THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 499 JR]

BETWEEN

ALICE HAYES, PATRICK HAYES AND PETER SWEETMAN

Applicants

-and-

AN BORD PLEANÁLA

Respondent

IRELAND AND THE ATTORNEY GENERAL

Respondent

-and-

MURRAY BROTHERS TARMACADAM LIMITED

Notice Party

-and-

CORK COUNTY COUNCIL

Notice Party

-and-

AN TAISCE

Notice Party

Judgment of Ms. Justice Ní Raifeartaigh delivered on the 17th day of May, 2018

Nature of the Case

1. This is a case which concerns the procedures under Irish planning legislation insofar as they apply to the relationship between applications for planning permission in respect of quarries, on the one hand, and EU law, on the other, or perhaps more accurately, Irish law as enhanced or supplemented by EU law concerning environmental matters. It concerns matters such as the relationship between past and future development in the context of quarrying; the relationship between retention permission and "standard" or ordinary permission; the relationship between regularising the past and obtaining permission for future development; and the distinction between an "ordinary" environmental impact statement and a remedial environmental impact statement.

2. A very specific and net legal issue is presented to the Court for decision. This issue is whether an application for planning permission under s.34 of the Planning and Development Act 2000, as amended, (hereinafter "the Act of 2000") may be made, and granted, in the particular configuration of circumstances presenting in the present case: these being (a) that the quarry fell into a category which would have required environmental or habitat assessment; (b) that the quarry owner had previously failed to register the quarry with the local planning authority in accordance with his obligation under s.261 of the Act of 2000, as a result of which, by operation of law, it became an "unauthorised development" ; (c) that this resulted in service by the planning authority of an enforcement order in accordance with the regime established by s.261A of the Act of 2000 as amended; (d) that the quarry complied with the enforcement notice and ceased its quarrying operations for six months; (e) that subsequent to this cessation, the quarry owner applied for planning permission in respect of future development by means of an application pursuant to s.34 of the Act of 2000, which application was accompanied by an environmental impact assessment; and (f) where no application for substituted consent was (or apparently could have been) made by the quarry owner or operator under the statutory provisions governing these matters. The question is whether, in these circumstances, such an application for planning permission amounted in effect to a grant of prohibited "retention permission" contrary to s.34(12) of the Act of 2000 as amended and/or constituted a breach of the requirements of the European Environmental Impact Assessment and the Habitats Directives.

3. The case came before the Court by way of judicial review for an order of *certiorari* of a decision made by the An Bord Pleanála (hereinafter "the Board) on the 17th May 2016 upholding a decision of the second notice party, Cork County Council, (hereinafter "the Council") in respect of a grant of planning permission for a quarry owned and operated by the first notice party and further, a declaration that this decision was *ultra vires* the first respondent's powers. The applicants also seek a declaration that the second and third respondents have failed to give effect to the decision of the CJEU in *Case C-215/06 Commission of the European Communities v Ireland* [2008] ECR I-4911 and the substantive requirements of the EIA Directive insofar as the relevant transposing legislation permits a developer who has engaged in unauthorised development to comply with an enforcement notice under s. 154 of the Planning and Development Act 2000 and upon compliance submit an application for planning permission pursuant to s. 34 of the Planning and Development Act 2000 rather than avail of the substitute consent procedure in Part. XA of and ss. 261-261A of the same Act. A stay was also sought to prevent the first named notice party from carrying out any works at the quarry site and if necessary, a preliminary reference to the Court of Justice of the European Union (CJEU) pursuant to Art. 267 of the Treaty on the Functioning of the European Union.

Relevant Facts/Chronology

4. The most important features of the chronology set out below, for present purposes, are that the quarry failed to register with its local planning authority under s.261 of the Act of 2000; that it was refused planning permission in 2011; that it was the subject of a determination in 2012 by the Council that it was an "unauthorised development"; that it was served with an enforcement notice as a result of which it ceased activities for 6 months, ending on the 17th October, 2014; and that it subsequently made a successful application for planning permission to the Council, subsequently upheld by the Board in 2015.

5. The quarry in issue in these proceedings is situated at Ardcahan, Dunmanway, in County Cork. It was purchased at some time by Murray Brothers Tarmacadam Ltd. (hereinafter "the Developer") from Cork County Council (hereinafter "the Council"). When the

obligation pursuant to s.261 of the Act of 2000 to register the quarry came into force, in the 2004/5 period, the Developer did not comply with its statutory obligation to register with the Council. This is a matter of considerable significance in the case.

6. On the 25th May, 2011, the Developer made an application to the Council for planning permission in respect of the quarry. On the 13th July, 2011 the Council refused to grant the permission sought on the grounds that it was an extension of an existing unauthorised quarry and was not supported by an Environmental Impact Statement (EIS) or a Natura Impact Statement (NIS).

7. In accordance with its obligation pursuant to s.261A of the Act of 2000, as amended, (discussed below), the Council examined this particular quarry. On the 23rd August, 2012 the Council made a formal determination. This concluded first, that development had been carried out at the site since 1 February 1990 such as to require an Environmental Impact Assessment (EIA), and since 26 February 1997 such as to require an Appropriate Assessment (AA), and that neither form of assessment had been carried out. It also stated that although a pre-1964 use had existed at the quarry, this had not been properly registered under s.261 before the deadline of April 2005. Accordingly, it determined that the quarry was an "unauthorised development" within the meaning of s.261(10) of the Act of 2000.

8. On the 25th November, 2013, and in accordance with the procedures mandated by s.261A, the Council issued an enforcement notice to the Developer pursuant to s. 154 of the Act of 2000. The enforcement notice required, *inter alia*, the cessation of quarrying at the site within a six-month period. It did not require the taking of any remedial steps with regard to the operation that had been carried out there in the past.

9. Although there was some dispute as to precisely when the enforcement notice was complied with, it is clear that that this had taken place by the 17th October, 2014 at the latest, because on this date, the Council wrote to the Developer stating that the enforcement notice had been complied with and was now closed.

10. On the 24th October, 2014, one week after the Council had communicated that the enforcement notice had been complied with, the Developer submitted a planning permission application to the Council pursuant to s. 34 of the Planning and Development Act 2000 i.e. an application for "standard" or "conventional" planning permission. This application was accompanied by an Environmental Impact Statement (EIS). It was also accompanied by a legal opinion setting out the conclusion of the author that the application could be considered a standard application for planning permission once the terms of the 2013 enforcement notice had been complied with. It may be noted that the EIS submitted with this planning application described the proposed development as "at the site of a previous quarry development and existing tarmacadam plant…". This application was subsequently amended on three occasions in 2015 (on the 10th March, 14th May, and the 4th June).

11. On the 14th November, 2014, the third named notice party, An Taisce, made a submission to the Council, referring to the history as described above and submitted that the subject of this 2014 application was entirely contiguous with the 2011 unauthorised site. It submitted that this could not be considered a de novo application and was in reality an application for retention permission and that the Council would be acting *ultra vires* if it were to grant planning permission.

12. On the 25th November, 2014, the applicants made a submission objecting to the application on grounds relating to the unauthorised status of previous development, the scale of the quarry, and the requirements in respect of environmental impact assessment.

13. On the 26th June, 2015 Cork County Council granted planning permission to the Developer subject to 27 conditions.

14. On the 22nd July, 2015, the first and second named applicants and An Taisce appealed the Council's decision to the first named respondent, An Bord Pleanála (hereinafter "the Board"). The Developer also appealed the decision in respect of one of the conditions laid down by the planning authority, relating to the payment of monies towards the maintenance of nearby public road. The third named applicant was an observer to the appeal and made a submission to the Board on the 13th August, 2015. The Developer issued a response to the third-party appeals dated the 19th August, 2015.

15. The Board appointed an inspector who carried out a site inspection on the 28th September, 2015 and prepared a report dated the 13th October, 2015. He noted, *inter alia*, that the application was contiguous to, and included part of, the quarry against which the enforcement notice had previously issued. The inspector recommended that the planning permission be granted subject to 18 conditions.

16. On the 20th November, 2015 the submissions in relation to the appeal and the inspector's report were considered by the Board. The Board decided to defer the decision to a further meeting. On the 11th May, 2016 this meeting took place. The Board decided to grant permission generally in accordance with the inspector's recommendations, subject to some amendments. A record of the board's decision states that it had regard to the EIS, the NIS, the character and nature of the application site, the location, scale and form of the proposed development, the planning history of the site, the inspector's report, the pattern of development in the vicinity, the proposed means of controlling and mitigating emissions from the development, and the policies of the planning authority in respect of extractive industry, landscape character and heritage. It concluded that the proposed development, subject to compliance with several conditions, would not seriously injure the amenities of the area or of property in the vicinity, would not be prejudicial to public health or would not pose an unacceptable risk of environmental pollution and so would be in accord with the proper planning and sustainable development of the area. It laid down 17 conditions to be complied with by the Developer and reduced the figure of the sum payable for the maintenance of the nearby public road.

17. Following this decision, the Board granted planning permission to the Developer on the 17th May 2016, subject to 17 conditions for development. This is the decision impugned in these proceedings. The decision included the following statement:

> "In making its decision, the Board had regard, *inter alia*, to the following:
>
> …
>
> (g) the planning history of the site, including that the existing quarry has been deemed, by virtue of section 261(1) of the Planning and Development Act, 2000, as amended to comprise unauthorised development by reason of the failure to register under section 261 of the Act of 2000 as amended, that an enforcement notice has been served by the planning authority and that the planning authority is satisfied that the enforcement notice has been complied with.
>
> (h) the fact that the application is not prohibited under section 34(12) of the Planning and Development Act, 2000, as amended.

18. The Developer did not at any stage make any application for substitute consent under the procedures introduced by the Act of 2010, for reasons which are discussed below.

The Legal Context

19. The courts have frequently observed in the past that quarries present unique challenges for planning law. This arises from certain distinctive features of quarries, including that the operation of many quarries pre-dated planning control in Ireland; the long period of time during which quarrying operations may be carried out, the intensity of which may ebb and flow at different times within the overall period; and the range of effects and impacts on the environment that arise from the process of extraction; as well as the unique nature of quarrying itself. There is a significant difference, both in practical and in conceptual terms, for example, between a planning application to build a house, and a planning application in respect of a quarry which has existed for more than 50 years. The law in this area is complex and involves, *inter alia*, the interaction between Irish law and a number of European Directives and CJEU decisions.

20. In examining the legal context to events in this case, it may be helpful to distinguish between the legal framework prior to the CJEU decision in *Commission v. Ireland Case C-215/06* [2008] E.C.R I-04911 and the legal position after that decision.

The relevant EU Directives and the law prior to the decision in Commission v. Ireland

21. Two important EU Directives in the environmental area had imposed obligations on Ireland to ensure that the decision-making process in the planning area included meaningful consideration of environmental issues, as well as affording an important role to public participation in the process.

22. Council Directive 85/337/EEC (also known as the "EIA Directive") was introduced to deal with the effects of public and private projects which were likely to have significant effects on the environment and came into effect on the 3rd July, 1988. Article 2 required that Member States adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in the Directive. The Directive was subsequently amended on three occasions and is no longer in force. A codified version of the Directive and its amendments now exists in the form of Directive 2011/92/EU. Article 3 of the EIA Directive provided that a valid EIA shall identify, describe and assess the direct and indirect effects of a project on the following factors: (i) human beings, fauna and flora; (ii) soil, water, air, climate and the landscape; (iii) the inter-action between these factors and; (iv) material assets and the cultural heritage. Article 4 provided that the projects subject to the directive are to be found in Annex II. Annex II was amended by Council Directive 97/11/EC to include quarries, open-cast mining and peat extraction,

23. Article 5 provided that Member States adopt the necessary measures to ensure that the developer supplies information laid out in Annex III (now Annex IV of Directive 2011/92/EU) in as much as the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected and that the Member States consider that a developer may be required to compile this information having regard *inter alia* to current knowledge and methods of assessment. The type of information mandated under Annex III includes, for example, a description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.

24. Article 6 required that public authorities concerned with the environment and members of the public shall be given the opportunity to express their opinion on a request for development consent.

25. The second relevant directive, Council Directive 92/43/EEC (also known as the "Habitats Directive"), was adopted to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements and came into force on the 10th June, 1994. It lays down the general rule that an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future. Article 6(3) mandates that 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. Annexes I – V of the Directive list the various criteria to be applied when determining if a given site is a designated site.

26. Another important distinction of the legal landscape was s. 261 of the Act of 2000. The Act of 2000 introduced an obligation to register quarries and commenced on the 28th April, 2004. Section 261 required the owner or operator of a quarry (not being one in respect of which planning permission was granted within the previous 5 years), within one year of the coming into operation of the section, (i.e. by the 27th April, 2005) to register with their planning authority. It set out the specific type of information to be provided to the authority. The planning authority was then required to publish a notice of the registration and the required contents of the notice were prescribed. Where certain proposed courses of action were in contemplation, the authority was required to serve notice on the quarry owner or operator. Not later than 2 years from the registration of a quarry, the authority could impose conditions on a quarry which had commenced operation before the 1st October, 1964; or restate, modify or add conditions in respect of a quarry in respect of which planning permission was granted. Section 261(7) dealt with the continued operation of a quarry greater in size than 5 hectares or that was situated in particular sites *and* that commenced operation before 1 October 1964; where such a quarry "would be likely to have significant effects on the environment" . In such a case, the authority was required to request an application for planning permission accompanied by an environmental impact statement. Importantly, s. 261(10) also clearly established that a failure to register renders a quarry an unauthorised development.

27. Under the provisions of s.261, there was no duty on the planning authority to seek out quarries; it was for the owner or operator to make the information available to the authority. This is of particular relevance in the present case, as the Developer did not register the quarry in issue in these proceedings.

28. A practice apparently developed whereby quarry owners applied for, and were routinely granted, retention permission under s.34(1) of the Act of 2000 in respect of unauthorised development, even where the unauthorised development should have been assessed under the EIA or Habitats Directives. This practice was examined and condemned by the CJEU in the case of *Commission v. Ireland* and led to a number of significant legislative amendments.

The decision in Commission v. Ireland

29. In Commission of the European Communities v Ireland (Case C-215/06) [2008] E.C.R I-04911 the Commission brought proceedings

against Ireland on the basis that, *inter alia*, Ireland had failed to transpose the EIA Directive adequately and that in allowing for retention permission to be granted after the development had been executed, in whole or in part, without consent undermined the preventive objectives of the Directive.

30. At para. 49, the court referred to the "fundamental objective" of Directive 85/337/EEC; namely that *before* development consent is given, projects likely to have significant effects on the environment should be made subject to a requirement for development consent and assessment with regard to their effects. At para. 54, it accepted that Irish legislation requires environmental impact assessments and planning permission to be carried out and obtained as a general rule prior to the execution of works. However, it said (at para. 55) that Irish legislation established retention permission and "equates its effects to those of the ordinary planning permission which precedes the carrying out of the works and development", even though the project has been executed and no environmental assessment was, in fact, carried out. "In addition,", the court said at para. 56, "the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied". It said (para. 57) that while Community law cannot preclude the national rules from allowing, in certain cases, the regularisation of operations which are unlawful in light of Community law, "such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception". It said that the system of regularisation in force "may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of the Directive 85/337 as amended, and, consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment" (para. 58). It pointed out that the first recital of the preamble to the Directive referred to the necessity for the planning authority to take into account "at the earliest possible stage" the effects on the environment, "the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects".

31. Ireland had attempted to rely on a previous decision of the CJEU in *Case C-201/02 R(Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] E.C.R I-748. In Wells, a mining operation had been granted consent without an EIA having been carried out. Mrs. Wells made a request to revoke the approval in order to remedy the failure to carry out an EIA. The Court held, *inter alia*, that as regards to remedying a failure to carry out an EIA: -

> "it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered…. *the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project* as provided for in Article 2(1) of Directive 85/337." (emphasis added)

However, in *Commission v Ireland*, the court held that Ireland could not usefully rely on Wells as in the same judgment it was stated that:-

> "Member States are required to *nullify* the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States." (emphasis added).

32. What is clear from the decision in *Commission v. Ireland* is that what was not in compliance with the EIA Directive was a regime in which a developer could routinely bypass the requirements of the Directive by applying for and obtaining, *ex post facto*, a grant of retention permission after a project had been executed, having failed to submit appropriate environmental assessments before the project had commenced.

33. However, the decision left a number of questions unanswered. For example, precisely what type of "exceptional" circumstances would justify permission being granted after the event? And could development into the future be authorised even where there had been a failure to submit/carry out environmental assessment in the past, and if so, in what circumstances?

The law after the decision in Commission v. Ireland

34. Certain legislative amendments to the Act of 2000 were introduced in order to address the issues identified in the CJEU decision. In broad terms, these were three-fold: a prohibition in respect of retention permission in certain circumstances (s.34(12)); a new procedure for a new species of permission described as "substitute consent" (Part XA); and an obligation on the planning authorities to examine and make decision on quarries within their area (s.261A).

35. The first of these amendments, s. 34(12) of the Act of 2000, as inserted by s. 23 of the Planning and Development (Amendment) Act 2010, provides that a planning authority "shall refuse to consider an application to retain unauthorised development of land" where the application is one which would have required an Environmental Impact Assessment, or a determination regarding the necessity of an EIA, or an Appropriate Assessment, had planning permission been sought before the development was commenced.

36. Secondly, the amending Act introduced a new Part XA into the Act of 2000, containing procedures in respect of "substitute consent". Substitute consent is essentially a form of retention permission which may only be granted in limited circumstances in order to comply with the *Commission v. Ireland* strictures as to "exceptional circumstances". S. 177O of the Act of 2000 provides that: -

> "(1) A grant of substitute consent shall have effect as if it were a permission granted under section 34 of the Act and where a development is being carried out in compliance with a substitute consent or any condition to which the consent is subject it shall be deemed to be authorised development.
>
> (2) Where a development has not been or is not being carried out in compliance with a grant of substitute consent or any condition to which the substitute consent is subject it shall, notwithstanding any other provision in this Act, be unauthorised development."

37. The provisions concerning substitute consent are extremely, and I would venture to comment, unduly, complex. There are a number of "gateways" to obtaining substitute consent. A planning authority may issue a notice requiring the quarry developer/owner to apply for substitute consent if the planning authority is of the belief that existing planning permission is defective, invalid or otherwise in breach of law. Otherwise the first step in seeking substitute consent is for the developer to make an application for leave to apply for substitute consent. Section 177C of the Planning Development (Amendment) Act 2010 envisages two situations where a

developer's application for leave to apply for substitute consent arises. The first situation arises where the developer/owner is applying for leave to apply for substitute consent because he believes that the permission granted was in breach of law, invalid or otherwise defective in a material respect. In this situation the developer/owner is relieved from having to show exceptional circumstances. The second situation arises where the developer/owner believes that "exceptional circumstances" exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

38. In this regard, s. 177D lays out 7 different factors the Board is to have regard to in determining whether or not "exceptional circumstances" exist. These factors are:

- whether regularising the development would circumvent the purpose and aims of the EIA or Habitats Directives;
- whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- whether the ability to carry out an assessment of the environmental impacts of the development, or an appropriate assessment, and to provide for public participation in such an assessment has been substantially impaired;
- the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;
- the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- Whether the applicant had complied with previous planning permission granted or had previously carried out an unauthorised development; and
- any other matters the Board considers relevant.

39. If leave is granted, then the process of the substantive application for substitute consent begins under s. 177E. This section provides that the application must be accompanied by a *remedial* environmental impact statement (EIs) or a *remedial* Natura impact statement (NIS). This is of significance in the present proceedings. Ss. 177F and 177G contain what is to be included in a remedial EIS and NIS respectively. These includes details of any appropriate remedial measures taken or proposed to be taken to remedy any significant adverse effects on the environment (if EIS) or any appropriate remedial or mitigation measures undertaken or proposed to be undertaken to mitigate or remedy any significant effects on the environment or European Site (if NIS).

40. Section 177K provides that the Board may decide to grant the substitute consent, subject to, or without, conditions, or to refuse it. It lays out the 12 criteria to be regarded by the Board in determining whether or not to grant substitute consent. These include, *inter alia*:

- The provisions of the development plan and any local area plan for the area;
- The provision of any special amenity area order relating to the area;
- The remedial environmental impact statement, or remedial Natura impact statement, or both of those statements as the case may be, submitted with the application;
- the significant effects on the environment or on a European site which have occurred, are occurring or could be reasonably expected to occur because the development was being carried out.

41. Section 177K (3) provides that the conditions which may be attached to the grant of a substitute consent may include conditions relating to remediation of all or part of the site on which the development the subject of the grant of substitute consent is situated. This is also of significance in the present proceedings.

42. Section 177L deals with the refusal of leave to apply for substitute consent/refusal to grant substitute consent. It provides for a process of issuing a draft direction to the applicant, an opportunity to make submissions, and the finalisation of the direction. The direction can do one of two things. The first is to require the applicant to cease activity or operations at the site of the development "where the Board forms the opinion that the continuation of all or parts of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site". The second is to require, alternatively, the applicant to take such remedial measures as are considered necessary to restore the site to a safe and environmentally sustainable condition and to avoid, in a European site, the deterioration of natural habitats and the habitats of species or the disturbance of the species for which the site has been designated, insofar as such disturbance could be significant in relation to the objectives of the Habitats Directive. Insofar as the direction requires the taking of remedial measures, such remedial action may be required in relation to development that was carried out at any time but no more than 7 years prior to the date when the section came into operation.

43. What is of particular significance about the substitute consent procedure, for present purposes, is that consideration of possible harm done to the environment in the past (or continuing harm as a result of past activity) and remediation of the land are central considerations. The developer must submit a remedial impact assessment and the Board is empowered to impose conditions for remediation.

44. A third, important amendment to the Act of 2000, in order to render Irish law compliant with the Commission v Ireland decision, was the insertion of further provisions concerning quarries, including another gateway for substitute consent, via a new provision, s.261A. It was commenced on the 15th November, 2011 and provided that between that date and the 23rd August, 2012, each planning authority had to examine every quarry in its area and determine whether (i) a development, which was not authorised by Part IV of the Local Government (Planning and Development) Act 1963, was carried out after the 1st February, 1990 which would have required an environmental impact assessment or a determination as to whether an EIA was required, but that such assessment or determination was not carried out or made; or whether (ii) a development, which was not authorised by Part IV of the Local Government (Planning and Development) Act 1963, was carried out after the 26th February, 1997, which would have required an appropriate assessment, having regard to the Habitats Directive, but was not carried out. If development had been carried out after these prescribed dates which should have been assessed having regard to the relevant European directives, but was not, either a developer would be required to apply for substitute consent or they would receive an enforcement notice. The only quarries which

were allowed to apply for substitute consent were those which had a pre-1964 use or had a permission under Part III of the Act of 2000 or Part IV of the 1963 Act, *and that* had registered under s.261 of the Act of 2000. This gateway allows a quarry to bypass the s.177D leave procedure and therefore exceptional circumstances will not have to be shown in relation to the development. Because the quarry in the present proceedings had not registered under s. 261, it could not avail of this pathway into the substituted consent procedure.

45. It was submitted by counsel that an important feature of the substitute consent procedure, for present purposes, is that a developer in the position of the Developer in the present proceedings is, in effect, precluded from availing of the s.177D "gateway" because of the listing of the following as a factor which the Board is to take into account in deciding whether exceptional circumstances exist (s.177D(2)(b)): "whether the applicant had or could reasonably have had a belief that the development was not unauthorised". Given the Developer's failure to register the quarry before April 2005 and given the Council's subsequent determination of the quarry's unauthorised status, he could manifestly not have satisfied this condition. Whether this necessarily means that he would automatically have had his application for leave refused by the Board is perhaps less clear, but in any event the Developer in the present case did not seek leave pursuant to s.177D. Further, because the quarry had not been registered, the Council was not empowered to serve a notice inviting an application for substitute consent under the s.261A gateways.

46. This legal landscape after the 2010 Act amendments has been considered in a number of judgments. In *McGrath Limestone Works Ltd v., A Bord Pleanála* [2014] IEHC 382, the planning authority had, pursuant to s.261A, required that an application for substitute consent be made in respect of a quarry which had previously been registered pursuant to s.261. The quarry firm had sought to argue, *inter alia*, that the planning authority, by dispensing with the requirement for an environmental impact statement and imposing conditions for regulating noise, blasting and operating times etc. at the time of registering the quarry under s. 261, had created a legitimate expectation that the firm would not have to comply with any further legal obligations, which arose subsequently under s. 261A. There was also a claim that s.261A was unconstitutional. The application was refused by Charleton J. who comprehensively examined the provisions of s.261 and s.261A. He described the decision in *Commission v. Ireland* as an "unrestrained condemnation of a legal order which not having detected projects deleterious to the environment, because they were not reported by developers, could subsequently authorise these without the need for any assessment as to their effects on either protected habitats or on the environment". He commented that s.261A rather than being "an imposition on quarries" instead "enabled every quarry to be what is, in effect, a special case: a complete exception to the strictures of what European law requires. In that context, requiring a quarry owner to which that section applies to seek substitute consent and in doing so fulfil the European law obligations which is part of the Irish legal order is entirely reasonable". Of course, the present case raises questions about the position of a quarry which cannot (or did not) apply for substituted consent.

47. In *An Taisce v McTigue Quarries* [2016] IEHC 620, Barrett J. described the concept of substitute consent in the following terms: -

> "Among the changes made were the establishment of a substitute consent process whereby the legal position of quarry developments that had been done without an environmental impact assessment (EIA), screening for an EIA, or appropriate assessment (AA) could apply for 'substitute consent'. The key provision in this regard was a new s.261A of the Planning and Development Act 2000, as inserted by the Act of 2010. Notably, for reasons that will be identified later below, a substitute consent regularised what was done previous to consent but save as regards the taking of those remedial measures, it did not allow for continuing or future development of a quarry and continuing or future development required separate planning permission to be obtained following the issuance of the substitute consent."

He continued that: -

> "The substitute consent process was established…to allow the retrospective regularisation of a quarrying development which had been carried out in the absence of an EIA, screening for an EIA, or AA, as applicable."

48. Barrett J. went on to examine the Commission v Ireland decision where the court emphasised that any regularisation procedure must not allow applicants to circumvent Community rules or dispense with applying those rules and that such a procedure must be an exception. Having examined this legal background, he said, at para. 10: -

> "Put plainly, a substitute consent regularises what was done previous to the consent and allows the undertakings of certain remedial measures after the consent, but does not otherwise allow continuing or future development of a quarry: such continuing or future development requires separate planning permission."

49. It is clear, therefore, that Barrett J. considered that a substitute consent was backward-looking rather than forward-looking; it regularises what was done previous to the substitute consent but does not authorise future development. Therefore, in relation to any future development an applicant cannot rely on substitute consent but must instead go through the procedures laid down for a normal grant of planning permission.

50. Since 2015, as a result of further amendments in that year, a person can now apply simultaneously for (a) substitute consent in respect of a quarry under s.261A and (b) permission for further development of a quarry. This arises as a result of s.37 L of the Act of 2000 inserted by reg. 4 of EU (Environmental Impact Assessment and Habitats) Regulations 2015 (S.I. No. 301 of 2015). This provision was not a part of the legal regime under consideration in the present case as it was not in force at the relevant time, but it does tend to emphasise that there is an important distinction between an application for substitute consent and application for permission to further develop a quarry.

The Comune di Corridonia case

51. Subsequent to the decision of the Board in the present case, an important decision was handed down by the CJEU, namely the *Commune di Corridonia* case. *Commune di Corrridonia v Provincia di Macerate (Joined Cases C-196/16 and C-197/16)* [2016] involved a reference for a preliminary ruling from Italy, "to clarify whether an environmental impact assessment pursuant to Directive 2011/92 can be carried out after the project concerned has already been realised" (emphasis added). The factual matrix in which this arose was in the context of the construction of two plants for the generation of electricity on the basis of biogas obtained from the anaerobic digestion of biomass. The competent Italian planning authority had given its consent for the plants in 2012. The authority responsible for the project's environmental impact did not require an assessment of the environmental impact to be submitted; this decision was taken in accordance with a provision of regional law. This provision of regional law was subsequently annulled by Italy's constitutional court. Accordingly, the failure to obtain an environmental assessment before the project's implementation was the consequence of a legal error by a State authority. By this stage, the plants had already been constructed and commenced operations. Proceedings were brought subsequent to the constitutional court's decision, which resulted in the annulment of the original planning permissions. The question then arose as to the appropriate approach in circumstances where the appropriate

assessments had not been, and could no longer be, obtained at the earliest possible time and in advance of the development.

52. Advocate General Kokott in her opinion dated the 30th March 2017 referred to the suggestion that the plants should be dismantled and removed as a "legal consequence [that] is-at least in theory – possible" but said that it was "unlikely to come into consideration". She said that although the error of procedure could no longer fully rectified i.e. there could not now be an environmental assessment at the earliest possible opportunity, the consequences of the error could still be mitigated. She referred to "pragmatic solutions" being called for which did not result in an incentive to circumvent the rules of the Directive. She went on to discuss what could be done and concluded that, in answer to the legal question raised, the court should rule that in such a situation, the competent authorities should carry out the assessment at a later stage and draw the appropriate consequences from this outcome; but that this cannot result in the project being treated as if its consent had been given in full compliance with the Directive. Overall, I think it is fair to say that her Opinion as a whole is *not* premised on any view that a failure to carry out an environmental impact assessment in advance of a development would always and necessarily be fatal to the continued operations of the development in question.

53. The decision of the court was delivered on the 26th July, 2017. It pointed out that the purpose of taking into account environmental effects at the earliest possible stage in the planning and decision-making processes was to try to prevent the creation of pollution or nuisances at source rather than trying to counteract their effects at a later stage. It noted that neither Directive 85/337 nor Directive 2011/92 contained any explicit provisions relating to the consequences of a breach of that obligation to carry out a prior assessment. While Member States were required to "nullify the unlawful consequences of the breach of EU law", and competent national authorities were under an obligation to take all necessary measures within the sphere of their competence to remedy the failure, "for example" by revoking a consent already granted in order to carry out an assessment, the Court had held that EU law " does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in light of EU law, provided the regularisation did not offer the persons concerned the opportunity to circumvent the rules of EU law or dispense with their application". It referred to the regime in Commission v Ireland at this point, and then referred to *Stadt Wiener Neustadt v Niederosterreichische Landesregierung Case C-348/15* [2016] in respect of the concept of "deemed consent", as examples of what was not permissible. It then went to say, in what I consider to be an important passage at para. 41: -

> "Furthermore, an assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion."

54. While it was for the referring court to assess whether the legislation at issue satisfied the requirements above, the facts of the present case appeared to indicate that the activities of the biogas plants had not attempted to circumvent rules of EU law. The failure to procure environmental impact assessment had been due to the application of domestic law as it was before it was ruled incompatible with EU law by the constitutional court.

55. The formal answer to the question posed was as follows: -

> "In the light of all of the foregoing considerations, the answer to the question posed is that, in the event of failure to carry out an environmental impact assessment required under Directive 85/337, EU law, on the one hand, requires Member States to nullify the unlawful consequences of that failure and, on the other hand, does not preclude regularisation through the conducting of an impact assessment, after the plant concerned has been constructed and has entered into operation, on condition that:
>
> -national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and
>
> -an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact but must also take into account its environmental impact from the time of its completion." (para 43)

56. Thus, it appears that there is a two-pronged test to be applied when considering a measure or provision which seeks to regularise a past failure to conduct an environmental impact assessment: (1) whether it provides the developer with an opportunity to circumvent EU law; and (2) whether the assessment to be now carried out takes into account not only the development's *future* impact but also its past impact.

The decision in Murphy v. An Bord Pleanala [2009] IEHC 38

57. An issue debated between the parties was whether the application for permission in the present case involved an element of retention and/or whether permission may be given where the site in question contains, or is connected in some way to, an unauthorised development. There appears to be little Irish authority on the point, but one authority identified by the parties in this regard was the decision in *Murphy v. An Bord Pleanala* [2009] IEHC 38. The development in question consisted of a first-floor extension over an existing premise which involved an extension for which permission had not been sought. The applicant (a neighbour-objector) contended that the original development was (in part) illegal and that the proposed development incorporated that development by being built on top of it. The allegation that the original development was illegal was the subject of Circuit Court proceedings between the parties. In reply, the developer claimed it was not unauthorised because it amounted to an exempted development, on the basis that its area was below the threshold in respect of which planning permission would be required. By the time of the planning inspector's report into the premises, the Circuit Court proceedings had been withdrawn. The inspector recommended a refusal of planning permission. He did not express a view as to the dispute concerning the earlier works. An Bord Pleanala decided to grant planning permission. It too made no determination as to whether the earlier works amounted to unauthorised development. The applicant brought judicial review proceedings, seeking *certiorari* of that decision, which was refused. The High Court, Feeney J., noted that there was no express statutory prohibition on the grant of planning permission which has within its area unauthorised development. Feeney J. rejected the submission that the grant of planning permission in respect of the first floor would thereby implicitly approve the status of the existing storeroom underneath:

> "In this case the planning permission did no more than assure the applicant that as regards the planning legislation, the particular development sought would be lawful. That development was in respect of a first-floor extension and did not extend to the ground floor. If an earlier development by the developer was unauthorised and/or unlawful, the planning permission granted did not, either by law or by implication, authorise or permit such earlier development".

And later-

> "The applicant's argument in relation to an irrational decision is predicated upon a claim that the proposed development is to be carried out on top of an illegal structure. That has not been established. Even if it were the case that it had been proved that the development permitted by the planning permission was to be carried out on top of an illegal structure, that, of itself, does not disentitle An Bord Pleanala from granting permission…In light of the above, the Court is satisfied that An Bord Pleanala is not prohibited from granting planning permission in circumstances where the development in respect of which planning permission is sought incorporates an extant development which it is alleged amounts to an unauthorised use and/or development. Nor is it the case that an application for permission, in circumstances such have been established in this case, must include an application for retention of the alleged unauthorised development. Therefore, it cannot be said that An Bord Pleanala was obliged to determine whether or not the disputed works were an authorised development or exempted development".

58. Interestingly, Feeney J. referred to a planning decision in respect of a quarry relied on by the applicant, where the Board had refused the grant of planning permission for an extension of an unauthorised development in relation to quarrying activities. He said "Cases such as that are fundamentally different from the facts of this case. What was under consideration in the quarrying case was the extension of quarrying activities into a new field or area from the original quarry area. The decision was that the proposed development of itself, would be an unauthorised development".

59. I will summarise below the submission of the parties as to the implications of this decision, if any, for the present proceedings.

The submissions of the parties

60. As the submissions on behalf of the applicants and those of the State parties were aligned insofar as they both considered that the Board had made a legal error in granting the planning permission sought by the Developer, I will deal with those in the first instance, and then turn to the submissions on behalf of the Board, even though this was not the order in which the submissions were presented at the hearing. My summary is a paraphrase of, I hope, the essential points on behalf of each of the parties rather than a comprehensive repetition of their written and oral submissions.

The submissions of the applicants

61. It was submitted on behalf of the applicants that the legislative scheme did not permit of a situation whereby, in circumstances such as that pertaining in the present case, the planning authority could grant "standard" planning permission pursuant to s.34 to the quarry in question, because this, it was submitted, would in effect amount to retention permission and would therefore breach the prohibition in s.34(12) of the Act of 2000 and circumvent the substitute consent procedure in s.261A of the Act. Reliance was placed upon *Shillelagh Quarries v. An Bord Pleanala* [2012] IEHC 257 for the proposition that in determining whether or not an application is for retention permission or not, it is the substance of the application that should be examined, not the words used. In that case, Hedigan J. said:

> "whether or not the word 'retention' is used, the substance is the same here as in the case of retention permission. Development, which would otherwise be required to undergo the EIA process, cannot be given *ex post facto* development consent under EU law".

It was argued that what was, in effect, being authorised was the extension of an existing and unauthorised quarry, rather than a proposal for a new quarry. Emphasis was laid upon the map submitted with the planning application, which showed a substantial overlap between the location of the "old" quarrying operations and the proposed "new" quarrying operations within the overall site.

62. Further, it was argued that s.1A of the Act of 2000 requires the court to interpret the legislative provisions in a manner compliant with, *inter alia*, the requirements of the EIA Directive and the Habitats Directive, and that the procedure used in the present case circumvented the requirements of European law as set out in *Commission v. Ireland* and the statutory procedures specifically designed to ensure that those EU law requirements were complied with. It was submitted that the Developer is compliance with the enforcement notice of the Council merely led to the cessation of quarrying for six months but did not lead to the carrying out of any remedial EIS or NIS. Thus, the grant of planning permission in all of the circumstances was not in compliance with the requirements as set out in *Commission v. Ireland* or the fundamental objective of the two Directives in question.

63. Counsel on behalf of the applicants submitted that an important point of distinction between the present case and the *Murphy* case was that in the present case, there had been a determination that there had been an unauthorised development, whereas in *Murphy*, this issue had never been determined.

The submissions of Ireland and the Attorney General

64. It was submitted on behalf of Ireland and the Attorney General (hereinafter referred to as "the State respondents") that it was ultimately a question of degree as to whether or not, in any particular case, a planning application amounted to an application for retention permission, and that this was a matter for the local planning authority, followed by An Bord Pleanála, and these decisions were only amenable to being overturned by the Court on the usual judicial review principles. It was submitted that in this case, the Board had made an error of law. It submitted that at the level of general principle, where permission is sought for the carrying out of further quarrying activity at quarry face or edge which would not otherwise exist "but for" the previous unauthorised development, such a planning application might reasonably be said to involve "an element of retention". Pointing out that the statutory definition under s.2 of the Act of 2000 defines "structure" to include an excavation, or other thing constructed or made on, in or under land, it was submitted that a literal interpretation would suggest that there is an element of retention where a planning application seeks to retain an existing quarry pit. It was submitted that "retention" meant retention in the ordinary meaning of "keeping" something, rather than the meaning contended for by An Bord Pleanála, namely that it amounted to a "legal cleansing" of its planning status. It was also suggested that, on a purposive interpretation, if there is no requirement to apply to retain the existing "hole in the ground", then the risk of having to restore the land is removed and in a real sense the landowner is benefitting from being allowed to retain the unauthorised development and to develop it further.

65. A number of European authorities were opened to me by counsel on behalf of the State respondents on the subject of when operations or developments can be considered distinct from previous operations or developments, for the purpose of arguing that continuing to quarry on an existing quarry site amounted to further development of the same quarry in reality. In *Stadt Papenburg v Bundesrepublik Deutschland Case C-226/08* [2010] E.C.R I-00131, the question arose as to whether the repeated, ongoing dredging of a river could be considered a single "project" under Article 6(3) of the Habitats Directive or a series of projects all of which would require development consent. The court stated at para. 47: -

> "Finally, if, having regard in particular to the regularity or nature of the maintenance works at issue in the main

proceedings or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to *be one and the same project* for the purposes of Article 6(3) of the Habitats Directive."(emphasis added)

66. In *Brussels Hoofdstedelijk v Vlaams Gewest Case C-275/09* [2011] E.C.R I-01753, a dispute arose in relation to the renewal of an existing consent for the operation of Bruxelles-National Airport. The Court stated that the objective of legislation cannot be circumvented by the splitting of projects and a failure to take into account their cumulative effect and in doing so, escape the obligation to carry out an assessment when, taking the projects together, they are likely to have significant effects on the environment within the meaning of the EIA Directive.

67. *Stadt Wiener Neustadt v Niederosterreichische Landesregierung Case C-348/15* [2016] concerned a waste processing plant in Austria for which consent was originally given to process 9,900 tonnes of waste per annum in 1986 and 1993 (i.e. before Austria joined the European Union). In 2002 the regional government permitted an increase in the plant's maximum processing capacity to 34,000 tonnes. This was to be affected through the construction of an extension of the plant. The consent for the extension was granted without an EIA. The domestic legislation provided that consent for a project which required an EIA but for which one had not been completed was capable of being annulled within 3 years. If a project's consent was no longer at risk of annulment the domestic legislation provided that the consent was at this point deemed to have been granted lawfully. The CJEU held that while time limits in relation to bringing proceedings against a grant of consent were not in principle precluded, a provision which deemed such consent as lawfully authorised by virtue of it being incapable of challenge before the courts was incompatible with the EIA Directive. As noted earlier, this decision was referred to in *Comune di Corrridonia v Provincia di Macerate (Joined Cases C-196/16 and C-197/16)* [2016] ECLI:EU:C2017:589.

68. Counsel on behalf of the State respondents placed considerable reliance on the decision in *Comune di Corrridonia v Provincia di Macerate (Joined Cases C-196/16 and C-197/16)* [2016] ECLI:EU:C2017:589, and in particular the passages of the Court's judgment which stated that where an assessment has been carried out after a plant has been constructed and has entered into operation, such assessment cannot be confined to its future impact on the environment but must also take into account its environmental impact from the time of its completion i.e. in the past.

69. With regard to the decision in *Murphy v. An Bord Pleanála,* it was submitted that, in the first instance, this did not involve a quarry and that the decision did not arise in the context of the complex EU/Irish web of law concerning quarry planning and environmental assessments; and secondly, that there was no discussion of the concept of retention useful for present purposes.

The submissions of the Board

70. Counsel for the Board submitted that there is nothing in the Act of 2000 as amended which explicitly prohibits an application for planning permission of the kind made here. It was submitted that there was no express statutory prohibition on an application for planning permission for future works where the history had been such as that in the present case, and that this was of considerable relevance in circumstances where the planning code does, in other areas, contain explicit statutory prohibitions.

71. It was submitted that the present application did not amount to an application for retention permission because it concerned quarrying operations in the future and did not seek in any way to legally regularise what had happened in the past. It was submitted that the application did not in fact involve "retention". A quarry was essentially "a hole in the ground" and new quarrying is by its nature "parasitic" on the old quarry. This did not mean that quarrying into the future necessarily involved "retention"; the consequences of the prior unauthorised development remain and its legal status has not been cleansed. The Oireachtas had set out a complex scheme which had been followed in the present case; given the circumstances of this quarry, an enforcement notice had been served and there had been a cessation of the activity for six months in compliance with the notice. However, this does not prevent an application for planning permission in respect of developments which are to take place into the future. As was stated in the written submissions: "What it means it that the quarryman has to accept the consequences that there is an historic issue over the status of works carried out on the lands. That historic issue does not mandate the result of any prospective application, although it clearly is a relevant consideration for the Planning Authority in determining the prospective application for permission". The unauthorised status of the past development is a consideration to be taken into account in the planning application for future development but does not constitute a bar to future development.

72. It was submitted that the contrary interpretation of the legislation would be to effectively "sterilise" the quarry into the future, leaving a quarry face, which is in fact still capable of being physically exploited, legally incapable of being exploited. This would be to wrongly treat an "unregularized past" as inevitably leading to a sterilised "future". Further, it would lead to the absurd practical consequence that a neighbouring quarry could be commenced so long as it did not rely upon established cutting lines.

73. It was submitted that the construction contended for by the applicants and the State respondents would also be a disproportionate consequence from the failure of the Developer to have registered in accordance with s.261 Act of 2000. On this approach, nothing could ever, it was argued, be done at this quarry, not matter how environmentally acceptable it would be, simply because of a past failure to have engaged in an administrative act, namely putting details on a register. It was pointed out that a relevant environmental impact assessment had been sent to the Board with the present application for planning permission and that the Board had decided that the proposed quarrying would not have unacceptable environmental effects.

74. The Board relied on the case of *Desmond Murphy v. An Bord Pleanála* [2009] IEHC 38 for the proposition that planning permission may be applied for (and granted) even if the site of the proposed development contains a previous unauthorised development.

75. The Board sought to distinguish *Shillelagh Quarries v. An Bord Pleanála* [2012] IEHC 257 case on the basis that, in the present case, there had been an enforcement notice which had been complied with.

76. As regards European law, it was submitted that the core problem identified in *Commission v. Ireland* was a situation whereby retention permission could be granted routinely in non-exceptional circumstances, thus regularising the past unauthorised development and treating it in legal terms as if it had received planning permission prior to the carrying out of the development. The case did not deal with the question of future development but was instead focussed on the issue of regularising the past. In contrast, the case of *Comune di Corridonia* did deal with the issue of future developments and did envisage that permission could be granted to projects in respect of which there had been a failure to carry out environmental impact assessment pre-development, provided later environmental impact assessment was carried out. It was submitted that none of the authorities cited by the State respondents showed that European law took a rigid perspective to the effect that the Directives could never be satisfied by carrying out assessments *after* the development had commenced.

Discussion and Decision
77. I will start with an examination of *Murphy v. An Bord Pleanala* [2009] IEHC 38, the facts of which were set out earlier. In this case, the High Court (Feeney J). accepted the proposition that the planning permission for a proposed first-storey development did not implicitly authorise an existing extension, the planning status of which was in dispute, and that the permission granted did not in any way incorporate any element of retention in respect of the first extension. His decision could therefore be said to support the broader proposition that a planning permission application under s.34 is limited to defining the status and conditions of future development and does not speak at all to the legal status of past development. I appreciate that there is a distinction between that case and the present one insofar as whether the first extension in the *Murphy* case was unauthorised or not was a matter in dispute, rather than a matter unequivocally established (as was the unauthorised nature of the quarry in the present case). However, this does not seem to me to be an important point of distinction because the decision of Feeney J. was based upon the principle that the status of the first extension did not affect the validity of permission given; no doubt if the establishment of the status of the first extension would had made any difference to the outcome, Feeney J. would have held that the issue required a determination by the Board. His decision was, however, that the status did not need to be determined precisely because it was not relevant to the permission for the future development which was actually granted and in issue in the proceedings.

78. More problematic, however, is the fact that Feeney J. specifically stated that quarry cases were "fundamentally different" from the case before him. Unfortunately, his brief reference to a quarry planning decision cited to him does not make it clear whether the quarry permission in that case was refused because of features of the proposed development (i.e. an objection to the future development itself), or simply because the proposed quarrying was the extension of quarrying activities from the original quarry area (i.e. that the future development amounted to retention). Further, the decision pre-dates the decision in *Commission v. Ireland* and the 2010 legislation enacted in response to it. Accordingly, it seems to me that the precedential value of the *Murphy* decision is rather limited when considering the situation in the present case.

79. Turning therefore to the CJEU decisions, which are of central importance in these proceedings, there is no doubt that the specific problem in issue in *Commission v. Ireland* was the widespread practice of granting retention permission and treating the situation as legally identical to a situation where a developer had obtained planning permission before the development and as a result of a process in which appropriate environmental impact assessments had been submitted by him and considered by the decision-maker. However, it seems to me that EU law is not primarily concerned with the label given to the type of permission granted but is more fundamentally concerned with ensuring that the process of assessing environmental impact and incorporating this into planning decisions is observed as fully as possible. What was of concern to the CJEU, on my understanding of *Commission v. Ireland*, was that by retrospectively validating development via the mechanism of granting retention permission, the requirement to submit an environmental impact assessment was thereby routinely being bypassed. This concern with process, and the role of environmental impact assessments with the process, emerges further in *Comune di Corridonia*. The case of *Comune di Corridonia* dealt with what is, for present purposes, the even more pertinent factual situation of an actual development which had failed to submit an environmental impact assessment in the past (in that case, because the competent national authority did not deem it necessary) and was now seeking to have development authorised into the future. Thus, it squarely addressed the question of whether and when a future development may be permitted even when there has been a failure to conduct environmental impact at the earliest possible time, which of course is the most desirable scenario from an environmental point of view. As noted above, the court set out a two-pronged test for when such development may be permitted: at para. 38, the court said "such a possible regularisation would have to be subject to the condition that it *does not offer the persons concerned the opportunity to circumvent* the rules of EU law or to dispense with their application, and that it *should remain the exception*" (emphasis added) and, at para. 41, "an assessment carried out after a plant has been constructed and has entered into operation *cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion*" (emphasis added). Obviously, the choice of the word "completion" in its formulation above was influenced by the facts of that case which involved the construction of a biogas plant. However, what I understand the words to mean is that the "baseline" from which the environmental effects must be assessed is the date when the environmental impact assessment should originally have been carried out and taken into account by the decision-maker.

80. How do the principles identified in those authorities interact with the regime currently set out in the Irish legislation? The substitute consent procedure in Part XA of the Act of 2000 was introduced into Irish law in order to comply with the requirements of EU law. As has been discussed above, at the core of the procedure is the requirement that the developer submit a "remedial" environmental impact assessment, which is then factored into the decision-making process by the decision-maker, and as a result of which, *inter alia*, remediation works may be ordered. But what of a quarry owner who wishes to obtain permission for future development? In this regard, it seems to me helpful to compare and contrast the position of two categories of developer.

81. Let us take first the position of a registered quarry owner who applies for both substitute consent and planning permission in respect of future development. Prior to 2015, as I understand it, these applications would have to be consecutive, but now they can be carried out simultaneously because of the insertion of the new s.37L. Whether the applications are sequential or simultaneous the important point is that, by the end of the entire process, the decision-maker will have reached its decision on the basis of a full range of information -retrospective *and* prospective-before deciding what to do. It might be said that the developer's applications, and the Board's decisions, are Janus-faced in this regard; that is to say, both forward- and backward-looking as regards the environmental impact on the site. The purpose of the process is to ensure that any past adverse effects on the environment are ameliorated or mitigated as much as this can now be done, as well as to prevent future adverse effects from the future works as far as possible.

82. By way of contrast, let us take the position of a developer such as a Developer in the in the present case, who has not gone through the substitute consent process and instead has been determined to have been engaged in unauthorised development in the past, has ceased quarrying operations for 6 months in compliance with an enforcement notice, and has then made an "ordinary" or "standard" s.34 planning application in respect of proposed future development. It is true that the quarry was closed for 6 months, and it also true that the unauthorised status of the past development has not been legally cleansed. However, a key practical distinction is that this Developer has not at any stage of the process submitted a remedial impact statement, and the impact of the past works on the environment and/or the issue of remediation works has not been directly addressed by the Board in respect of his quarry.

83. Thus, the important practical distinction between the two categories of developer i.e. the developer described at paragraph 81 above, and the Developer in the present case, is that while both have to submit forward-looking environmental impact reports in respect of their future development, the Developer in the present case was not required to submit a remedial impact statement and the Board did not factor the impact of past development on the environment into its decision-making process. It does not seem to me that this situation could be in compliance with EU law as interpreted by the CJEU, particularly having regard to the second prong of the two-pronged test set out in the *Comune di Corridonia* case. Accordingly, I am of the view that the decision of the Board in the present case must be quashed.

84. I should perhaps clarify my view on the question of whether the grant of permission in this case can be characterised as "retention permission". Insofar as retention is seen as simply "cleansing" the past from a legal point of view, the answer is no, because the past unauthorised development of this quarry remains unauthorised. However, a slightly different, and in my view more pertinent question, is whether what was done in this case was in breach of the principles set out by the CJEU, to which the answer is, in my view, yes. There was considerable argument between the parties as to whether the decision in *Commission v. Ireland* was primarily about the legal "cleansing" of the past or not. It seems to me that the answer is neither a simple "yes" or "no". Rather, my understanding of *Commission v. Ireland* is that it was concerned about the legal cleansing of the past because this was being done without environmental impact assessments being carried out and the results of such assessments being factored into the decision-making of the planning authority. My understanding of this decision in this regard is re-enforced by how matters were dealt with in the *Comune di Corridonia* case, where the emphasis on (what Irish law would call) remedial environmental impact assessments came to the fore. Accordingly, I am not convinced that framing the issue for decision into the binary question of whether or not the permission given amounted to retention permission or not necessarily advances the analysis or answers the right question. Fundamentally, the Directives are about process; ensuring that an appropriate process in respect of assessing environmental impact is followed. The label given to the permission granted must surely be subordinate to that core purpose.

85. It was argued on behalf of the Board that if the views of the applicants and State respondents were correct, this quarry would be rendered sterile into the future, because it could not move beyond its unauthorised past and obtain permission for the future. It was submitted that this would be a disproportionate effect flowing from the failure of a developer, in the past, to have taken the simple administrative step of furnishing details for a register, particularly in circumstances where (as was found by the Board in 2015) there would not be significant environmental impacts from this quarry into the future. I would characterize the failure to register as going somewhat further than a mere failure to take an administrative step, despite what was stated in this regard by Charleton J. in the *McGrath Limestone* case in a different context, because this failure to register entailed the further practical and real consequence that the quarry escaped the scrutiny of the planning authority in 2004/5 and therefore also escaped a determination at that time as to whether an environmental impact assessment was required. However, I agree with the Board's interpretation of EU law, as elucidated in the decisions referred to, insofar as it suggests that EU law does not always and necessarily require that developments which have failed to submit environmental impact assessments in the past must be permanently sterilised into the future (i.e. a particular *outcome*); rather, it seems to me that EU law requires that information about past adverse environmental effects (if any) be made available to the decision-maker and a decision made by the decision-maker about the future in light of all relevant information (i.e. a particular *process*).

86. It is not clear to me whether the exclusion of a quarry such as the one in the present case from the substitute consent regime was a deliberate strategy on the part of the Oireachtas or whether it is something of a loophole arising in a highly complex set of provisions (Part XA and s.261A). But insofar as there is such an exclusion and it is considered to be disproportionate, the problem could presumably be remedied in the future by some appropriate legislative amendment. I do not, however, consider that the suggested disproportionality of the effect of the statutory regime enables me to disregard the preconditions to regularisation described in the *Comune di Corridonia* case. If the sterility effect is because of a procedural blockage in the Irish statutory regime which attempts to transpose EU law, an amendment could remove the procedural blockage and allow a quarry developer, in an appropriate case, to obtain the appropriate environmental impacts assessments (including remedial assessment) and successfully acquire permission for future development.

87. I add one caveat to the above. It is not entirely clear to me that the Developer was in fact excluded from, and could not have submitted an application pursuant to s.177(D) for substituted consent, as distinct from the invitation to apply for the substitute consent "gateway" under s.261A from which regime he was clearly excluded. It appeared to be the assumption of the parties in the case that the Developer could not make any such application, by reason of s.177D(2)(b), which refers to the developer's belief as to the whether or not the development was unauthorised. However, this factor is only one of a number of factors to be considered by the Board under a s.177D application for permission. Another factor is, for example, the actual or likely significant effects on the environment resulting from the carrying out or continuation of the development. Is it a foregone conclusion that the application must necessarily be refused simply because the Developer engaged in authorised development in the past? I am not entirely convinced that a developer in the position of the Developer in the present case is definitively precluded from making an application under s.177D. Whether he would succeed in obtaining leave to make an application for substitute consent, and then ultimately obtain substitute consent, is a different matter. What was assumed in these proceedings was that he could not even make the application, or at least, that such application would inevitably be futile. This question was not necessary for determination in the present proceedings as the Developer had not in fact sought to obtain leave under this provision and I therefore do not express any concluded view in relation to the matter. Arguments can be made on both sides, having regard to not merely the language of s.177D itself but also how this section interacts with the overall scheme in the legislation and the enforcement procedure in respect of unauthorised quarries.

88. By reason of the foregoing conclusions, I will grant *certiorari* of the Board's decision of 17 May, 2016. I will hear argument as to the precise terms of any Declaration to be granted. My provisional view in that regard is that I should grant a Declaration that the acceptance, consideration and granting of planning permission to the Developer pursuant to s.34 of the Act of 2000 as amended in the particular circumstances of the present case was not in compliance with the principles of EU law as identified in *Commission v Ireland* and *Comune di Corridonia* and/or the provisions of the 2011 Directive and Habitats Directive as transposed into Irish law. However, I will hear such argument on this as the parties may wish to offer when they have had an opportunity to consider the judgment.

89. Finally, I should say, for completeness, that an issue was raised as to whether adequate notice of the decision of the 17th May, 2016 was given by the Board. Having regard to the affidavit evidence in this regard, together with the submissions filed, I am not satisfied that there is sufficient evidence to substantiate this contention and I refuse this ground of relief.