are complied with as regards the application, and
>
> (c) the planning authority does not give notice to the applicant of its decision as regards the application within the period of 8 weeks beginning on –
>
> (i) in case all of the requirements referred to in paragraph (b) are complied with on or before the day of receipt by the planning authority of the application, that day, and
>
> (ii) in any other case, the day on which all of those requirements stand complied with,
>
> subject to section 246 (3), a decision by the planning authority to extend, or to further extend, as may be appropriate, the period, which in relation to the relevant permission is the appropriate period, by such additional period as is specified in the application, shall be deemed to have been given by the planning authority on the last day of the 8 week period."

26. The Regulations governing the procedure provided for in s. 42 are contained in the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), as inserted by art. 8 of the Planning and Development Regulations 2006 (S.I. No. 685 of 2006).

27. The articles relevant to this application are those set forth below:-

> "42. *An application under section 42 of the Act* to extend the appropriate period as regards a particular permission shall be made in writing, ***shall*** be accompanied by the prescribed fee as prescribed by Article 170 of these Regulations and *shall contain the following particulars* –
>
> (a) the name and address, and telephone number and e-mail address, if any, of the applicant and of the person, if any, acting on behalf of the applicant,
>
> (b) the address to which any correspondence relating to the application should be sent,
>
> (c) the location, townland or postal address of the land or structure concerned, as may be appropriate,
>
> (d) *the legal interest in the land or structure held by the applicant,*
>
> (e) the development to which the permission relates,
>
> (f) the date of the permission and its reference number in the register,

(g) the date on which the permission will cease to have effect,

(h) the date of commencement of the development to which the permission relates,

(i) particulars of the substantial works carried out or which will be carried out pursuant to the permission before the expiration of the appropriate period,

(j) the additional period by which the permission is sought to be extended, and

(k) the date on which the development is expected to be completed.

44(1) On receipt of an application to extend or extend further the appropriate period as regards a particular permission, a planning authority shall –

(a) stamp the documents with the date of their receipt, and

(b) consider whether the application complies with the requirements of article 42 or 43, as the case may require.

(2) (a) Where a planning authority considers that an application to extend or extend further the appropriate period as regards a particular permission complies with the requirements of article 42 or 43, as may be appropriate, the authority shall send to the applicant an acknowledgement stating the date of receipt of the application.

(b) *Where a planning authority considers that an application to extend or extend further the appropriate period as regards a particular permission does not comply with the requirements of article 42* or 43, as may be appropriate, *the authority **shall**, by notice in writing, require the applicant to furnish such further particulars as may be necessary to comply with the said requirements.*

45(1) *Where a planning authority receives an application to extend or extend further the appropriate period as regards a particular permission, the authority **may**, by notice in writing, require the applicant –*

(a) *to submit such further information as it may require to consider the application (including any information regarding any estate or interest in or right over land)*, or

(b) to produce any evidence which it may reasonably require to verify any particulars or information given in or in relation to the application.

(2) A planning authority shall not require an applicant who has complied with a requirement under sub-article (1) to submit any further information, particulars or evidence save as may be reasonably necessary to clarify the matters dealt with in the applicant's response to the said requirement or to enable those matters to be considered or assessed.

(3) Where an applicant does not comply with any requirement under this article within 4 weeks of such requirement, the planning authority shall refuse the application."

Decision

Jurisdictional Issues
28. I will firstly deal with the two preliminary jurisdictional issues raised by the respondent.

29. The respondent maintains that, even though it dealt with the applicant's application under s. 42, same was invalid for failing to disclose its legal interest in the relevant lands as required by art. 42(d) of the 2006 Regulations. It submits that it was not obliged to seek further particulars of the applicant's legal interest in the land, although it enjoys the right to do so under the provisions of art. 45(1)(b), which allows the planning authority to request any evidence which it may reasonably require to verify any particulars or information regarding the application.

30. The applicant relies upon art. 44 of the Regulations ,which deals with the procedure to be adopted by the planning authority on receipt of a s. 42 application. Article 44(2)(b) requires a planning authority, where it considers that an application does not comply with the requirements of art. 42, to notify the applicant in writing of such particulars as may be necessary to allow them comply with the requirements. It received no such notice. Further, the applicant submits that, in circumstances where the respondent accepted its application for the relevant extension and adjudicated upon it, it should now be estopped from raising an issue regarding its own jurisdiction.

31. I am satisfied that I should reject the respondent's preliminary objection for a number of reasons. Firstly, the provisions of art. 44(2)(b) appear to mandate the planning authority, if it deems that an application is invalid for want of the inclusion of the required information, to notify the applicant in writing of this fact. No such notice was served by the respondent. This article was clearly designed to insure that an applicant seeking an extension of lifetime of their planning permission would not find their application rejected based upon a technical defect in the application, which was otherwise capable of being rectified if brought to their attention. I am satisfied that art. 45(1), which permits the planning authority to seek further information, does not in any way relieve it of its mandatory obligations under art. 44(2)(b) if for any reason it perceives the application to be invalid due to non-compliance with the requirements of article 42.

32. Even if I am incorrect in my interpretation of the mandatory nature of art. 44(2)(b), I am nonetheless satisfied that the respondent, by reason of its own conduct, should now be estopped from relying upon its assertion that it lacked jurisdiction to entertain the application under section 42. The respondent not only accepted the application, but also the fee lodged with it following upon which it proceeded to adjudicate upon the application prior to notifying the applicant of its decision.

33. I also consider the respondent's preliminary objection to be somewhat opportunistic. The affidavit of Caroline Phelan dated the 19th July, 2010, which sets out the substantial dealings had between these parties over a period of 30 years, demonstrates that the respondent knew well the applicant's legal interest in the lands. During all of that period the respondent dealt with the applicant as the operator of the quarry. The original planning permission was granted to the applicant as the operator of the quarry, all enforcement proceedings were likewise issued against that legal entity and prior to the s. 42 application the applicant was engaged with the respondent regarding a fresh application for planning permission.

Repealed Legislation

34. The respondent maintains that the application made under s. 42 of the 2000 Act was misconceived as that section and art. 207 of the Planning and Development Regulations 2001 do not apply to a planning permission granted under the Local Government (Planning and Development) Acts 1963 – 1999, under which the applicant's permission was granted. In support of this argument, the respondent relies upon the definition of the word "permission", which was first introduced into the planning code by s. 6(b) of the Planning and Development (Strategic Infrastructure) Act 2006, which came into operation on the 31st January, 2007. Thereafter, the respondent maintains that the word "permission" under the Planning and Development Acts 2000 – 2010 must now be defined as meaning "a permission granted under s. 34 or s. 37(g) as appropriate," i.e. a permission granted under the Planning and Development Acts 2000 – 2007.

35. Article 207(2) of the 2001 Regulations came into force on the 11th March, 2002, and provided as follows:-

> "Sections 42 and 43 of the Act and articles 40 to 47 of these Regulations shall apply to any application made after the coming into force of these regulations to extend the appropriate period as regards a permission."

36. Accordingly, it is submitted that since the insertion of the definition of the word "permission" in the 2006 Act, the respondent is no longer entitled to entertain an application under s. 42 in respect of a permission granted prior to the 11th March, 2002.

37. The applicant disputes the respondent's submission on the basis that the 2000 Act provides for the continuity of the effect of the pre-existing legislation. It also submits that if the respondent's argument is correct, this would lead to absurd results and that the court should strain against any such interpretation, having regard to s. 5 of the Interpretation Act 2005.

38. Having considered the submissions of the parties, and given that judicial review is a discretionary remedy, I believe the respondent should be estopped by reason of its own conduct in entertaining the application under s. 42, from maintaining this argument. However, I also believe that the submission is, in any event, legally flawed and without foundation.

39. I reject the respondent's submission that I should interpret the law in such a fashion as to conclude that there has been some hitherto undiscovered lacuna in the planning legislation which means that applications for extensions of the lifetimes of permissions granted prior to the commencement of the 2000 Act cannot be considered under s. 42 of that Act, and all merely because of a definition of the word "permission" that is inserted into the 2000 Act in 2006. I cannot accept that it was the intention of the legislature by introducing this definition to close down the effect of s. 42 to all planning permissions granted under the Act of 1963, as amended. The fact that s. 42 of the 2000 Act repeats verbatim the provisions of s. 4 of the 1982 Act, to me, suggests that the legislature intended a continuity of the 1982 provision. If it had been the intention of the legislature to rule out vast swathes of planning permissions granted prior to the enactment of the 2000 Act from the benefit of an extension of the appropriate period, which could only be sought under the 2000 Act, I believe the Act would have said so in no uncertain terms. It is clear to me that the legislature has by s. 265 of the 2000 Act sought to ensure the continuity and validity of Acts done under repealed enactments. Accordingly, I reject this argument made by the respondent.

40. Section 26 of the Interpretation Act 2005 deals with the procedure for the coming into force of amendments, particularly the continuation of existing arrangements. In dealing with a similar provision under the Interpretation Act 1937 (s.20(1)), the Supreme Court in Lavole and Carvida Limited v. District Judge O'Donnell [2008] 1 I.R. 651 stated as follows at p.660:-

> "Section 20(1) is in the nature of a provision which has long been available to legislatures, and in practice to parliamentary draftsman, to ensure continuity in statutory interpretation and application where a statutory provision is repealed and re-enacted, with or without modification, without the necessity of having to trawl through all the possible references to the repealed section in other Acts, possibly many passed over the decades, and having to recite, in a potentially cumbersome fashion, the relevant statutes so as to expressly provide in each case that reference to the repealed section means a reference to the new section." (Emphasis added).

41. Section 42 of the 2000 Act repeals and re-enacts s. 4 of the 1982 Act. As the wording of the new legislation is identical to the old, the substance of the provision is not changed. It has been re-enacted, not amended. If the text of s. 42 had been amended by the insertion, deletion or substitution of words, then it could be argued that the legal meaning could be altered. If there had been a modification to s. 42 then it would have to be considered whether the modification substantially changed the provision; whether the effect of the alteration was to narrow or to enlarge the provisions of the former Act. However, that is not the case as both provisions are identical.

42. If the addition of the word "permission" had the effect that the respondent is no longer entitled to entertain an application under s. 42 in respect of a permission granted prior to the 11th March, 2002, this would defeat the plain intention of the Oireachtas. The intention of the legislation as a whole is to regulate planning, therefore, the argument of the respondent amounts to an absurdity as it completely dismisses s. 42 applications prior to March, 2002.

Does Section 42 Apply to a Planning Permission Granted for a Development in the Nature of a Quarry?

43. Whilst the court was never asked to engage upon this issue, I have to say that I have some doubts as to whether or not s. 42 of the 2000 Act, or its predecessor s. 4 of the 1982 Act, was ever intended to apply to planning permissions pertaining to ongoing commercial enterprises such as quarrying. However, I note no such reservations expressed by my learned colleague Smyth J. in *John A. Wood Limited v. County Council of the County of Kerry* (Unreported, High Court, Smyth J., 31st October, 1997), *("John A. Wood")*, a decision which in part focused upon an application brought by the operator of a gravel quarry to extend the life of its planning permission under s. 4 of the 1982 Act.

44. Whilst the definition of "development", as defined in s. 3 of the 2000 Act, covers "a carrying out of any works on, in, over or under land or the making of material change in the use of any structures or other land" it appears to me that the primary purpose of s. 42 was to provide a method whereby structures, which were substantially completed at the time of the expiry of a planning permission, could be completed. The vast preponderance of the case-law in relation to s. 42 of the 2000 Act, or s. 4 of the 1982 Act, relates to planning permissions pertaining to houses, housing estates, shops, offices and other buildings, which, by reason of their

non-completion at the expiry of those permissions, could not be completed without the relevant extension. The decisions in *State (McCoy) v. Dun Laoghaire Corporation* [1985] I.L.R.M. 533, *Garden Village Construction Company Limited v. Wicklow County Council* [1994] 3 I.R. 413 and *Frenchurch Properties Limited v. Wexford County Council* [1992] 2 I.R. 268 all deal with major housing schemes which were not completed within the lifetime of their respective planning permissions. Likewise, the decision in *McDowell v. Roscommon County Council* [2004] I.E.H.C. 396, (Unreported, High Court, Finnegan P., 21st December, 2004), deals with the construction of a private house which was not completed within the lifetime of the original planning permission.

45. It is the concept of "completion" which is at the essence of the power to extend the appropriate period under s. 42 and that is a difficult concept to grasp in the context of a planning permission referable to a quarry. There is no obligation on the operator of a quarry who obtains planning permission to extract all of the reserves from the area covered by the permission during the permitted period so that the development is, so to speak, completed. The operator is merely required to operate within the confines of the permission granted and at the end of the prescribed period to reinstate the lands. If the operator only removes three quarters of the reserves permitted over the lifetime of the planning permission, he will not find himself at the end of this period in the same position as a developer of an office block who has three quarters completed a development who cannot then complete it because any continued work would be unauthorised.

46. Notwithstanding these reservations, it is clear from the evidence in the present case that the respondent accepted the application made under s. 42 of the 2000 Act and in its report, which preceded its decision of the 16th April, 2010, sought to apply the relevant statutory provisions thereto for the purpose of deciding whether or not the applicant had satisfied it in relation to the matters set forth at s. 42(1) (c) (i), (ii) and (iii) thereof.

The Law in Relation to Section 42 of the 2000 Act

47. There is now a substantial body of case-law which has considered the role of the planning authority in an application to extend the life of a planning permission under s. 42 of the 2000 Act. It commences with the decision in *State (McCoy) v. Dun Laoghaire Corporation* [1985] I.L.R.M. 533 (*"McCoy"),* where Gannon J. dealt with the positive and negative aspects of s. 4 of the 1982 Act. He pointed to the mandatory nature of the obligation placed upon a planning authority, having regard to the use of the word "shall" in the section.

48. Gannon J in *McCoy* emphasised that the onus was on an applicant seeking an extension to the life of a planning permission to satisfy the planning authority regarding each of the matters specified at s. 4 of the 1982 Act. He also stressed the lack of discretion enjoyed by the planning authority to consider any matters beyond those specified in the section. At pp. 536-537 he stated as follows:-

> "Compliance with the terms of sub-paragraph (c) of s. 4(1) requires that the planning authority 'be satisfied' on all of the matters under three sub-headings in relation to the particular permission. These are factual matters in relation to the performance of works of development within the control of the developer upon which the planning authority is required to make an assessment or evaluation. These matters, of their nature, are such that the onus must lie on the developer to furnish the planning authority with information or evidence verifying such facts sufficient to support a decision as to the accuracy of the facts at (i) and (ii) and the probability in relation to (iii). The expression that the planning authority 'are satisfied' used in paragraph (c) is an expression commonly used in reference to a verdict, or judgment or decision.
>
> The particularity of the provisions of s. 4(1) of the 1982 Act and the fact that they are included in a section imposing a mandatory function precludes consideration of any other matters. The subsection is explicit on what it requires, and consequently the exercise of the power to extend the appropriate period as regards a particular permission or not to extend that period must comply in all respects with the terms of s. 4(1) and may not be exercised in any other manner or upon any other considerations. A decision, therefore, of a planning authority as to whether or not to extend the appropriate period as regards a particular permission which is arrived at without considering all the matters set out in sub-paragraphs (a), (b) and (c) (i), (ii) and (iii) or upon consideration of other matters not coming within these sub-paragraphs would be *ultra vires*."

49. That statement of law has been followed repeatedly in more recent times. In particular *McCoy* has been followed by Smyth J. in *John A. Wood*, referred to above, and Laffoy J. in *Littondale* Limited v. Wicklow County Council [1996] 2 I.L.R.M. 519 ("Littleton"). In *John A. Wood* Smyth J. concluded *(inter alia)* that the planning authority, in dealing with an application under s. 4(1) of the 1982 Act, was not entitled to have regard to the fact that if the extension sought was granted it would preclude the rights of third parties who lived in close proximity to the development from a right of appeal. For other reasons, however, he did not quash the decision made. Most recently these principles were adopted by Finnegan P. in *McDowell v. Roscommon County Council* [2004] I.E.H.C. 396, (Unreported, High Court, Finnegan P., 21st December, 2004). Whilst I find it difficult to agree with all aspects of that decision, it is nonetheless clear authority and support for the conclusions of Gannon J. in *McCoy*.

50. Whilst the planning authority is confined to considering whether or not the applicant has satisfied it of each of the matters set out in s. 42(1)(a), (b) and (c), it does nonetheless, as was confirmed by Lynch J. in *Frenchurch Properties Limited v. Wexford County Council* [1992] 2 I.R. 268, enjoy a discretion in assessing whether the conditions set forth in s. 42(1)(c) are met. In that case, Lynch J., when dealing with the issue as to whether or not "substantial works" had been carried out by the applicant, stated as follows at p. 282:-

> "It is a matter for the planning authority *bona fide* using its own expertise and judgment to decide whether or not substantial works were carried out pursuant to the permission."

Reason 1: Condition No. 2

51. Applying the decisions in *McCoy* and *John A. Wood* to the first reason given by the applicant for refusing the extension sought, namely reliance upon Condition No. 2 of the original planning permission, I have concluded that the respondent took into account what is commonly described as an irrelevant consideration.

52. If the respondent had formed the view that Condition No. 2 of the original planning permission precluded its consideration of an application for an extension of the appropriate period under s. 42, it should have refused to accept the application as valid. Of course, that decision might well have been met with an alternative challenge from the applicant. It might have sought leave to apply for an order of *bona fide* contending that the condition was an unlawful one which had the effect of precluding it from availing of its statutory entitlement under s. 42 of the 2000 Act and that this constituted an impermissible encroachment on the legislative power of the Oireachtas. However, having decided to accept the application as being valid, I am satisfied that the respondent was not entitled to take Condition No. 2 into account for the reasons outlined in the case-law just referred to.

Habitats Directive 92/34/EEC and Environmental Impact Assessment Directive 85/337/EEC

53. In its decision of the 16th April, 2010, the second reason given by the respondent for refusing the s. 42 application was stated to be as follows:-

> "2. The grant of an extension to the appropriate time period of the existing permission would be in conflict with obligations and requirements regarding the environment and designated European sites as defined under the provisions of the Council Directive 85/337 as amended, the Habitats Directive 92/43/ECC as amended and European Communities (Natural Habitats) Regulations 1997 as amended."

54. The parties are agreed that the abovementioned Directives do not have direct effect and that the means of securing the objective of any Directive is a matter for the individual Member State. They also agree that the said Directives, as transposed into Irish law, raise significant environmental issues which the planning authority is mandated to address at the time of an application for planning permission. The parties also agree that the location of the quarry is adjacent to a "Natura 2000" site for the purposes of the Habitats Directive and that the quarrying operation is a project within the meaning of the EIA Directive. Where the parties differ is on the question of the relevance of these Directives to an application to extend the lifetime of a planning permission under section 42. The applicant is adamant that the environmental objectives of these Directives are not proper matters for the respondent's consideration on such an application.

55. Having considered the submissions made by the parties in relation to this issue, I accept all of the arguments made by the applicant and I am satisfied, as a matter of law, that the respondent was not entitled to take into account the provisions of either Directive when making its decision.

56. Notwithstanding the copious case-law submitted by the respondent, I remain to be convinced that either Directive was ever intended to apply to an application such as that which is provided for under s. 42 of the 2000 Act. However, that is not what matters. What matters is the extent to which the obligations set out in those Directives have been transposed into Irish domestic law. Having considered all of the relevant regulations and legislation in this jurisdiction, I am satisfied that the Directives have not been transposed in a manner such as to permit the respondent to take these environmental considerations into account on a s. 42 application. I will briefly deal with the Directives in turn.

57. The Habitats Directive set up a network of special areas of conservation under the title Natura 2000. Natura 2000 sites are of community importance. The objective of the Directive is to enable these sites and the special habitats concerned to be maintained, protected and, where appropriate, restored.

58. Article 6 of the Habitats Directive sets out the provisions which govern the conservation and management of Natura 2000 sites and arts. 6(3) and 6(4) set out the decision making tests to be applied to plans and projects likely to effect Natura 2000 sites. Article 6(3) provides as follows:-

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

59. Under the Directive there is no definition of what constitutes a "plan" or "project".

60. The Habitats Directive was given effect to in Ireland by the European Communities (Natural Habitats) Regulations 1997, and these were further amended by the European Communities (Natural Habitats) (Amendment) Regulations 1998 and 2005. Part IV of the 1997 Regulations provides for various amendments to the Planning and Development Act 1963. These Regulations imposed a range of additional obligations upon a local authority when dealing with planning and development matters. In particular, art. 27 is of relevance. It provides as follows:-

> "Obligations of local authorities and An Bord Pleanála in granting planning permission.
>
> > 27(I) A local authority when duly considering an application for planning permission, or the Board when considering an appeal on an application of planning permission, in respect of a proposed development that it not directly connected with, or necessary to the management of, a European site but likely to have a significant effect thereon either individually or in combination with other developments, shall ensure that an appropriate assessment of the implications for the site in view of the sites conservation objectives is undertaken."

61. It is clear from the aforementioned Regulation that the objectives of the Directive, as transposed into Irish law, are to be achieved through the proper investigation of all of the relevant matters by the planning authority prior to the commencement of a development and in the course of the application for planning permission. There is nothing in the Regulations, from which it can be inferred, that it was intended that the environmental considerations provided for in the Directive would form any part of the s. 42 process. Whilst it must be accepted that the Regulations fall to be construed in the light of the wording of the community measure, there is nothing in those Regulations which supports the respondent's submission. The "plan or project" requiring approval under art. 6 has, in the aforementioned Regulations, been confined to the plan for the development in respect of which planning permission is sought, rather than any application for an extension of the lifetime of a planning permission so granted.

62. The EIA Directive is concerned with the effect of certain public and private projects on the environment and it requires member states to carry out assessments of the environmental impact of certain public and private projects before they are permitted to go ahead. Its aim seems to be to ensure that projects likely to have a significant effect on the environment are assessed in advance so that people are aware of what those effects are likely to be.

63. The EIA Directive requires the party applying for authorisation for a "project", which is likely to have significant effects on the environment, such as quarrying in the present case, to seek what is referred to in the Directive as "development consent" from the competent authority, which if granted then permits the developer to proceed with the project. The Directive further provides that "any change or extension of projects" already authorised which might have significant adverse effects on the environment would fall to be assessed by way of Environmental Impact Assessment ("EIA").

64. "Project" as defined in the EIA Directive is defined as meaning:-

"the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

65. "Development consent" means:-

"the decision of the competent authority or authorities which entitles the developer to proceed with the project."

66. The EIA Directive is implemented in this jurisdiction by the Planning and Development Acts, the Planning and Development Regulations 2001-2002 and the European Communities (Environmental Impact Assessment Regulations) 1989-2000. These Regulations set out *(inter alia)* thresholds above which an EIA is required and the criteria by which a development may be classified as having a significant effect on the environment. However, these matters are only relevant to those processes which have been captured by the Directive as transposed into Irish law. In this regard, the respondent has failed to identify any regulation from which it can be inferred that the environmental concerns which form the objective of the EIA Directive are proper matters for consideration on a s. 42 application.

67. The fact that current ECJ case-law may give a wide definition to the words "plan" or "project" within the meaning of art. 6 is irrelevant if the Directive, as transposed into domestic law does not make it clear that a s. 42 application should be considered to be a "plan" or "project" for the purposes of the Directive.

68. In further support of the applicant's submission is the fact that s. 42 of the 2000 Act, which postdates the Regulations implementing the Directives, specifically sets out matters to be considered by the planning authority on a s. 42 application, but makes no reference to these Directives. I must conclude that environmental issues were not open for the respondent's consideration on that application.

69. Of perhaps some further importance is the fact that the Planning and Development Act 2010, which came into effect on the 19th August, 2010, gives further effect to both the Habitats Directive and the EIA Directive, which are listed at s. 3 thereof. It is interesting to note that the Act does not incorporate the need for an environmental assessment under the EIA Directive or appropriate assessment under the Habitats Directive into the application process. This is of significance in circumstances where the provisions of s. 42 of the 2000 Act have been changed so as to extend the circumstances in which an extension can be obtained, yet no provision has been made to provide for the updating of any EIA that accompanied the original planning application. Accordingly, it is difficult to see how the respondent can maintain that the relevant environmental assessments were matters it was entitled to consider in the context of the application under section 42.

70. The respondent has failed to convince me that there is any regulation or statutory provision in this jurisdiction from whence it can be maintained that the s. 42 application was a project which required development consent within the meaning of the EIA Directive, or was one requiring appropriate assessment under the Habitat's Directive. Even if the Directives had direct effect, which they do not, there are strong grounds to argue that development consent was given following the assessment of the likely environmental impact of the proposed project at the time of the application for planning permission. An Environmental Impact Statement ("EIS") was submitted and considered subsequent to which the project received approval. A similarly strong argument can be made to the effect that a s. 42 application should not be considered to amount to a change or extension to the project as referred to in Annex II of the EIA Directive, such as to require further development consent. The development as planned and approved of from an environmental prospective remained the same as did the scale of the project. It was only the addition of time to complete the previously approved project that had changed. However, as already stated, the Directives do not have direct effect.

71. Insofar as the applicant respondent maintains that it was entitled to consider the Directives because they had been mentioned in government circulars or guidelines, this argument must fail for a number of reasons. Firstly, there is nothing in the approximately one hundred pages of documentation emanating from the Department of the Environment, Heritage and Local Government addressed by way of "guidance for planning authorities" which makes any mention of either of these Directives in the context of an application to extend the life of an existing planning permission. It confines its guidance to the approach to be adopted by the planning authority when faced with an application for planning permission. Secondly, if there was any such statement, or if it could be inferred from any guidance document that the Directives were to be considered by the planning authority in the course of a s. 42 application, that guidance would be legally incorrect as Directives can only be transposed by Regulations. The Regulations relevant to these Directives do not require the planning authority to consider the relevant environmental issues at the time of a s. 42 application.

Fallback Argument made by the Applicant

72. Lest I am wrong on this issue and the applicant respondent was entitled to take the relevant environmental issues into account, I will deal with the fallback argument of the applicant. The applicant submits that if the respondent was entitled to have regard to the EIA Directives and the Habitats Directives in making its decision under s. 42, its failure to advise it of this fact so as to afford it an opportunity to make submissions in relation thereto was to fail to comply with the rules natural justice and fair procedures.

73. To consider whether or not fair procedures were afforded to the applicant, it is probably necessary to consider the nature of the process which is involved in an application for an extension of the appropriate period under s. 42 of the Act. In this regard, the wording of s. 42 does not give any support to the view that the decision to be made by the planning authority is of a quasi judicial nature. The planning authority has very little discretion in relation to its decision, and its role appears to be confined to satisfying itself as to whether the applicant has complied with the statutory conditions for the grant of an extension of time and the legislation makes no provision for third party participation of any nature. All of these factors tend to suggest that the role of the planning authority on a s. 42 application is an administrative decision, thus limiting the circumstances in which judicial review is available as a remedy.

74. Notwithstanding these limitations, I am satisfied that if the respondent had jurisdiction to consider environmental issues at the time of the s. 42 application it was under an obligation to advise the applicant of this fact. I reject the respondent's argument that the applicant should have predicted that it would take into account environmental issues when considering the application, having regard to the dealings between the parties in 2009 in the course of the scoping exercise engaged in by the applicant as a precursor to a potential application for a fresh planning permission.

75. It is true that the applicant knew that the respondent was concerned about the environmental repercussions of quarrying continuing on this site in the context of a potential application for a fresh planning permission. However, the respondent was aware that the applicant did not pursue the application for planning permission, which it had earlier flagged, but opted instead to seek to avail of the provisions of section 42. The respondent must have known when, following notification to the applicant of its scoping opinion, it did not receive an application for planning permission, but rather a s. 42 application, that the presumed objective of the applicant was to adopt a procedure which would avoid it having to deal with environmental issues, which had been referred to in the

scoping opinion. In this regard, I agree with the submission made by the applicant that the respondent is not entitled to rely upon its dealings with the applicant in the course of a potential planning application as the basis from which the applicant should have anticipated the s. 42 application might be determined based upon environmental considerations.

76. If the respondent was entitled to consider environmental issues on the s. 42 application, a position I do not accept is correct, it was incumbent upon the respondent to advise the applicant that it was considering its application against the backdrop of such considerations.

77. Whilst not entirely on point, the applicant's submissions gain some small amount of support from the decision of Lynch J. in *Frenchurch Properties Limited v. Wexford County Council* [1992] 2 I.R. 268. When dealing with s. 4 of the Act of 1982, he described the obligations of the planning authority at pp. 284-285 as follows:-

> "A planning authority is not obliged to enter into a dialogue with an applicant or to indicate in advance to an applicant the planning authority's thinking or views before deciding on the application. Nor is the planning authority bound to conduct any sort of adversarial hearing of an application before deciding the matter. In the ordinary course of events the planning authority will receive an application; consider it; and decide on it without giving any advance reasons. If the planning authority refuses the application it must give its reasons for such refusal at that stage but not earlier.
>
> If an applicant *bona fide* and reasonably and not vexatiously or capriciously requests to make submissions to the planning authority, he should be given an opportunity of doing so. Then if there is a point on which the planning authority knows that the applicant relies to a significant extent and which the planning authority (unknown to the applicant) thinks is invalid the planning authority should draw the applicant's attention to this point to give the applicant an opportunity of trying to persuade the planning authority that he is right and they are wrong. This does not mean any obligation to conduct any sort of formal hearing or debate; simply an indication that such and such a point on which the applicant appears to rely to a significant extent seems to the planning authority to be invalid and what has the applicant got to say about that?"

78. Perhaps the corollary of the statement of Lynch J. would suggest that, where the planning authority is intent on basing its decision on considerations which are not anywhere referred to in the relevant section and which might not reasonably have been anticipated to be within the applicant's contemplation when they lodged their application, the planning authority should, at a minimum, bring its intended approach to the attention of the applicant so as to allow them to engage upon the issue.

79. For the aforementioned reasons, if the respondent was entitled to consider environmental issues in the course of its deliberations under s. 42 (an argument that I have already rejected), I am satisfied that the respondent did not afford to the applicant a procedure which was fair in all of the circumstances.

Reason 3: Order of the High Court in Proceedings Record No. 54 MCA [2006]

80. It is accepted that in March, 2006 the respondent discovered that a substantial portion of the quarry floor approximating four hectares had been quarried by the applicant below the level of 15m OD (above ordnance datum), which was in breach of the original planning permission. As a result, an enforcement notice was served. It is accepted that this unauthorised development created a real and substantial risk that the water table could be breached with potential adverse consequences in terms of both water supply and pollution. Thereafter, proceedings under s. 160 of the 2000 Act were issued. When the motion was first listed an undertaking was furnished by the applicant that, pending the full hearing of the action, no further blasting or excavation works would take place below the permitted level. The substantive proceedings were ultimately settled in November, 2008 upon terms which included the following consent order, namely:-

> (i) An order restraining the respondent their servants or agents from carrying out any works on the lands comprised in Folios 79373F, 49753F, 30033F, 45714F and 8649 County of Galway ("the lands") save in accordance in with Planning Reference Number 553/99 and/or any *further permission* which may be granted in respect of the lands; and in particular restraining the respondents their servants or agents from excavating on the lands below the level of 15.0 metres (ordnance datum).

81. Having considered the submissions of the parties, I am satisfied that the respondent was not entitled to take this order into account as a relevant consideration at the time of its decision, for the reasons advised by Gannon J. in *McCoy*. I am further convinced the respondent has incorrectly interpreted the terms of the court order. The court order does not preclude the applicant applying for an extension of the appropriate period under s. 42, a matter which I am sure was never within the contemplation of either party at the time the proceedings were settled. The order does nothing more than restate the applicant's obligation under the original planning permission and recites its undertaking to continue to comply therewith. It goes without saying that any extension of the appropriate period granted by the respondent under s. 42 could only apply to development carried out in accordance with the planning permission then existing. Accordingly, reliance on the High Court order as a basis for refusing the extension of the appropriate period is misplaced and, in any event, a matter upon which it was not entitled to rely for the purposes of making its decision.

Reason 4: Completion of the Development; Section 42(1)(c)(iii)

82. The fourth reason given by the respondent for refusing the application was the failure of the applicant to satisfy it as to the requirements of s. 42(1)(c)(iii) of the 2000 Act. Having regard to the submissions made by the applicant, I believe it is of assistance to set out the text of the reason given by the respondent in support of this aspect of its decision, and also that part of the s. 42 report, which presumably informed that decision.

> "(4) The planning authority is not convinced and therefore not satisfied that the quarry will be exhausted within a 'reasonable period' as is required under section 42 of the Planning Act 2000and in this regard cannot therefore extend the appropriate period, this is following consideration of the scale of the site, the nature and characteristics of the development."

83. The relevant extract from pp. 12-13 of the s. 42 report reads as follows:-

> "As part of the requirement of Section 42 the Planning Authority shall extend a particular planning permission if the authority is ***satisfied*** in relation to the permission that the development will be completed within a ***reasonable*** time.
>
> With respect to this current proposal, this is not the case. The planning authority is not convinced and therefore not satisfied that the quarry will be exhausted within a reasonable period and in this regard cannot therefore extend the appropriate period.

> The nature and scale of the development are critical to this argument. The quarry is of a significant scale as highlighted in the Inspector's report on the original assessment (see appendix 1). The quarry has unexploited reserves and it is not considered that these will be removed within a reasonable time period. The characteristics of quarrying too are part of this argument in that quarrying can occur intermittently. It is not necessary for it to be a continuous activity and the intensity of the activity is normally driven by economic demand in particular from the construction and infrastructure industry, which by nature can be unpredictable.
>
> It is considered that the likely intention of S.42 was to allow for developments which have logical stages and which may have been delayed to reach completion expeditiously without the need for another planning application. It is not considered that the current circumstances can fit into this category and that it can be considered to be completed within a reasonable time period."

84. The applicant submits that the respondent erred in law in the test that it applied when considering whether or not the applicant had complied with the provisions of s. 42(1)(c)(iii), which requires the planning authority to be satisfied that "the development will be completed within a reasonable time". It submits that the respondent asked itself the wrong question, namely, whether or not all of the unexploited reserves in the quarry could be removed within a reasonable period. It maintains that the correct question was whether the works permitted by the planning permission were capable of being carried out within a reasonable period. In this regard, the applicant submits that the respondent included within its consideration the removal by it of reserves below or beyond the level permitted in the original planning permission. It says this is to be inferred from (i) the reference within the s. 42 report to "unexploited reserves"; (ii) their view that the quarry would not be "exhausted" within a reasonable period; and (iii) the reference in the report to an earlier application by the applicant for a variation of the original planning permission to allow it quarry below the level originally permitted, namely 15m OD.

85. The respondent maintains that it did not apply an incorrect test. It submits that it used the word "exhausted" in its decision as a word which was interchangeable with the word "completed" as provided for in section 42(1)(c)(iii). It submits that it is clear from the s. 42 report that in coming to its decision it did not consider the removal of reserves below or beyond the level permitted by the original planning permission.

86. I am firstly satisfied that, in applying s. 42(1)(c)(iii) to a planning permission concerning quarrying activity, the test is not that outlined by the applicant in the written submissions, namely whether the works permitted by the original planning permission "were capable of being carried out within a reasonable period". In this regard, the section is clear. The onus is on the applicant to satisfy the planning authority that the development "**will** be completed within a reasonable time". It is not a theoretical question permitting of an aspirational answer. If this was the case it would be difficult to envisage circumstances in which any application for an extension might be rejected. A case in point is that of *John A. Wood* already referred to earlier in this judgment. In that case, the planning authority rejected an extension of time under s. 4 of the 1982 Act for the continuation of the removal of gravel on the applicant's site on the grounds that:-

> "The development of plots 3 and 4 would not be completed within a reasonable time period. The applicant states January 1st 2008 as the completion date but that depends on 'market forces and the demand for gravel in the area'."

87. In that case the planning authority, in considering the application of *John A. Wood* for an extension to the lifetime of its planning permission, appears to have accepted that the intended works were capable of being completed if the extension sought was granted. However, the planning authority was not satisfied, as a matter of fact, that those works would actually be completed within a reasonable period due to the fact that completion was dependent upon market forces and that the demand for gravel might not be such as to drive the works to actual completion. The learned judge accordingly concluded that the planning authority had appropriately determined that the application failed to pass the test set out in s. 4(1)(c)(iii) of the Act of 1982.

88. The next question to be answered is whether or not the respondent in the present case actually applied the aforementioned test, or whether it incorrectly considered the time that would be required by the applicant to exhaust the quarry, including reserves below or beyond the confines of the original planning permission.

89. I am satisfied that the respondent, in concluding that the application failed to pass the test set out in s. 42(1)(c)(iii) of the 2000 Act, did not take into account any work involved in the removal of reserves below the 15m OD that had been permitted in the original planning permission, or from any other area beyond the confines of the original planning permission. The respondent had earlier instituted proceedings against the applicant to restrain it from quarrying below the level permitted in the original planning permission and had obtained a court order to ensure that quarrying beyond that permitted level would not reoccur. Thus it was not open to the applicant to quarry below the permitted level not only by virtue of the original planning permission, but also by virtue of the court order. To suggest that the planning authority were engaged upon considering the amount of time it would take for the applicant to remove reserves in breach of its own planning permission and the aforementioned court order is untenable.

90. Insofar as the applicant seeks to rely upon an application which it made for retention of the 3.98 hectares, which had been quarried by it below the permitted level in support of its assertion that the respondent incorrectly took into account the potential removal by the applicant of reserves below the permitted level, I reject any such reliance. The facts of the matter are that the aforementioned application met with stern resistance from the respondent due to environmental concerns. It made known to the applicant that an EIS would be required to support any such application and, in face of this demand, the applicant chose not to proceed with its application. Accordingly, there is no merit or force in the applicant's submission that the respondent could have taken into account, when considering the requirements of s. 42(1)(c)(iii) of the Act of 2000, that the applicant would be removing any reserves below the level permitted by the original planning permission. Further, there is nothing in the s. 42 report or in the decision itself to support this submission.

91. In the aforementioned circumstances, it is unstatable to contend that, in referring to "unexploited reserves" or the "exhaustion" of the quarry, the respondent reached its decision by reference to the length of time required by the applicant to remove reserves beyond the level permitted by planning permission No. 553/99. It is clear to me that the applicants used the words "completed" (as referred to in s. 42(1)(c)(iii)) and "exhausted" interchangeably.

92. In updated submissions delivered after the close of the proceedings, the applicant sought to rely upon a further argument not set out in the statement of grounds, namely that the respondent reached its decision on s. 42(1)(c)(iii) without any consideration of the matter. The applicant must be aware that the court is not entitled to embark upon the consideration of any grounds which were not advanced in the statement of grounds supporting an application for judicial review. Neither is the court entitled to decide the outcome of this litigation on a point not argued in the course of the proceedings. Accordingly, I reject this submission on the aforementioned basis.

93. Lest I am incorrect and it be established that this argument was in fact made in the course of the proceedings, and for some reason that I failed to have a note of the same, I will deal with the substance of the point. Prior to doing so, however, I believe it important to reflect briefly upon the limited circumstances in which this Court may, on a judicial review application, interfere with a decision such as that made by the respondent in the present case. I do so partly by reason of the fact that in a supplemental affidavit filed in the course of the proceedings before me, Mr. James Burke, Director of the applicant company, exhibited a report from Mr. Brian Gallagher of Patrick J. Tobin and Company, Consulting Engineers. In that report dated the 4th October, 2010, the rock volumes remaining in the quarry are stated to be 836,000 tonnes. He states that at the present rate of extraction, of approximately 320,000 tonnes per year, the development would be completed within the three year period as per the s. 42 application. This report was destined to substantiate before this Court the applicant's assertion that it was capable of extracting the remaining rock volumes from within the permitted quarrying area within the three year period extension which it had sought.

94. Laffoy J. in *Littondale* and Smyth J. in *John A. Wood* both made strong statements to the effect that affidavits introduced by the respective parties, engaging upon issues such as the extent of the works which had been carried out prior to the application for an extension of the life of a planning permission, were generally irrelevant to the court's considerations once it had evidence upon which it could make its decision. They stressed that it was for the court to review the manner in which the planning authority reached its decision on each of the relevant issues. It was not for the court to determine whether the decision made by the planning authority was correct as the proceedings were not in appeal against the relevant decision. In the present case, the report of Patrick J. Tobin and Company does not address the issue as to whether or not substantial works had been carried out at the time the s. 42 application was made, but does direct the court to whether or not the existing reserves could be removed within a reasonable time as required by section 42(1)(c)(iii). This evidence is irrelevant to the court's considerations. As Lord Brightman stated in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155 at pp. 1171 and 1174:-

> "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 will 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."

95. The court may only intervene in relation to a decision of an administrative officer or a Tribunal if the decision is unreasonable or irrational, or if it had before it no relevant material which could support its decision. In particular, Finlay C.J. dealt with the jurisdiction of the courts in relation to decisions made by planning authorities in the following manner at p.71 of his judgment in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, where he stated as follows:-

> "Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.
>
> I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that 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."

96. In *Littondale*, a case concerning the validity of a decision of the planning authority under s. 4(1)(c) of the 1982 Act, Laffoy J. proceeded to strike down as irrational one element of the decision made by the planning authority, which concerned whether or not the development would be completed within a reasonable time. She did so on the basis that it had been established before her that there had been no assessment made by planning officers in relation to this issue and that, consequently, that there was no material before the county manager upon which he could have concluded that the development would not be completed within a reasonable time.

97. The facts of the present case are, however, in stark contrast to those which were presented to Laffoy J. in *Littondale* and I reject unreservedly the applicant's contention that the decision made in reliance upon s. 42(1)(c)(iii) should be quashed. I am satisfied that there is no substance to the applicant's submission, belatedly made, that the decision of the respondent was made without proper consideration of whether the development would be completed within a reasonable time. In my view, the respondent had ample evidence before it to reach the conclusion it did.

95.98. The s. 42 report sets out the extensive quarrying history in relation to the relevant lands over a period of 30 years. Mr. Blake, senior executive planner, had, as therein stated, the benefit of the inspector's report dealing with the nature and scale of the applicant's development. He was also the planning official to whom Mr. Gallagher, on behalf of the applicant corresponded in 2009 regarding its intention to apply for planning permission to continue quarrying on the site. Perhaps of most significance is the fact that the respondent appears to have taken the same view as the planning authority did in the case of *John A. Wood*. The decision reached in relation to question 4 seems to have been substantially based upon its view that, in circumstances where the completion of the works in respect of which planning permission had been granted would, because of the characteristics of the quarrying business, be dependent upon the demand for stone in the construction industry and that it could not therefore be satisfied that the work would be completed if the extension was granted.

99. For the aforementioned reasons, I am satisfied that the respondent applied the appropriate test having regard to the nature of the applicant's development under section 42(1)(c)(iii). Further, this is not a case where the applicant has established that there was no evidence upon which the respondent was entitled to reach its decision. That decision was entirely rational and cannot be stated to fly in the face of reason or commonsense.

What Consequences Flow from the Court's Findings?

100. I have concluded that the respondent, in reaching its decision, took into account irrelevant considerations; namely those matters set out as Reasons 1, 2 and 3 in its decision. I have also concluded that the respondent lawfully decided that the applicant failed to discharge the burden of proof of satisfying the respondent that the development would be completed within a "reasonable time", as was required under section 42(1)(c)(iii). Accordingly, I must now consider the effect of these findings, in terms of the relief, if any, that should be granted to the applicant.

101. In relation to this issue, the decision of Laffoy J. in *Littondale* is of real assistance. The trial judge, in the course of her judgment, concluded that the decision of the planning authority regarding the conditions stipulated at paras. 4(1)(c)(i) and (iii) of the 1982 Act was irrational. However, she also concluded that its decision that "substantial works" had not taken place, as required by s.

4(1)(c)(ii), was not unlawful and could not be said to fly in the face of reason or commonsense. Against the backdrop of these conclusions, Laffoy J. held that, since all three of the requirements stipulated by s. 4(1)(c) had not been met by the applicant, the court would not quash the decision.

102. Smyth J. in *John A. Wood* took a similar approach to that of Laffoy J. in *Littondale*. In reaching his decision on the lawfulness of the decision of the planning authority under s. 4(1)(c) of the 1982 Act, he concluded that the planning authority had acted *ultra vires* in that they had taken into account, as a reason for refusing the extension, the fact that "third party rights of appeal would be compromised" if the extension was given. However, he also concluded that the applicant had not been in a position to undermine the conclusions of the planning authority that "the development of plots 3 and 4 would not be completed within a reasonable time period". Thus the applicant, having failed one of the elements of the test set out in s. 4(1)(c) of the 1982 Act, was refused the order of *certiorari* sought.

103. Applying the rationale of the aforementioned cases to the present case, I am satisfied that in circumstances where the applicant has not been successful in demonstrating that the conclusion of the applicant in relation to the provisions of s. 42(1)(c)(iii) of the 2000 Act was unlawful, it has failed to pass the statutory test provided for in s. 42, such that the decision should be quashed.

Miscellaneous

104. Prior to dealing with the court's discretion on an application for judicial review, I wish to briefly refer to two further issues which were canvassed in the course of the hearing. The first of these relates to the legal consequences which would flow from an order made quashing a decision of a planning authority made under s. 42, where that decision was notified to the applicant within the requisite statutory period. The second relates to the significance to be attached to the fact that much of the s. 42 report concerned itself with a history of unauthorised development upon the relevant quarry site.

105. I reject the applicant's submission that if the court had decided to make an order of *certiorari* in relation to the decision of the respondent the applicant should be granted a declaration that it was entitled to an extension of the appropriate period by default with effect from the last day of the eight week period following the date of the lodgement of its application.

106. I am satisfied that the respondent complied with its obligations under s. 42 of the 2000 Act. It considered the applicant's application and duly notified it of its decision within the required eight week period. This is not a case where the planning authority defaulted in its obligations to notify an applicant of its decision, thus entitling it to the benefit of a default extension.

107. The decision of the court in *State (Abenglan Properties) v. Corporation of Dublin* [1984] I.R. 381 ("*Abenglan*") is of assistance in this regard. In that case, *Abenglan* sought to argue that in circumstances where the planning authority had acted *ultra vires* in granting an outline planning permission that the development was entitled to the benefit of a default permission under s. 26(4) of the Act of 1963, a proposition rejected by the Supreme Court. This alleged entitlement was, in fact, the reason that *Abenglan* applied for judicial review to seek to quash the decision of the planning authority, rather than appeal its decision to An Bord Pleanála.

108. In that case, both Henchy and Walsh JJ. considered the consequences of an order of *certiorari* quashing a decision of the planning authority and whether such an order would entitle *Abenglan* to claim a grant of development permission by default under s. 42(4)(a) of the Act of 1963. Henchy J. found such a proposition to be untenable, stating as follows at pp. 400-401:-

> "Even if it were to be held that the decision given was one reached in excess of jurisdiction, it was nevertheless a decision and, moreover, it was a decision of which notice was given within the appropriate period in compliance with s. 26, sub-s. 4(a)(iii), of the Act of 1963. Unless and until invalidated by a court order, it retains the status of a decision for the purpose of sub-s. 4 of section 26. Sub-section 4 is designed to enable an applicant to be deemed to have got permission by default when, regardless of whether the planning authority has or has not made a decision within the appropriate period, such authority has failed to give him *notice* of its decision within the appropriate period—see sub-s. 4(a)(iii) of section 26."

109. A similar conclusion was reached by Walsh J. who, at p. 397, stated as follows:-

> "In my view, the default provisions were enacted for the purpose of compelling a planning authority to direct its mind to an application. They do not amount to a statutory decree that every decision must be one which is sustainable in law. In my view a decision which, when questioned, is found to be *ultra vires* or unsustainable in law for any reason is nonetheless a 'decision' for the purposes of the default provisions. It is not possible to attribute to the Oireachtas the intention that every decision which has been proved to be unsustainable in law for one reason or another shall have the effect of giving the applicant permission for his proposed development – however outrageous it might be and however contrary to both the spirit and letter of the planning laws. It would require quite clear affirmative language in the statute to evidence any such legislative intention. No such language appears in the present legislation. Therefore, I am of opinion that a decision (within the meaning of that term in the default provisions of the statute) was given and that, therefore, the default procedure does not apply."

110. Smyth J. in *John A. Wood*, somewhat in passing in the course of his judgment, at p. 20, also briefly referred to the consequences of quashing a decision of the planning authority made on an application to extend the appropriate period under s. 4 of the 1982 Act. In that case, notwithstanding his conclusion that the planning authority had acted *ultra vires* in one respect in considering an irrelevant matter, he decided that he would not "adopt the course of referring the matter back to the planning authority".

111. Applying the reasoning of the aforementioned cases to the facts of this case, even if I had been of the view that the applicant was entitled to an order of *certiorari*, having regard to the fact that the respondent notified the applicant of its decision within the requisite period, that decision remained valid until quashed, thus denying the applicant of the right to a default extension to the lifetime of its planning permission.

112. The second matter to which I briefly wish to refer is the complaint made by the applicant, that much of the s. 42 report relates to enforcement issues and as to whether or not the applicant was operating lawfully in accordance with the planning permissions granted. It was submitted that these were not matters to which the planning authority was entitled to have regard and I agree with this submission.

113. Having considered the decision of the respondent made on the 16th April, 2010, and the reasons for the refusal of the application, it does not appear to me to be the case that the planning authority based its decision upon historical enforcement issues. None of these are mentioned in the decision. Even if they had been taken into account, for the reasons already expressed in this judgment, the applicant, in any event, did not satisfy the respondent regarding the requirements of s. 42(1)(c)(iii). Accordingly, there

is no valid basis for the court to quash the decision.

The Court's Discretion to Withhold Relief on a Judicial Review Application
114. The respondent has urged the court to exercise its discretion and refuse the relief sought, even if satisfied that it acted *ultra vires*. In this regard, the respondent has argued, firstly, that the applicant has a viable alternative remedy and also that its conduct has been such that the court should decline to exercise its discretion in its favour. Lest my findings in relation to the substantive issues in this case are incorrect, I will set out my conclusions on this additional argument.

Alternative Remedy
115. I reject the respondent's submission that the applicant's right to apply for a fresh planning permission to continue quarrying would provide it with an adequate alternative remedy if the court were to decline the relief sought. The circumstances in which a court might consider refusing an order of *certiorari* on the basis that the applicant had available to it an adequate alternative remedy were considered at some length in *Abenglan*, a decision referred to earlier in this judgment.

116. In *Abenglan* the developer complained that in granting a certain planning permission the local authority had misinterpreted and misapplied the development plans and regulations and that by departing so radically from the proposal of the developer, it had failed to determine the application actually made. The developer successfully applied to the High Court for an order of *certiorari* quashing the grant of planning permission and that decision was appealed to the Supreme Court. In allowing the appeal, the court held that even if the permission granted had been *ultra vires* the powers of the planning authority, the court should not have granted an order of *certiorari* since the developer had a right to appeal to An Bord Pleanála. That right, if exercised, would have enabled the developer's concerns to be examined *de novo* by a statutory Tribunal having a comprehensive jurisdiction to determine all relevant matters.

117. At the heart of the decision in *Abenglan* was the fact that the availability of an appeal to An Bord Pleanála afforded the developer a full rehearing where the Board would, in effect, be carrying out a similar inquiry to that which had been carried out by the planning authority in the first instance. The considerations which ought to have guided the local authority in the first instance could be reconsidered in the course of the appeal.

118. It is difficult to see how the rationale of the decision in the *Abenglan* can be applied to the present case.

119. The matters to which the planning authority are entitled to have regard to in a s. 42 application are so limited that it cannot reasonably be stated that a right to apply for planning permission provides an adequate remedy to an applicant if that decision is invalid. An applicant seeking planning permission faces a whole range of obstacles and hurdles which do not arise on a s. 42 application. For example, environmental regulations fall to be considered, as do third party objections. No such concerns arise on a s. 42 application. The two processes are inherently different and an applicant could fail to obtain planning permission for a range of reasons which would not even arise for consideration on a s. 42 application. Hence, the respondent's arguments on this issue must fail and any reliance upon the decision in *Abenglan* is misplaced.

Conduct of the Applicant
120. *Certiorari*, like other stateside orders, is a discretionary remedy. It follows that even if the court is satisfied, which it is not, that the decision of the respondent should be quashed, the court is nonetheless entitled to refuse the relief sought. In this regard, one of the factors which the court is entitled to take into account is the conduct of the applicant. The question for the court in the present case is what, if any, conduct on the part of the applicant is relevant to the court's discretion.

121. I reject the respondent's submission that the court should take into account any historic breaches by the applicant of the original planning permission. Those transgressions became the subject matter of court proceedings which were resolved by agreement between the parties. Since that time, the applicant appears to have been compliant with the original planning permission. It would not be just for the court, if otherwise satisfied that the applicant was entitled to an order of *certiorari*, to fail to make that order because of its earlier conduct. That would be to impose upon the applicant a separate and distinct penalty in respect of that breach which is not provided for by statute. Accordingly, I reject the respondent's submission in this regard.

122. I accept the respondent's submission that, in exercising my discretion, the court should take into account the conduct of the applicant in relation to the original planning permission. The applicant submitted a planning application (No. 553/99) on the 30th July, 1999, wherein it sought planning permission for an extension of an existing quarry and retention and a continuation of quarrying on the relevant lands. The permission ultimately granted by the Board was subject to a number of conditions, the most important of which is Condition No. 2, which is set out earlier in this judgment. The applicant accepted this planning permission in the full knowledge that it was thereby committed, if it wished to continue quarrying beyond the period of ten years provided for in the permission, to apply for a fresh planning permission. It was aware that the reason for this condition was to allow the planning authority, at that stage, to reconsider the effect of the development on the amenities of the area having regard to the then prevailing circumstances. It is accepted that at the time of the grant of the original planning permission the lands in question adjoined Lough Corrib, which is a special area of conservation.

123. Whilst the applicant now maintains that it is relieved of the obligations it agreed to accept by virtue of Condition No. 2, on the basis that the condition if invalid amounts to an impermissible interference with its statutory right to seek an extension of the life of the planning permission, the applicant made no such complaint regarding the validity of the condition at the relevant time. It would have been open to the applicant, having been notified of the decision of the Board and the terms of Condition No. 2, to challenge the validity of that decision. It did not do so. It decided, presumably, for its own commercial reasons, to accept that condition and took the benefit of it over all of the period without objection.

124. Further, at all stages since the grant of the planning permission, the applicant has engaged with the planning authority on the basis that Condition No. 2 was valid and binding. In this regard, the letter written by Brian Gallagher of Patrick J. Tobin and Company, on behalf of the applicant, dated the12th June, 2009, is of significance. In that letter, Mr. Gallagher sought to engage with the planning authority vis-á-vis, the applicant's intention to submit a fresh planning application for the continuation of quarrying on the lands, in accordance with the provisions of Condition No. 2. He wrote to the Planning Department of Galway City Council in the following terms:-

> "Re: Lackagh Quarry Group
>
> Planning permission for Continuation of Quarrying Operations
>
> Scoping Request under Section 173(2)(a) of the Planning and Development Act 2000

> Dear Mr. Blake,
>
> We refer to our pre-planning meeting on 28th May, 2009, and to our discussions regarding the most appropriate approach to submitting a planning application for the continuation of quarrying at Lackagh Quarry Group at Coolagh, which as you know expires in October 2010 until the previous permission.
>
> We would like to state at the outset that Lackagh Quarry Group wish to regularise planning at their Coolagh site. The quarry at Coolagh is a significant resource in terms of supplying materials to the construction industry in Galway City and County, the west and indeed across the country, currently employing upwards of 100 persons at the facility. Lackagh Quarry Group shall be seeking permission to continue quarrying operations in the area outlined in the 1999 planning permission, but also to regularise planning in that portion of the quarry which was subject to High Court proceedings in November 2008. As you know, Lackagh have given and abided by an undertaking in relation to quarrying operations in that portion of the quarry. Lackagh consider that a single planning application for the entire quarry is the most appropriate way of achieving these aims. This application would cover the same plan area as that granted in 1999 permission."

125. After dealing with the possibility of an application for retention of that part of the development due to the unauthorised quarrying of four hectares of land below the permitted level, Mr. Gallagher went on to request a written opinion under s. 173(2)(a) of the 2000 Act, as to the information that the local authority would require to be addressed in an environmental impact survey in support of the proposed fresh planning application. He wrote as follows:-

> "Request for written opinion
>
> Section 173(2)(a) of the Planning and Development Act 2000, permits an applicant to request a written opinion on the information to be contained in an EIS. We now wish to formally request a written opinion on the scope of the EIS to accompany the planning application".

126. Mr. Gallagher then went on to set out the business of Lackagh Quarries Limited stating as follows:-

> "Planning permission was granted by An Bord Pleanála in 1999 [Ref. No. 533/99] for the continuation of quarrying operations at Coolagh. Condition No. 2 of the An Bord Pleanála permission stipulated a time limit of ten years in quarrying operations, after which a new application was to be made for continuation of quarrying. This permission runs out in October 2010 and the planning permission now being sought made relates to an application to continue quarrying in the same area as that covered under the 1999 permission."

127. The letter of Mr. Gallagher goes on to deal with the EIS furnished with the 1999 application and proposed that what would be furnished in the context of the fresh application for planning permission would be an updated version of the 1999 EIS.

128. The scoping opinion sought from the planning authority was then furnished on the 21st September, 2009. In that opinion, the respondent made it known that an EIS, which merely updated that which was provided in 1999, would not be sufficient and that it would be necessary to fully re-examine the environmental impact of the continued use of the quarry, given the change in circumstances that had occurred since the 1999 decision. These were stated to include *(inter alia)*the adjacent special area of conservation, the Galway City outer bypass, the change in environmental legislation, changes in the Galway City Development Plan 2005 – 2011, the Habitats Directives and the Galway City Heritage Plan. These appear to be precisely the concerns which it was intended to protect by the insertion of Condition No. 2 in the original planning permission and which considerations clearly the applicant was determined to avoid in circumstances where it did not pursue further an application for fresh planning permission, but rather lodged its application under section 42. In adopting this approach, the applicant has sought to frustrate the objectives of the Board which granted the planning permission in 1999, which was to ensure that the consequences of ongoing quarrying to the amenities of the area could be reassessed after ten years of quarrying. The applicant has also sought to renege upon the terms of the agreement in respect of which he has been the beneficiary, both financially and otherwise, for upwards of nine years.

129. By reason of the actions on the part of the applicant, I have concluded that, even if the applicant had convinced me that it was entitled as a matter of law to have the decision of the respondent made on the s. 42 application quashed, I would in any event have exercised my discretion and refused the reliefs sought on the basis that the applicant should now be estopped from contending that it is not bound by Condition No. 2 in the original planning permission.

Conclusion

130. Whilst the applicant has established that the respondent acted *ultra vires* its powers in taking into consideration matters irrelevant to its consideration of an application under s. 42 of the 2000 Act, it has failed to establish its contention that the respondent applied the incorrect test when considering whether or not the applicant had satisfied the requirements of s. 42(1)(c)(iii) of the 2000 Act, or that it made its decision without any proper consideration of the matter. Accordingly, the applicant was not entitled to an extension of the appropriate period under the said section. In such circumstances, the court will not make an order of *certiorari* quashing the decision of the 16th April, 2010.

131. The court is further satisfied that, even if the applicant had established an entitlement to have the decision of the respondent quashed, its conduct in relation to Condition No. 2 of the original planning permission has been such that the court would, in any event, in the exercise of its discretion, have declined to grant the relief sought.