Neutral Citation: [2016] IEHC 602

THE HIGH COURT

[2012/463MCA]

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

AND IN THE MATTER OF AN APPLICATION

BETWEEN

ROBERT HENRY FOWLER

APPLICANT

AND

KEEGAN QUARRIES LIMITED

RESPONDENT

JUDGMENT delivered by Mr Justice White on the 28th day of October, 2016

1. These proceedings arise from an originating notice of motion issued on 17th December, 2012, originally returnable for 28th January, 2013, seeking an order pursuant to the provisions of s. 160(1)(a) of the Planning and Development Act 2000, as amended, requiring the Respondent, its servants or agents to cease and/or refrain from carrying out or continuing unauthorised development on at or under lands located at Clegarrow and Rahinstown in the County of Meath and comprised in Folios 25123 and 12012F Land Registry Co. Meath in circumstances where:-

(i) no permission for quarrying development on certain of the said lands has been granted;

(ii) the appropriate period as respects the permission granted for quarrying development on certain other of the said lands has expired;

(iii) there are breaches of the water table by the Respondent;

(iv) there has been unauthorised removal of woodland;

(v) financial conditions have not been complied with;

(vi) no reinstatement has been carried out by the Respondent; and

(vii) the Respondent's quarrying activities constitutes an unauthorised development.

2. The Applicant also sought an order pursuant to the provisions of s. 160(1) (b) of the Planning and Development Act 2000, as amended, requiring the Respondent, its servants or agents to restore the lands to their condition prior to the commencement of the unauthorised development.

3. The quarrying operation has now ceased, the Respondent has surrendered the licence and is no longer in occupation of the lands.

4. While there are important historical connotations to other reliefs sought by the Applicant, what is now sought is a restoration of the lands to their condition prior to the commencement of the unauthorised development.

5. The hearing commenced on 14th July, 2015, when the court heard a preliminary issue arising from the death of the original Applicant, Jennifer Fowler on 12th March, 2013. By motion of 10th April, 2013, originally returnable for 29th April, 2013, an application was made pursuant to O. 15, r. 37 of the Rules of the Superior Courts to appoint Robert Henry Fowler as administrator *ad litem* of the estate of Jennifer Fowler for the purpose of prosecuting the proceedings before a full grant of probate had been extracted. This was granted by order of the High Court on 29th April 2013. The Respondent objected to the substantive hearing proceeding until a full grant had been extracted. The preliminary issue was heard on 14th, 15th, 21st and 30th July, and judgment was reserved.

6. Before the court gave judgment, the full grant of probate was extracted and the issue became moot.

7. The substantive s. 160 proceedings commenced on 24th November, 2015, and continued at intervals and concluded on 15th March, 2016 after fourteen days hearing when judgment was reserved.

8. The proceedings were heard on affidavit except that a number of witnesses who deposed affidavits were examined.

9. The matter came before Kearns P on 4th November, 2014, who directed on consent that the Respondent make an application for leave to apply for substitute consent in relation to the unauthorised development, the subject matter of the proceedings pursuant to s. 177C and/or 261A(18) of the Planning and Development Act 2000, as amended, within four weeks from the date of the order and to include in the application for substitute consent the extraction of sand and gravel from the lands after 2008 and extraction beyond the boundaries indicated in planning permission registration reference No. TA/20055 and extraction below the levels of the water table. The court further directed that in the event An Bord Pleanála refusing to grant leave to apply for substitute consent, the parties were to have leave to apply to the court to have the case relisted for hearing.

10. Subsequently, the Respondent made an application in writing on 8th December, 2014, to An Bord Pleanála requesting the Board to grant an extension of time for the substitute consent application to be made. By letter of 16th December 2014, An Bord Pleanála replied to the Respondent stating:-

> "the Board granted an extended period to 31st July, in respect of making an application subsequent to which the planning authority was notified on 4th September, 2014, that no application had been made. In that no extension of time application was received within the extended period, the Board has no discretion to deal with the application contained in your letter of 8th December 2014. Your request therefore cannot be considered by the Board."

11. The matter came back before the Court on 14th February, 2015, when the proceedings were re-entered for hearing and directions granted in respect of certain matters.

12. Subsequently, after the case was at hearing in this Court for four days on 24th, 25th, 26th and 27th November, 2015, the Respondent made an application on 3rd December, 2015, to refer the matter back to An Bord Pleanála for its consideration. This followed letters of 1st December, 2015, from the Respondent's solicitors to the Applicant's solicitor and from the Respondent's solicitors to An Bord Pleanála and a reply from An Bord Pleanála by email of 1st December, 2015, which indicated that the Board would consider an application for an extension of time in which to submit an application for substitute consent.

13. Following submissions on 3rd December, (transcript 5 pp. 61 – 68,) the court ruled it was not appropriate to refer the matter back to An Bord Pleanála and directed continuation of the hearing.

History of the Quarry

14. John Keegan, the managing director of the Respondent first became involved in a business relationship with John Fowler, the father of the present Applicant and spouse of the previous Applicant. Mr. Fowler Senior entered into a licence agreement with John Keegan on 29th March, 1996.

15. In consideration of the payments set out in the agreement the Licensee was granted an exclusive licence and full liberty to remove all such parts of the sand, gravel and stone under the licensed lands which were described on a map annexed to the agreement and outlined in red and were part of Folios 25123 and 12012F Co. Meath.

16. He undertook not to carry out operations in such a manner as to cause interference or annoyance to the Grantor or to any of the neighbours near or to adjoining the licensed lands provided always that normal operations of the lands as a sand and gravel quarry pit shall not constitute an interference or annoyance to the Grantor or his neighbours and that he would comply with all requirements of the Local Authority relating to the quarry on the licensed lands.

17. He also undertook at his own expense to apply to the relevant Local Authority for all necessary planning permissions in respect of the operation of the licence and at his own expense would comply with all requirements therein including financial requirements.

18. In the event of the Licensee with the consent of the Grantor entering into operations and removing sand and gravel from any lands, the property of the Grantor and not set out and delineated on the map annexed to the licence agreement, the terms and conditions of the agreement should apply in all respects as if the said lands formed part of the licensed lands and the lands should be deemed to be licensed lands.

19. The Licensee was given the option on serving three months notice to the Grantor to terminate the Agreement and on the exhaustion of the pit or early determination of the licence agreement was obliged to reinstate the lands at his own expense to a condition fit for agricultural use and carry out all necessary works for this purpose.

20. Mr. Keegan applied for planning permission to operate the quarry. The application covered the quarry use, construction of a washing plant, canteen, offices, toilets, tanks, pump house and well. Planning permission was granted by Meath County Council on 2nd January, 1997, register reference 96/633, subject to nine conditions. The permission was time limited for a period of five years beginning on the date of the grant of permission. Mr. Keegan commenced works at the quarry after the grant of planning permission in January 1997.

21. In or about 1999, the Respondent constructed a concrete batching plant at the quarry, and applied for retention permission in respect of this plant which was granted by Meath County Council on 18th July, 2000, register reference 00/840, subject to eleven conditions. The permission was time limited for a period of five years beginning on the date of the grant of permission.

22. Permission 10 stated:-

> "The rock, sand and gravel extracted from the quarry shall be used solely for the production of concrete on site, and in the maintenance of the development. These resources shall not be extracted or processed in any other form for the purpose of supply and/or delivery on or off site of crushed stone and or gravel and other related products unless otherwise permitted by way of a separate planning application."

23. A second licence was entered into between Mr. John Fowler and on this occasion, the Respondent. On 24th July 2001. This licence covered an additional area of lands to the north of the existing gravel extraction pit the subject of the original licence.

24. The licence contained similar conditions as the previous one as to the responsibility of the Respondent to apply for planning permission, not to cause any nuisance and in the event of operations moving beyond the licensed lands that the licence would cover the operation of any works on these extended areas of operation and again that on exhaustion of the pit or early determination of the licence agreement, it was the Respondent's responsibility to reinstate the lands at his own expense to a condition fit for agricultural use and carry out all necessary works for that purpose.

25. The licence was granted for a period of fifteen years from 1st June, 2001, with the option to the Licensee to terminate the agreement on three months notice in writing to the Grantor. A revised tariff was agreed for payments for each load of material.

26. On 28th February, 2002, the Respondent applied for planning permission from Meath County Council. This application was accompanied by a detailed environmental impact study prepared by John Barnett and Associates Ltd. This was a comprehensive environmental study.

27. The register reference was TA/20055 and permission was granted towards the end of 2002, subject to 35 separate conditions. The planning permission directed that the previous permissions 96/633 and 00/840 relating to the development shall be fully complied with except where the conditions of this permission specified otherwise. This is the planning permission the court has to consider except where the other planning permissions are relevant.

28. A further revision to the licence agreement was agreed between John Fowler and the Respondent in an exchange of letters on 15th May, 2007. Mr. Fowler wrote to Mr. Keegan stating:-

> "Dear John

Having had extensive discussions with my legal and financial advisors I wish to change the basis for your use of the facility at Clegarrow/Rahinstown from a net delivery of product by load to a rented arrangement, I therefore propose a gross (before withholding tax) rent of €7,500 per month as and from 1st March, 2007.

Yours sincerely

John Fowler."

29. The Respondent replied by letter of 18th June, 2007, headed reference ongoing rental charges for site at Clegarrow and stated:-

"Dear John

Further to your letter dated 15th May, 2007, and our subsequent conversations, I would like to clarify our agreement for record purposes.

Keegan Quarries Limited will pay John Fowler a minimum payment of €7,500 per month before withholding tax from 1st March, 2007.

This payment is to include any sand & gravel that Keegan Quarries takes from John Fowler's land in Clegarrow.

If Keegan Quarries takes more than €7,500 worth of sand and gravel from Fowler's land in that monthly period then Keegan Quarries will pay per load in the usual way for any materials taken above the €7,500.

If Keegan Quarries carries in more sand and gravel than is taken out Keegan Quarries will still pay John Fowler the €7,500 per month as above.

The letter went on to state:-

"John, if you have any problems with this please contact me and we can have a chat about it again."

30. Certainly as of that date, the relationship between the Respondent and John Fowler, deceased, seemed to be cordial.

31. John Fowler died tragically and suddenly as a result of an accident on 15th December, 2008. Subsequent to that date, there is factual controversy between the Respondent and the Applicant as to the nature of their relationship.

32. Subsequent to Mr. Fowler Senior's death, his spouse Jennifer Fowler was looking after the affairs of the quarry. There is no dispute that Mrs. Fowler was not previously familiar with the dealings between Mr. Fowler Senior and Mr. Keegan and had to familiarise herself with same. There is some confusion and factual dispute between the parties as to the contact between the Respondent and the Fowlers from the date of death of John Fowler, deceased, on 15th December, 2008, up to a letter from Maples and Calder of 13th April, 2012.

33. This letter alleged serious breaches of the planning permissions, including quarrying beyond the area delineated and permitted under the terms of the licence, quarrying at levels below that provided for under the planning permissions and E.I.S. and continuing to quarry when the planning permission had expired. It was also alleged that the Respondent had removed a significant volume of topsoil and trees in breach of the licence. The Respondent was called upon to cease all operations and to provide appropriate proposals for immediate reinstatement of the lands in compliance with the planning permission terms and E.I.S.

34. Mrs. Jennifer Fowler having had to deal with these matters subsequent to the sudden death of her husband, herself suffered ill health and died on 12th March, 2013.

Conditions of planning permission and compliance

35. The court has considered the expert opinion report of Paul Jennings, Geotechnical Engineer of AGEC Ltd of January 2013, planning opinions of Gavin Lawlor of Tom Phillips and Associates of 12th March, 2013 and 24th November 2015, a planning opinion of Declan Brassil of 18th September, 2014, and a planning note from him of 5th November, 2015. Mr. Jennings swore an affidavit on 14th January, 2013. Mr. Gavin Lawlor swore affidavits on 24th June, 2013, 25th November 2015, and 4th and 10th December 2015, and was examined on his affidavits on 4th and 10th December, 2015. Mr. Declan Brassil swore affidavits on 24th October, 2014, 11th November, 2015, and 2nd December, 2015. and was examined on his affidavits on 10th and 11th December, 2015.

Compliance with original permissions.

36. The relevant conditions of permission TA20055 were:-

Condition 1: the development shall be in accordance with the plans and particulars submitted on the 28th February, 2002, and in accordance with the provisions of the Environmental Impact Statement (EIS) submitted on 28th February 2002 as amended by Addendum A, submitted on 10th September, 2002, except where conditions hereunder specify otherwise.

Reason: In the interest of proper planning and development

Condition 3: The extraction of sand and gravel aggregate material from the extension to the quarry permitted under planning ref 96/633 hereby granted shall be limited to a period of five years from the date of the commencement of quarrying works.

Reasons: In the interest of proper planning and development

Condition 4: There shall be no excavation below the water table. Excavation shall not take place within 1.5m of the water table in the proposed extension to the sand and gravel aggregate quarry. Sand and gravel aggregate extraction shall be limited to the volumes outlined in s. 2 of the Environmental Impact Statement. In the event that quarrying operations give rise to a water table drawdown which seriously interferes with the quantity or quality of the potable water supply from any well serving a property located in the vicinity of the quarry, the developer shall, if requested to do so by the Planning Authority, provide or arrange for the provision of any alternative supply of portable water to that property.

Reason: In the interest of development, control and the protection of local water supplies.

Condition 12: The developer shall carry out monthly monitoring of ground water levels in the existing seven monitoring bore holes on the site to determine the highest ground water level at the site in order to maintain a minimum of 1.5m between the pit floor and the water table. Results of the monthly monitoring shall be submitted to the Planning Authority on a quarterly basis. On the basis of results submitted over time, the Planning Authority may review the frequency of monitoring.

Reason: In the interest of public health and in order to prevent the pollution of the water table.

Condition 13: If in the opinion of the Planning Authority ground water abstractions by the developer has had, or is likely to have a negative impact in

private wells in the vicinity of the development, the developer shall undertake such remedial works, at his own expense as shall be directed by the Planning Authority. These works may include the deepening of private wells, the drilling of new wells or the supplying of a portable water supply in lieu of the affected wells.

Reason: In the interest of public health and in order to prevent the pollution of the water table.

Condition 28: The restoration proposal submitted with the application and as described in the E.I.S. shall be undertaken in accordance with the phasing described in 'Addendum A' as detailed in Figure 8.1. Further to the restoration proposals already submitted, the following shall be submitted to the Planning Authority for agreement prior to commencement of the development (a) Detailed landscaping proposals for proposed screening mounds to include the proposed types/variety of native species, density of planting, maintenance programme and planting to supplement and strengthen hedgerows and tree belts that are to be retained.

Reason: In the interest of visual amenity.

Condition 35: The developer shall establish a fund in the form of a cash deposit to be lodged with the Planning Authority to ensure the satisfactory reinstatement of the quarry in accordance with the proposals for restoration. In the event of non-completion or failure to comply with restoration, the planning authority shall apply the money from the fund to complete the restoration. The amount of cash deposit shall be €126,974 which shall be reviewed and increased annually to take account of index linking in accordance with the Wholesale Price Index - Building and Construction (Capital Goods) published by the Central Statistics Office.

Reason: In order to ensure the satisfactory completion of the development and to provide for the restoration of the site, in the interests of orderly development.

37. Relevant extracts from the Environmental Impact Statement prepared for the planning application by John Barnett and Associations Limited are as follows

Part 2.3.3, Topsoil and Overburden Removal.
Topsoil and overburden stripping is an on-going operation prior to sand/gravel extraction commencing. It will be undertaken in a progressive manner as new extraction areas are required, and will be on-going throughout the life of the operation.

The material initially stripped, as with all subsequent stripped material, will either be placed in the overburden storage areas to the east of the development, or utilised in the restoration of worked out areas of the existing pit. (refer to figure 2.4) The storage areas and restoration areas will be vegetated as soon as is possible to reduce both visual impact and erosion. No stockpiles will be created outside the development area as defined in Figure 2.4.

2.4.6 Topsoil and Overburden Management
Topsoil and overburden stripped to obtain access to the sand and gravel resource must be either placed in overburden storage mounds, or utilised within the worked out areas of the existing pit as part of the final restoration scheme. Overburden material will be placed first. Topsoil material will be stored in separate stockpiles and placed last as the final vegetation layer to a depth of 300mm.

2.4.16 Progressive Restoration.
The development is to be phased so that progressive restoration of the worked out areas of the pit can be facilitated at the earliest possible opportunity.

As stated in s. 2.4.6, topsoil and overburden material removed as part of the extraction operation will be either placed in overburden storage areas to the east of the development or back into completed areas of the pit workings. When these storage mounds have been completed, they will be graded and contoured to merge in with the surrounding topography. They will then be vegetated with a mixed grass seed to avoid erosion and allow the restored area to blend seemingly back into the landscape.

Additionally as sections of the pit are completed, the pit face will be graded back to a slope not greater than 25 degrees from the horizontal (i.e. 1.2). Topsoil material will then be placed on the flattened slope as the final vegetation layer to a depth of 300mm and the faces re-vegetated as quickly as possible to avoid erosion by air and water. The phasing and location of these restored faces is shown on Figures 2.3 – 2.7.

The silt settlement ponds will be restored once they have reached their retention capacity. They will be covered over with a minimum depth of 500mm of overburden and 300mm of topsoil and graded back to merge in with the surrounding topography. They will then be re-vegetated to ensure their long term stability, resistance to erosion and inclusion into the surrounding landscape.

Consequently, the overburden and topsoil from both the existing pit and proposed extension will be utilised as effectively as possible to restore both the old and new workings. Section 2.4.6 details the procedures for the management of the overburden and topsoil resource.

2.5 Restoration and Aftercare

2.5.1 Final Site Restoration Scheme
As discussed in previous sections, restoration of the existing and proposed site will be carried out in a progressive fashion over the life

of the operation (refer to Section. 2.4.16). Figure 2.6 shows the final layout of the restoration scheme as cessation of extraction operations, and Figure 2.7 shows sections through this restoration.

The final landform will be contoured as far as practical to blend in with the existing environment. Re-vegetation will be implemented to restore these areas to as close as possible to the surrounding landscape, in terms on both visual state and ecological habitat (refer to Figure 2.6 – 2.7).

2.5.2 Long Term Safety and Security
All remaining pit faces will be graded back to a slope not greater than 25 degrees from the horizontal (i.e. 1.2). Topsoil material will then be placed on the flattened slope as the final vegetation layer to a depth of 300mm and the faces re-vegetated.

2.5.3 Long Term Stability of the Pit
The final pit face angles have been assessed by a geotechnical engineer to ensure long term stability after completion of extraction operations. Consequently, back filling operations carried out as part of the restoration programme will further reduce the slope angle of these faces to 1.2 or less, which will further ensure the long term stability of the restored site. The stability of restored faces observed in the existing pit indicates that the long term stability of the final pit faces will be satisfactory in this geological environment.

2.5.4 Long Term Surface Water and Ground Water Management
Only direct rainfall will need to be regulated by the final drainage control system. Low slope angles and re-vegetation employed as part of the final restoration will ensure minimal soil erosion as a result of surface run off. Any small amount of ground water seepage will collect in low lying areas to form wet grasslands, similar to those that exist at present across the site (refer to s. 3.2 – flora and fauna). In s. 3.4, headed Surface and Groundwater of the EIS Report, 3.4.2(ii) states:-

> "Surface Water Regime
>
> Site Hydrology
>
> The site occupies a local area of higher ground in the upper regions of the unnamed catchment. A northerly flowing unnamed stream bounds the western perimeter of the site. This stream is part of a network of tributaries of the River Boyne (refer to Figure 3.4.1)
>
> (iii) Ground Water Regime
>
> (a) Aquifer Category and Vulnerability"

There are no sufficiently detailed well records for the site in the immediate environments of the site in the GSI Database. The Ground Water Protection Scheme for County Meath has compiled all available data to determine the aquifer category for the Lucan Formation Limestone underlying this area. … Based on this information the bedrock formation underlying the site has been classed as Locally Important Aquifer, Generally Moderately Productive aquifer (Lm). There is no site specific data that could contradict this classification.

The sand and gravel deposits within the local area, particularly those further east in Summerhill are considered to have significant aquifer properties. These deposits are classed "Locally Important Sand and Gravel Aquifer" (Lg).

At 3.4.3, the EIS stated

Direct Impacts.
The new pit extension will not operate below the regional water table. It is proposed to excavate to a depth of 84m to 86m a.O.D. (i.e. within 1.5 – 2m of the water table). The level of the local water table will be monitored by excavation of test pits, and the floor level altered when necessary to maintain a separation distance…….

The underlying bedrock is a Locally Important Aquifer. Generally, Moderately Productive (lm). It has a moderate vulnerability rating. Removing the protective layer of subsoil will increase the vulnerability of this bedrock to contamination.

The proposed pit will not be extracting sand and gravel from below the water table. Therefore, the extraction of sand and gravel from the area will have no anticipated impact on ground water in the area.

38. The Planning Authority was concerned about the water table and Addendum A was prepared to the EIS due to additional information required. This was submitted on 10th September 2002.

Item 3 of a request for further particulars from the Planning Authority stated

> "The Planning Authority is not satisfied with the statement that 'The level of the local water table will be monitored by excavation of test pits, and the floor level altered when necessary to maintain separation distances and is concerned that final excavation levels which are intended to range between 84m and 86m a.O.D. appeared to go below the ground water level as identified in two of the three trial holes, undertaken as part of the ground water assessment in s. 3.4.2(iii)(b) of the Environmental Impact Statement. The Environmental Impact Statement should be revised to provide final accurate levels for both the existing local ground water level and the depth of proposed extraction, to clearly demonstrate that extraction will maintain a suitable clearance above the ground water level and will not give rise to an unacceptable risk of ground water contamination.'"

39. In response to this query from the Planning Authority, the Respondent undertook additional monitoring of the water levels in a series of bore holes around the site and concluded that working to 87m a.O.D. in the existing pit and to 84m a.O.D. in the proposed extension will maintain 1.5m to 2m between the pit floor and the water table. The monitoring bore holes would be retained for check monitoring of the water table level.

40. In respect of planning permission 00/84O which sought permission for the retention of a concrete batching plant which was lodged on 19th April, 2000 and which was subsumed into planning permission TA/20055, the planning opinion of Gavin Lawlor of Tom Phillips and Associates, Town Planning Consultants of 12th March 2013 has not been contradicted by the evidence of the experts adduced

on behalf of the Respondent and that opinion has come to the conclusion:-

> (i) That the concrete batching plant located on the site does not have the benefit of planning permission and, therefore, represents unauthorised development.
>
> (ii) That both permissions for a batching plant on the subject site have now expired. The concrete batching plant should have been removed by March 2009 and the lands should now be reinstated.
>
> (iii) That the Respondent never had permission to import aggregate to the site for the purposes of operating the batching plant. The EIS and associated documentation from permission 00/840 particularly a submission from Jarlath Rattigan stated that all materials with the exception of cement would be sourced on site. The traffic assessment submitted with the application was undertaken on this basis.

41. The evidence adduced before the court is that the concrete batching plant has now been removed by the Respondent. It never had planning permission to bring material onto the lands except cement. The court does note that Mr Fowler Senior was put on notice by the letter of 18th June 2007 from the Respondent that it was bringing sand and gravel into the quarry.

42. It is difficult for the Court to understand the activities of the Respondent. It responsibly applied for planning permission TA/2005. It commissioned a detailed Environmental Impact Statement. It then proceeded to completely ignore the terms of the permission and the relevant matters set out in the E.I.S.

43. The breaches of the planning permission were not minor but were of the most fundamental nature.

> (i) The Respondent breached the water table to a substantial degree.
>
> (ii) It did not carry out any monitoring of the water table and furnish the results of this monitoring to Meath County Council.
>
> (iii) It brought material other than cement including sand and gravel onto the subject lands for use in a concrete batching plant which was in breach of the planning permission.
>
> (iv) It was obliged to carry out progressive restoration and make sure that the topsoil and overburden were stored separately for the purposes of restoration. This was ignored.
>
> (v) It continued to extract material subsequent to the expiration of planning permission.
>
> (vi) It quarried beyond the lands the subject of the planning permission.
>
> (vii) In addition to this many less serious breaches occurred which are set out in Mr Jennings report.

44. The fact that progressive restoration did not take place and the water table was breached has made restoration and remediation difficult and complex.

Application for substitute consent pursuant to section 261A of the Planning and Development Acts 2000 – 2011
45. On 3rd August, 2012, the Planning Authority, Meath County Council served a notice pursuant to s. 261A of the Planning and Development Acts 2000 – 2011, on the Respondent and the late John Fowler.

46. The notice directed an application to An Bord Pleanála for substitute consent in respect of the quarry under s. 177E of the Planning and Development Acts 2000 – 2011, not later than twelve weeks after the date of the notice or such further period as the Board may allow. A review of the determination of the Planning Authority under s. 261A(2)(a) or the decision of the planning authority under s. 261A(3)(a) could be considered by An Bord Pleanála by application not later than 21 days after the date of the notice.

47. A planning report had been prepared on 21st May, 2012, by Meath County Council which related to an inspection of the quarry on 18th May, 2012, and also the examination of aerial photographs.

48. The purpose of the legislation was to determine which quarries having regard to two EU directives (E.I.A. Directive and Habitats Directive) would have required Environmental Impact Assessment or an Appropriate Assessment in relation to possible effects on the integrity of a European site which had not been subject to any such assessment or determination. This should be distinguished from the enforcement responsibility of the Planning Authority under the Planning and Development Acts.

49. This was made clear on the notice of 3rd August 2012 which stated:-

> "This quarry was assessed solely for the purposes of s. 261A of the Planning and Development Acts 2000 – 2011 and this determination is not an indication of its planning status/compliance.
>
> This determination does not inhibit Meath County Council from exercising its statutory powers pursuant to the Planning and Development Acts 2000 – 2011, in respect of the subject quarry at a future date."

50. Requests to review the Meath County Council decision to direct an application for substitute consent was made to An Bord Pleanála by a number of third parties in or around 23rd August, 2012.

51. The Respondent by letter of 21st August, 2012, wrote to An Bord Pleanála requesting an extension of twelve weeks for the preparation and submission of a remedial Environmental Impact Statement to accompany the application to An Bord Pleanála for substitute consent.

52. On 10th September, 2012, the Applicant's solicitors on behalf of Jennifer Fowler wrote to the Planning Section Meath County Council stating:-

> "As you are aware, Meath County Council as the relevant planning authority are obliged to ensure that all quarry operators comply with the law and the conditions of planning. We are extremely surprised that you have failed to take action and to have the illegal activities of Mr. Keegan and Keegan Quarries Limited discontinued. In doing so, we would

expect that you would pursue the proper remedial measures required to restore the site.

It is as a result of your failure to act that we have now been forced to issue proceedings against Keegan Quarries Limited for the violations listed in your Notice amongst others. We will also shortly be issuing proceedings on behalf of our client against Mr. Keegan personally.

Our client is not the operator of the relevant quarry. Our client will not be applying for any Substitute Consent and indeed she objects to such consent being issued.

In the circumstances we find your determination that the quarry operators apply for Substituted Consent wholly unsatisfactory. How can any action which is clearly in breach of planning laws be consented to? Indeed, where Mr. Keegan and Keegan Quarries are clearly in breach of the terms of the EIS and planning consents already granted (and long since expired), it strikes us that were Meath County Council to grant such substituted consent, it would be in breach of both domestic and European law."

53. Meath County Council replied on 20th September, 2012, stating:-

"The decision of An Bord Pleanála informs the steps which they operator and/or the Planning Authority must take. Such steps may include permitting the continued operation of the quarry or the issue of an enforcement notice requiring the cessation of unauthorised quarrying.

Meath County Council will await the outcome of An Bord Pleanála's decision in this regard and will discharge its statutory duty in accordance with s. 261A of the Planning and Development Act."

54. The solicitors for the Applicant copied the letter to Meath County Council of 10th September 2012 to An Bord Pleanala.

55. A senior Planning Inspector, Karla McBride prepared a report for An Bord Pleanála on 11th March, 2013. The recommendation set out at para. 11.0 stated:-

"I therefore recommend the following:-

(a) Confirm the Planning Authority's determination under s. 261A(2)(a)(i)

Reasons and Considerations

Having regard to the size of the extraction area and the scale of the extraction works which were carried out subsequent to 1st February, 1990 and to the 1st May, 1999, together with the nature of the receiving environment it is considered that a sub-threshold Environmental Impact Assessment or determination or a determination as to whether an Environmental Impact Assessment was required would have been necessary in this instance.

(b) Confirm the planning authority's determination under s. 261A(2)(a)(ii)

Reasons and Considerations

Development was carried out after 26th February, 1997 and involves the extraction of material in close proximity to the River Boyne and River Blackwater candidate c.SAC (site code: 002299). The nature of the work carried out after the 26th February, 1997, could potentially impact on the qualifying interests associated with this designated European site.

(c) Confirm the planning authority's decision under s. 261(3)(a)

Reasons and Considerations

The quarry was granted permission under the Planning and Development Acts 1963 – 2000 and was exempt from the requirements in relation to registration under s. 261 and therefore the decision made by the planning authority under sub-section (3) (a) of the s. 261A directing the owner/occupier to apply to An Bord Pleanála for consent accompanied by and EIS and NIS is confirmed."

56. The Respondent on 26th April, 2013, gave written notice to the Applicant that pursuant to clause 7 of the Licence Agreement of 24th July, 2001, as amended by the parties by exchange of letters dated 15th May, 2007 and 18th June, 2007 would terminate on the expiration of three months from the date of the notice.

57. Subsequently, on 23rd August, 2013, the Respondent wrote to Meath County Council enclosing a plan for restoration and seeking consent to commence this work. This was a plan prepared by Mullin Design Associates which is the landscape restoration plan of December 2012, exhibited in these proceedings in the affidavit of Peter Mullin.

58. By order of An Bord Pleanála register reference No. 17QV0066 dated 14th January, 2014, the Board confirmed the decision of Meath County Council under s. 261(3) (a) of the Act.

59. This was communicated to the Respondent on 15th January, 2014 and confirmed to it that "the effect of this order is to direct you to make an application to the Board for substitute consent not later than twelve weeks after the date of the giving of the Board's decision (or such further period as the Board may allow). The application shall be accompanied by a remedial Environmental Impact Statement and a remedial Natura Impact Statement.

60. By further order of 16th January, 2014, the Board extended the time for the Respondent to apply for substitute consent and by letter of 17th January, 2014, informed the Respondent that the final date for the making of any application for substitute consent was 31st July, 2014. An error in the letter stated 2013.

61. The Respondent did not make the application for substitute consent by the deadline of 31st July, 2014. Mr. Keegan on affidavit and on evidence in examination before this Court cited the opposition of Ms. Jennifer Fowler and the Applicant to the substitute consent process and his concern that having terminated the licence, the Respondent did not have any right of access to the property to have the remedial EIS report carried out and also the Natura study. He was also concerned that the site notice could not be

erected on the relevant property because of his lack of legal ownership or any rights after the termination of the licence.

62. The Applicant in submissions to the court has submitted that no application was made to An Bord Pleanála by the Applicant or Jennifer Fowler to review the decision of Meath County Council to refer the matter for substitute consent. It is clear from the affidavit of Mr. Kieran Cummins, Planning Consultant, and his evidence on examination before the Court and the correspondence from the Applicant's solicitors to Meath County Council and An Bord Pleanála that the Applicant and Mrs. Jennifer Fowler were particularly concerned that the substitute consent procedure would regularise the unauthorised development on the lands and were certainly very wary of the substitute consent procedure and wanted the planning authority, Meath County Council, to take enforcement action against the Respondent.

63. The proceedings pursuant to s. 160 of the Planning and Development Act 2000 had already been initiated by the Applicant on 17th December, 2012. It is the court's opinion that it would have been open to the Respondent after seeking formal consent from the Applicant to apply by way of motion to the court to seek consent to enter the lands for the purposes of preparing a remedial EIS and Natura study. A motion could have been issued as a matter of urgency by the Respondent and the matter could have been considered by the court.

64. The court accepts that a complicated situation had developed where both the Applicant and the Respondent had genuine concerns about this procedure. The application for substitute consent was the responsibility of the Respondent and not the land owner. It was also open to the Respondent not to terminate the licence agreement and to rely on it to exercise access to the lands. However, the court accepts there were financial implications for the Respondent if the license agreement was not terminated.

65. It is unfortunate that when the matter came before the President of this Court on 4th November, 2014, that the Board subsequent to that order did not consent to an extension of time. The effect of the absence of substitute consent is that the development is unauthorised.

66. By letter of 3rd February, 2014, Meath County Council, the Planning Authority wrote to the Respondent acknowledging receipt of its letter of 26th August 2013 and stated that the restoration plan furnished was acceptable. The Respondent was asked to address the issue of security in respect of public access to open water bodies on the lands and the letter confirmed that restoration works could commence.

67. This prompted a detailed letter from the solicitors for the Applicant on 4th March, 2014.

68. Subsequently, the Council wrote to the Respondent on 12th March, 2014. The letter stated:-

> "I refer to your submission of a restoration plan for the above quarry. On reviewing this file, I note that this Council accepted the restoration plan submitted by you pursuant to condition 28 of TA20055 on 3rd February, 2014.
>
> In issuing this approval in respect of condition 28, the Council did not have regard to the fact there is currently in existence a separation direction pursuant to s. 261A(3)(a) requiring you to apply for substitute consent in respect of this quarry.
>
> It is noted that you have sought and obtained from AIB an extension of time to lodge your substitute consent application. It is also noted the restoration plan submitted does not accord with the EIS submitted with planning application TA20055 nor did it address the significant unauthorised works carried out by you over and above those permitted under that permission.
>
> Bearing in mind that the substitute consent obtained operates to regularise the current activities and status of the quarry, it is clearly inappropriate for a planning authority to predetermine the outcome of that process and in particular what if any conditions An Bord Pleanála may wish to impose in respect of restoration.
>
> I note that no restoration works have taken place to date and hereby formally withdraw approval of the restoration plan as set out in this Council's letter of 3rd February."

69. The Planning Authority did not have authority on 3rd February, 2014 to accept the restoration plan furnished by the Respondent on 26th August, 2013, as the substitute consent procedure was still outstanding. The restoration plan prepared by Mr. Mullin had not substantially addressed the unauthorised development by the Respondent.

70. Opinions have been advanced to the court as to the approach An Bord Pleanála may have taken to the unauthorised development on the lands and the proposed remediation and restoration. They were the most serious and fundamental breaches of planning permission, where substantial undertakings were given to the Planning Authority when planning permission was sought in 2002 that the water table would not be breached and that progressive restoration would occur on the lands. An Bord Pleanála would have to have given serious consideration to this.

71. It would also have been confronted with the same difficulty this Court has to face that there are two substantial lakes and one less substantial one together with other water bodies on the lands.

72. It would be difficult to predict how An Bord Pleanála would have finally decided the substitute consent application. The substitute consent procedure is now at an end as it was not applied for. The development is an unauthorised development with the only issue outstanding being restoration and remediation.

Legal Principles

73. Section 160 of the Planning and Development Act 2000, as amended, states as follows:-

> "(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:
>
> (a) that the unauthorised development is not carried out or continued;

(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with—

(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject,…….

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.

74. Section 163 of the Planning and Development Act 2000, as amended, states:-

"Notwithstanding Part III, permission shall not be required in respect of development required by a notice under section 154 or an order under section 160.

Section 177O of the Planning and Development Act 2000, states:-

"(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.

(3) Where a person is required by a planning authority, under section 177B or section 261A, to make an application for substitute consent for a development and he or she—

(a) fails to make such an application in accordance with relevant provisions of this Part and regulations made under section 177N, or

(b) fails, having made an application, to furnish additional information as required under relevant provisions in this Part or in regulations made under section 177N, the Board shall inform the planning authority for the area in which the development is situated of that fact and the development shall, notwithstanding any other provision in this Act, be unauthorised development.

(4) Where a planning authority is informed by the Board that paragraph (a) or (b) as appropriate, of subsection (3) apply to an application, the planning authority shall, as soon as may be, issue an enforcement notice under section 154 of this Act requiring the cessation of activity and the taking of such steps as the planning authority considers appropriate.

The relief provided under s. 160 of the Planning and Development act is a discretionary remedy. In considering its discretion the court should have regard to the public interest, and can take into account, the conduct position and personal circumstances of the Applicant and Respondent. This has been confirmed by the decision of the High Court in Leen. v. Aer Rianta c.p.t. 2003 4I.R. p394 This judgment emphasises that the court is entitled to consider the wider public interest in deciding whether or not to withhold relief.

It was held by the High Court (McKechnie J.), in refusing the relief sought,

1, that, in deciding whether to grant an injunction under s.160 and, if so, on what terms, the court should have regard to:-

(a) the conduct, position and personal circumstances of the applicant;

(b) the question of delay and acquiescence;

(c) the conduct, position and personal circumstances of the respondent;

(d) the public interest, to include:-

(i) as part of that interest, the business, commercial and tourist activities conducted at the airport and in the wider general area and

(ii) as members of the public, those who derived any employment benefit, either directly or indirectly, from the airport's overall operation as well as persons in the wider community and those who availed of or utilised the respondent's facilities.

2. That the court had discretion to refuse relief under s.160 of the Act of 2000, even if it was satisfied that an unauthorised development or use was in being. Every court must decide each such case on the individual facts and circumstances surrounding it.

Morris v. Garvey [1983] I.R. 319 , Stafford v. Roadstone Ltd. [1980] I.L.R.M. 1 ; O'Connor and Spollen Concrete Group Ltd. v. Frank Harrington Ltd. (Unreported, High Court, Barr J., 28th May, 1987); Dublin Corporation v. Mulligan (Unreported, High Court, Finlay P., 6th May, 1980); Dublin Corporation v. Kevans (Unreported, High Court, Finlay P., 14th July, 1980); Dublin Corporation v. Garland [1982] I.L.R.M. 104 ; Furlong v. McConnell Ltd. [1990] I.L.R.M 48 ; White v. McInerney Construction Ltd. [1995] 1 I.L.R.M. 374 and Grimes v. Punchestown Development Co. Ltd. [2002] 4 I.R. 515 considered.

3. That the court's discretion could only be exercised when the relief sought was otherwise within the limits of s.160.

Mahon v. Butler [1997] 3 I.R. 369 applied.

4. That, while delay played a part in considering any application for a stay if the primary order had been granted, it was unclear whether delay could ever, in itself, be a ground to refuse relief under s.160 when the application was otherwise within the section.

5. That the court must take into account the interest and convenience of the public when considering the question of discretion under s.160.

Stafford v. Roadstone Ltd. [1980] I.L.R.M. 1 followed.

6. That the public interest in this regard included those who were directly or indirectly dependent on employment from the development or use under consideration and also extended to commercial, business and economic considerations and that the public interest could also include the potential ecological impact of a development.

Dublin County Council v. Sellwood Quarries Ltd. [1981] I.L.R.M. 23 ; White v. McInerney Construction Ltd. [1995] 1 I.L.R.M. 374 ; Mahon v. Butler [1997] 3 I.R. 369 ; Blainroe Estate Management Company Ltd. v. I.G.R. Blainroe Ltd. (Unreported, High Court, Geoghegan J., 18th March, 1994) and Irish Wildbird Conservancy v. Clonakilty Golf and Country Club Ltd. (Unreported, High Court, Costello P., 23rd July, 1996) followed.

7. That, while the respondent's reasonable conduct and co-operation with the planning authority might be of considerable relevance to the court's consideration of what order, if any, it should make, it could not impact on the court's finding as to whether there had been a breach of the planning permission conditions."

75. In *Morris v. Garvey* [1983] I.R. 319, one of the judgments referred to by McKechnie J, Henchy J. stated:-

"…the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the permission'."

76. The state of the Respondent's knowledge as to the existence of a breach of planning control may be a relevant factor. If the respondent acted in a *bona fide* belief that the development was authorised (for example, a mistaken assumption that same constituted exemplary development or did not otherwise require planning permission), this may be a factor in favour of withholding relief.

77. Delay can constitute a discretionary factor. An unreasonable delay on the part of the Applicant can be interpreted as acquiescence.

78. The discretionary nature of the remedy should be distinguished from the equitable doctrine of estoppel. The court in its discretion can take into consideration matters which would be similar to issues arising when considering relief pursuant to that doctrine. However, a planning permission is a public document and a direction to carry out development in a certain manner. A particular activity either requires planning permission or it does not. There is an obligation to comply with planning permission and if development occurs beyond the parameters of the permission then it is unauthorised development.

79. While the Planning Authority can and regularly makes use of the relief set out at s. 160 of the Planning Acts, it has additional statutory powers including the use of warning letters, statutory notices and the initiation or recommendation of criminal prosecution.

80. The section is not restrictive and grants to the court wide powers in respect of restoration, reconstruction, removal, demolition and alteration of any structure or other feature.

81. The court is not a Planning Authority and should not attempt to replicate it, but there is no mandatory requirement in a case of unauthorised development, where the court has to exercise its discretion pursuant to s. 160 of the Act, to refer the matter to the Planning Authority.

82. There is no mandatory responsibility on the court to direct an Environmental Impact Statement or Assessment pursuant to Directive 2011/92/EU where one has been carried out already in the planning process and where subsequent unauthorised development takes place. It may be desirable in the court's discretion to direct a further assessment dealing with the impact of development not envisaged by the original planning permission. This need not be an all encompassing assessment but may be confined to the effects of the unauthorised development and solutions by way of amelioration and restoration.

83. The situation is different where the court is considering an appropriate assessment pursuant to the Habitats Directive. Since no Special Area of Conservation or candidate Special Protection Area (SPA) had been designated when planning permission was granted, no screening for an Appropriate Assessment was carried out pursuant to Council Directive 92/43/EEC of 21/05/1992 given effect in this jurisdiction by S.I. No 94 of 1997 European Communities (Natural Habitats) Regulations 1997.

84. Article 6(3) of Council Directive 92/43 EEC states

"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."

In considering the application of the article Finlay Geoghegan J in Kelly –v- An Bord Pleanala [2014] 1 EHC 400, stated

> 25. "As appears Article 6(3) envisages a two-stage process which is implemented in greater detail by ss. 177U and 177V of the PDA:
>
> (i) a screening for appropriate assessment in accordance with s. 177U;
>
> (ii) if, on a screening, the Board determines that an appropriate assessment is required then it must carry our an appropriate assessment in accordance with s. 177V.
>
> 26. There is a dispute between the parties as to the precise obligations imposed on the Board in relation to the stage 1 screening by s. 177U but its resolution is not strictly necessary in these proceedings. There is agreement on the nature and purpose of the screening process which is well explained by Advocate General Sharpson in Case C-258/11 *Sweetman* at paras 47-49:
>
> "47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may be* such an effect.
>
> 48. The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having *any* effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.
>
> 49. The threshold at the first stage of Article 6(3) is thus a very low one.
>
> It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken on the implication of the plan or project for the conservation objectives of the site […]"

85. While the legislation envisages the process is carried out in the context of an application for planning, if subsequent unauthorised development, could pose a risk to an S.A.C. and the Court is beings asked to rectify it, it is appropriate that the court respect the Directive and the subsequent Irish legislation giving effect to it. If the court is of the opinion the unauthorised development could adversely affect the integrity of a Special Area of Conservation, it would have to direct the preparation of a screening assessment. If that assessment finds such an effect, the court may have to direct an Appropriate Assessment. If the court had to order an A.A. the proceedings would no longer have the character of purely private law proceedings, and it would be appropriate at that stage to refer the matter back to the Planning Authority originally responsible for the development, or join the Planning Authority as Notice Party to deal with this aspect of the unauthorised development.

86. There is no obligation on this Court to refer the matter to An Bord Pleanála for the purposes of further extension of time to submit an application for substitute consent. The Respondent did not apply for substitute consent within the time allowed. It was its responsibility to do so and not the Applicant's. While the court accepts that the Applicant wanted to have the Planning Authority, Meath County Council, enforce the original conditions of the planning permission and was opposed to the substitute consent procedure that did not absolve the Respondent as it had carried out the unauthorised development contrary to the planning permission. It was not a mere trivial or technical breach but a substantial one where the Respondent given its experience had to have known that it was deliberately and consciously breaching conditions of planning permission. The court does not intend to refer the matter back to An Bord Pleanála for the purposes of an application to extend time to make an application for substitute consent. That process is at an end.

Delay and Acquiescence.

87. The Respondent made detailed submissions in the course of the proceedings that due to the delay of the Applicant in bringing the s. 160 proceedings and the acquiescence of John Fowler Snr, deceased; Jennifer Fowler, deceased, and the Applicant a form of estoppel arises to preclude the Applicant from seeking relief. Alternatively, the Respondent argues that as this is a discretionary remedy and as there has been a substantial delay in applying for relief, the court should not exercise its discretion to grant the relief sought. That is to be distinguished from the nature of the relief if the court decides to grant such.

88. The Respondent has alleged that John Fowler, deceased, consciously agreed to the breaches of planning permission. He stated that Mr. Fowler Snr visited the lands on a regular basis and that lakes started to appear on the lands in late 2007 and that Mr. Fowler Snr must have seen the long armed digger purchased by the Respondent in May 2007 which was used to extract material below the water table.

89. The Respondent has also denied that it was responsible for the removal of any woodland and alleges this was carried out by Mr. Fowler's contractor who removed the trees. In addition, the Respondent stated that the quarrying at the northern end of the lands outside the area, the subject of the grant of planning permission, was specifically directed by Mr. Fowler Snr. The Respondent stated it could have carried on in an easterly direction on lands within the Licence Agreement and Grant of Permission, but Mr. Fowler Snr wished the Respondent to quarry to the north of the existing quarrying operation rather than move eastwards.

90. This presents difficulties for the court as Mr. Fowler is deceased and his evidence is not available to the court. The court is satisfied that Mrs. Fowler was left in a difficult position after the death of her husband who was the person who interacted with Mr. John Keegan, Managing Director of the Respondent, and who had to take over the affairs of her late husband without much prior knowledge of the contractual relationship between the Respondent and her late husband.

91. These are private law proceedings but there is a strong public interest in ensuring that those responsible for carrying out development in accordance with planning conditions laid down by the appropriate Planning Authority, do so in a manner which is compliant with those conditions, particularly where there are potential injurious consequences for the environment. This is such a case. It is the court's opinion that breaching the water table with possible consequences of polluted matter leeching off the lands into water courses and either affecting other private land owners or the public water supply or the natural environment is a matter of serious consequence.

92. I cannot see how the doctrine of proprietary estoppel if it applies at all to planning could apply in a situation where either an owner, tenant or licensee of lands carries out a development which required planning permission and which was the subject of a grant of planning permission, is developed in a way that there are serious breaches of the statutory conditions.

93. There was delay on the part of the Applicant. John Fowler, deceased, must have been conscious that progressive restoration of the lands was not taking place. However I cannot establish on the balance of probabilities that John Fowler Snr conscientiously acquiesced in the breach of the water table.

94. The court regards the substantial breach of the water table and the failure to progressively restore the lands as work was proceeding as the most serious breaches of the planning permission.

95. The court accepts the Licence Agreement envisaged that if the quarrying operation moved into other lands that the conditions of the agreement would apply to those lands. The Respondent did not quarry lands to the east, it was entitled to do, but instead moved north, outside the parameters of the Licence Agreement and grant of permission. The court is satisfied based on the evidence of the available lands to the east, the condition in the Licence Agreement and the evidence of John Keegan that its movement onto the northern lands outside the Licence Agreement and grant of permission, was with the consent of John Fowler Senior. The Respondent before quarrying the lands should have applied for a revision of the planning permission. It is also noted that the Respondent had undertaken in the planning application not to remove the tree belt from this area. It has at all times agreed to restore these lands, pursuant to the terms of the Licence Agreement, and it has a legal responsibility to do so.

96. The court is not in a position in these summary proceedings to determine if the Respondent removed the trees without the consent of John Fowler, deceased. The Applicant has not been able to tender any evidence that would persuade the court that the Respondent has done so. This is a matter more appropriately reserved to the plenary proceedings.

97. The court accepts there was substantial delay between Mrs. Jennifer Fowler acquiring knowledge about the breach of planning conditions and the issue of proceedings. The court is satisfied from the evidence of Mr. Kieran Cummins, Planning Consultant, engaged by Jennifer Fowler that there was difficulty in procuring information from Meath County Council about the relevant planning permissions and that planning file 96/633 was not available.

98. There is a gap in the correspondence between a letter written by Mrs. Fowler on 12th January, 2010, to Meath County Council and a further letter written on her behalf by Kieran Cummins, on 15th November 2011. This period of delay has not been explained very satisfactorily by the Applicant.

99. It is obvious from the evidence of Mr. Cummins and the correspondence exhibited to the court from Mrs. Fowler to Meath County Council and from Mr. Cummins to Meath County Council that Mrs. Jennifer Fowler did have concerns about the planning permission and was trying to assemble information.

100. The relationship between the Applicant, Mrs. Jennifer Fowler, and the Respondent continued and it continued to pay rent in accordance with the revised agreement.

101. Relations had not broken down as of 2nd November, 2010, as the Applicant wrote to Mr. Keegan stating "we are happy to remain doing business with you and continue our working relationship but we need everything to be very clear and above board so we all know where we stand".

102. The Respondent replied on 5th January, 2011, explaining the planning permission as follows:-

> "Firstly I would like to deal with the planning issue. The Green Party introduced a new Planning Bill which was passed in the Dáil a few months ago. The part of the Planning Act that affects the quarrying industry is a section called 261A. In complying with the act Meath County Council have nine months to inspect in great detail every sand and gravel pit and quarry in their jurisdiction. This in turn means that Meath County Council will be taking a detailed look at the operations in Clegarrow.
>
> We received full planning permission for lands that we are currently quarrying and we are currently working within the area we received planning permission for. We are happy that we are fully compliant with the existing planning permission."

103. That letter did not evidence a full and frank acknowledgement on the part of the Respondent that the planning difficulties were such that there was a fundamental breach of the conditions of the planning permissions.

104. The court has to take into consideration some matters. John Fowler Snr the person dealing with the Respondent had died suddenly in December 2008. His spouse, Jennifer Fowler, had no prior knowledge of the contractual relationship and she became ill and died on 12th March, 2013.

105. Jennifer Fowler had commenced plenary proceedings on 10th September, 2012, seeking orders for specific performance of the licence and agreements, damages and an injunction restraining Keegan Quarries from continuing to act in breach of the licence agreement. The Respondent has alleged that Mrs. Fowler was using the s. 160 proceedings as a means of exerting pressure on the Respondent to settle the plenary proceedings. Based on the evidence before it the court cannot come to that conclusion.

106. There were genuine reasons for Mrs. Fowler to be concerned about the operation of the quarry and her relationship with the Respondent subsequent to the death of her husband.

107. The court accepts that Mr. Keegan was trying to deal with the situation that had arisen, but he was not frank in appraising Mrs. Fowler of the extent of the breaches of the permission as evidenced by his letter of the applicant of 5th January, 2011.

108. He also asserted in his affidavit on 10th February, 2013, that the Respondent had planning permission which did not expire in 2008 to operate the concrete batching plant and washing and screening plant. It transpires from the evidence that this whole operation of bringing aggregate onto the lands was contrary to the planning permissions.

109. On balance, the court finds that while there was substantial delay on the part of the Applicant and Mrs. Jennifer Fowler in bringing the s. 160 proceedings, because of the serious nature of the breaches and their deliberate and conscious nature, the court is of the opinion that it would not be appropriate to refuse the relief sought on either grounds of delay or acquiescence.

Alleged breach of undertaking of the Respondent and amount of extraction

110. James Weir, Land Surveyor called as an expert witness by the Applicant swore three affidavits. The first was sworn on 7th November, 2013, exhibiting a topographical survey report of 25th June, 2013. The second affidavit of Mr. Weir was sworn on 4th November, 2014, and exhibited a report of 3rd November, 2014, which was a preliminary review of a technical memorandum furnished by Golder Associates. Mr. Weir's final affidavit was sworn on 14th January, 2016, in response to an affidavit of Eamon Carroll, a quarry operator for the Respondent sworn on 10th December, 2015. Mr. Weir was examined on his affidavit on 4th December, 2015. He referred to four large scale maps in the course of his evidence.

> (i) An existing site layout of September 2011 prepared on 20th September, 2011, drawing No. 13 – RN-03.
>
> (ii) Existing site layout of November 2012, prepared on 23rd November, 2012, drawing No. 13 – RN-02.
>
> (iii) Existing site layout of May 2013, prepared on 10th June, 2013, drawing No. 13 – RN-01, and a cross section A-A to D-D prepared on 10th June, 2013, drawing No. 13 – RN-04.

111. In the course of his examination, Mr. Weir was asked to comment on certain photographs exhibited in the affidavit of the Applicant sworn on 18th November, 2013.

112. Connor Wall, Senior Environmental Consultant, with Golder Associates, an expert called on behalf of the Respondent swore an affidavit on 31st October, 2014, exhibiting a technical memorandum headed, Preliminary Review of Mr. James Weir affidavit, an overview of s. 261A. He was examined on his affidavit on 11th December 2015.

113. In the course of the hearing, reference was made to an Apex survey carried out on behalf of the Respondent but this was not exhibited in the proceedings before this Court.

114. In a letter of 19th April, 2012, Malone and Martin Solicitors for the Respondent responding to the letter from the solicitors for the Applicant of 13th April, 2012, at para. 10 stated:-

> "There has been no extraction of fresh material from the Fowler property for some considerable time. In that context and as a concession to your client and without prejudice to any rights or entitlements that the company may have, the company hereby undertakes to refrain from digging out any fresh material on the Fowler property until further notice. You will appreciate that there is a large amount of material stockpiled on the property which is made up only of material brought on to the site. The company will continue to process the stockpile material in the normal way and will continue to import material for processing. Processed material will continue to leave the site."

115. In his affidavit of 7th November, 2013, and his report, Mr. Weir referred to a number of matters. He referred to an area of approximately 6 acres to the north of the site excavated outside the permitted boundaries relevant to planning application reference TA/20055. He confirmed that the quarry lake beds had been excavated below the permitted level of 84m as stipulated in planning application reference TA/20055. He estimated total volumes in material extracted in the extended area and the permitted area below the datum of 84m. He also estimated the overburden topsoil on the site to facilitate the reinstatement process and the amount of topsoil that should be available based on an average depth of topsoil at 300m. He went on to allege in his affidavit that further material had been excavated in the area permitted by the planning permission between September 2011 and November 2012, and between November 2012 and May 2013. He alleged that the material was excavated from two areas highlighted in black lining on map 13 – RN-01 of 10th June, 2013, and from lake 1 which he alleges was extended slightly; lake 3 which he alleged was extended by approximately half an acre; lake 4 which he alleged was reduced down to a depth of 0.5m to 1m.

116. The methodology of Mr. Weir's calculations were challenged by Mr. Connor Wall.

117. The issue of volume was also referred to in the Meath County Council Inspectors report prepared subsequent to an inspection of the quarry on 18th May, 2012, for the purposes of considering whether it would be referred for a substitute consent application pursuant to s. 261A of the Planning Acts.

118. There are separate plenary proceedings in being in which the Applicant is suing the Respondent for damages for unlawful extraction of material. It would be inappropriate for this Court in the s. 160 proceedings to prejudge those proceedings or to make any finding in relation to volumes of extracted material and will thus refrain from doing so. It is also appropriate to avoid determining any dispute about the use of the datum and how it was calculated. The court is also reluctant to determine the issue of a breach of undertaking as it will impinge on the plenary proceedings.

However, insofar as the expertise of Mr. Weir has been challenged by Mr. Wall, the court is satisfied that Mr. Weir is an experienced land surveyor and the quality of the maps presented to the court was excellent.

119. In respect of the topsoil, this is a matter of concern to the court. The Respondent has brought material on to the site and also removed material and because there was no progressive restoration and the topsoil does not seem to have been properly separated from the overburden, it is very difficult to determine what topsoil remains on the lands and its quality to ensure restoration and remediation takes place.

120. The court can state unequivocally that the activity of the Respondent in bringing material onto the site and compacting material throughout the site and then removing material subsequent to the undertaking being given was very undesirable. The bringing of aggregate onto the land was contrary to the planning permissions and the Respondent's activity has led to a very unsatisfactory situation, presenting any court with a difficulty in determining if the Respondent removed material it was not entitled to.

121. The court can determine the issue on the s. 160 application without making a determination on the total extraction or making a finding on the alleged breach of the undertaking.

122. There is no dispute that the depth of the extraction below the water table was very substantial, given the assurances by the Respondent to the Planning Authority that it would quarry to a depth of 1.5m above the water table. I am satisfied that the depths which are recorded on drawing No. 13 –RN-01 of 10th June, 2013, and recorded by Murphy Engineers are accurate and extensive and that the estimate of Mr. Weir in para. 10 of his affidavit of 7th November, 2013, that the level of excavation is as low as 76.20m which is 7.8m below the permitted datum of 84m and 7.25m below the May 2013 recorded water level of 83.45m is not unreasonable and probably close to the degree of depth or excavation carried out by the Respondent.. However the court is conscious that the

Apex survey prepared for the Respondent is not before it.

123. Mr. Weir has surveyed four water bodies on the lands. Lake 1 on the south eastern portion of the lands has an area of 3.039 hectares or 7.511 acres. Lake 2 to the north has an area of 3.562 hectares, or 8.800 acres. Lake 3 to the southwest has an area of 0.690 hectares or 1.704 acres. Lake 4 has an area of 0.753 hectares or 1.860 acres

The restoration and remediation proposals of the Applicant and Respondent

124. The court had the benefit of expert reports and evidence presented by Thomas Burns of Brady Shipman Martin who was called as an expert witness by the Applicant and Mr. Pete Mullin of Mullin Design Associates called as an expert by the Respondent. Both Mr. Burns and Mr. Mullin are landscape architects.

125. Mr. Burns swore four affidavits on 2nd December, 2013; 10th July 7th October, 2015 and 26th January, 2016. Mr. Mullin swore three affidavits, 3rd November 2014, 11th November, 2015; and 5th February, 2016. Mr. Burns affidavit of 2nd December, 2013, summarised the detailed written expert report of October 2013 which is headed Restoration Plan for Existing Sand and Gravel Quarry Clegarrow and Rahinstown in Summer Hill, Co. Meath. The affidavit also commented on the proposals set out in the landscape restoration report of Mullin Design Associates of December 2012. Mr. Mullins' affidavit of 3rd November, 2014, exhibited his landscape restoration plan dated December 2012, and the landscape restoration addendum report prepared in October 2014 and the affidavit was sworn for the purposes of exhibiting those reports. The affidavit of Mr Burns of 10th July, 2015 was sworn for the purposes of reviewing aerial photographs which were referred to in the affidavit of Robert Henry Fowler sworn on 18th November, 2013. The affidavit of Mr. Burns sworn on 7th October, 2015, was for the purposes of exhibiting the report entitled "Brady Shipman Martin Review of MDA Restoration Report Addendum" dated 7th October, 2015.

126. The affidavit of Mr. Mullin sworn on 11th November, 2015, was for the purpose of exhibiting a report entitled "Response to Brady Shipman Martin's review of MDA Restoration Report Addendum" of 9th November, 2015.

127. Mr. Burns swore another affidavit on 26th January, 2016. This was to review a final landscape restoration drawing produced by Mr. Peter Mullin and provided to the Applicant on 21st January, 2016. Mr. Burns referred to the maps already referred to and prepared by Mr. James Weir of J. Weir Land Surveying Limited and made certain comments on the MDA drawing. In response to this affidavit, Mr. Pete Mullin swore another affidavit on 5th February, 2016, and exhibited a further reported headed response to fourth affidavit of Thomas Burns of Brady Shipman Martin filed on 26th January, 2006 and this report was dated 3rd February, 2016.

128. The court had the benefit of a written note prepared by Pete Mullin on a consultants site meeting which took place on 22nd May, 2015, subsequent to directions of the High Court. There were also notes prepared by Brady Shipman Martin of this meeting dated 26th June, 2015, and subsequently Brady Shipman Martin on 30th June, 2015 issued a further written response to the consultant site meeting report issued by Mullin Design Associates of June 2015.

129. Mr. Burns was examined on his affidavits of 2nd December, 2013; 10th and 7th October, 2015 on 11th December, 2015 (Day 8); 19th January, 2016(Day 9) and Wednesday, 20th January, 2016, (Day 10). Mr. Burns was not cross examined on his affidavit of 26th January, 2016; which was furnished by permission of the court subsequent to his sworn evidence to the court. Mr. Mullin was examined on his affidavits of 3rd, and 11th November, 2015, on 20th January, 2016(Day 10). He was not cross examined on his affidavit of 5th February, 2016 which was in response to Mr. Burns affidavit of 26th January, 2016.

130. The court heard substantial evidence about the proposed restoration and remediation by both the Applicant and the Respondent in the course of this hearing. Some restoration proposals were agreed by the experts but they were opposed on some controversial aspects of these proposals. Mr. Burns proposed a full reinstatement of the lands to agricultural pasture and woodland without retention of any of the existing water bodies on the lands. Mr. Burns paid close attention to the original grant of planning permission and the original EIA prepared by John Barnett and Associates Ltd which was furnished on the application for planning permission TA/20055. His expert reports and evidence to the court has recommended that the court follow restoration as close to the original grant of permission based on the proposals in the EIA taking into account the unauthorised development which has occurred subsequently particularly the large water bodies now on the lands and the lack of progressive restoration and poor storage of topsoil and overburden and also extraction in parts of the lands beyond the designated area for which planning permission was granted.

131. Mr. Mullin has taken a different approach. He has examined the quarry workings and has recommended a restoration plan which in his opinion is the most realistic and feasible considering the actual state of the quarry at present, the state of the soils stored there and the existence of these large water bodies. His proposal would include the filling in of lake 4 referred to in Mr. Weir's drawing and the reduction in the size of lakes 1, 2 and 3. Mr. Mullin accepted in evidence in respect of lake 3 which Mr. Weir measured at 0.690 hectares that there may be enough material available to continue filling this relatively small water body and while in his proposal this was to remain, there might be scope for deviation from that.

132. There was also some disagreement between the experts on the requirement for topsoil. Mr. Burns was of the opinion due to the mixture of topsoil and overburden on the lands by the Respondent and the deterioration of the topsoil, it would be necessary to import onto the lands substantial amounts of topsoil and/or other organic material to mix with the soil to ensure that there is appropriate soil on restoration to provide for vegetation growth. Mr. Burns estimated that 28,000 cubic meters of an approved subsoil together with approximately 44,000 cubic meters of an approved topsoil or an approved organic soil improver would required to be imported onto the lands to provide an appropriate and sustainable surface growth medium.

133. Mr. Mullin had concern that the proposals put forward by Mr. Burns exceeded the restoration as provided for in the original Environmental Impact Statement prepared by John Barnett and Associates Ltd and accepted by Meath County Council when granting planning permission and he was of the opinion that the existing material on site could be utilised. However, he accepted that there was a need for organic improver but did not accept that it would be appropriate to import actual topsoil onto the lands or subsoil.

134. There was broad agreement on the following matters:-

> (i) That the baseline for the restoration would be the Environmental Impact Statement report of John Barnett and Associates Ltd.
>
> (ii) A general grading out of the current unstable steep side slopes to sustainable and stable slopes. There was common agreement that the minimum gradient should be 1.25 moving up to 1.6 in places.
>
> (iii) Removal of all remaining structures including fuel tanks and general quarry debris.

(iv) Breaking up of remaining hard standing and concrete standing areas.

(v) Creating levelling, cultivating of existing soils.

(vi) Provision of drainage both natural and installed as appropriate.

(vii) Proceeding with appropriate agricultural pasture seed mix and planting.

(viii) Reestablishment of field hedge rows.

(ix) Fencing off site.

135. There was no agreement on the filling of all existing quarried water bodies with appropriate material to be imported in significant quantities. There was also disagreement as to the timescale for restoration to agricultural use.

136. Both experts agreed that it would be desirable for a report to be prepared to consider the impact on the environment of the existing condition of the lands and any future restoration in accordance with the Habitats Directive.

137. Both recommended there should be some form of updated Environmental Impact Assessment to take account of the substantial changes of unauthorised development not envisaged in the original Environmental Impact Statement.. Mr. Burns, however, was of the opinion that if the restoration plan of Brady Shipman Martin was followed in full by the court there would be no requirement for an EIA. In considering the expert reports and the expert opinion of both witnesses, the court finds there were substantial deficiencies in certain aspects of their evidence. Mr. Mullin underestimated the severity of the non-compliance with planning permission. He had not examined in detail the Environmental Impact Statement originally prepared for the planning permission nor did he examine the original planning permission. His report and evidence was deficient in respect of the treatment of the topsoil and subsoil by the Respondent. There was evidence from Mr. Mullin that soil analysis had been prepared by the Respondent but this was not furnished to the court. The evidence adduced by Mr. Burns in relation to the topsoil and overburden was much more comprehensive in detail and of assistance to the court with the exception of his proposal to have topsoil imported and his position as to where this could be sourced and how much of the existing soils on the lands could be utilised.

138. In respect of the filling of the water bodies, the Brady Shipman Martin report apart from estimating the amount required to fill the bodies did not look in any great detail at the mechanics of bringing this about. There was no evidence as to the cost. In questioning from the court it was estimated that the amount of infill required for the lakes would be approximately 21,000 lorry loads of material. Mr. Burns suggested that it would have to be filled either by stone or clean sand and gravel. There was no cost analysis prepared for the benefit of the court or where this material could come from. The only example of the experience of Mr Burns in respect of infilling of water bodies was a road project for a Shannon tunnel in Limerick which was the construction of a causeway for a new roadway which in the court's opinion was irrelevant to the problem confronting it.

139. The preponderance of evidence of all the experts including the planning experts, whatever the morality of this approach, was that where large water bodies were created in quarries, the tendency was not to infill completely but to try and improve them and make them safe. This was not always the position. The court heard evidence that quarries near Dublin Airport and in Mayo were in filled completely but the impression the court formed was that generally speaking in relation to the aggregate and extraction industry where there were water bodies of a substantial nature, Local Authorities and An Bord Pleanála on the substitute consent procedure were inclined to leave them there but to improve and make them safe.

140. That is not to say in this particular case because of the very serious breaches, that An Bord Pleanála would have taken that approach had there been an application for substitute consent.

141. There were deficiencies also in the expert evidence of Mr. Mullin in his proposed treatment of the water bodies. He had suggested in evidence that lake 4 could be infilled with overburden material on the site which is in conflict with the evidence of Mr. Burns that either stone or clean sand or gravel would be required and that overburden would not be a suitable infill material. Mr. Mullins report and evidence was also deficient in the treatment of steep slopes. He accepted that these had to be levelled out but there was an issue left unaddressed that this levelling would have to be done by moving onto lands which were outside the licence agreement albeit lands in the ownership of the Applicant.

142. The court is faced with an issue of moral hazard. There are two very deep lakes on the lands which were dug by the Respondent illegally with no regard to the planning permission. In the court's opinion, there are substantial logistical problems about infilling them. The expert evidence adduced by the Applicant in relation to this particular problem does not give the court comfort that this could be achieved in accordance with section 160. The wording of the Act states restoration should be "as far as is practicable".

143. The court would have concern if the cost of infilling the two deep lakes, lake 1 and lake 2, exceeded the agricultural value of the lands taking into consideration that the Applicant or his predecessors in title were paid substantial sums of money for the extraction of material by the Respondent, with the court noting that there is a legal dispute between the Applicant and the Respondent in separate plenary proceedings where the Applicant alleges that substantial material was extracted without payment.

144. The court has already considered its responsibilities under the Habitats Directive and has formed the opinion that it will have to direct a screening assessment which does not need to be extensive in nature to ensure that there is no leeching from the site of pollutants which could affect the Special Area of Conversation site of the River Boyne and Blackwater. It is appropriate the court appoints its own expert, who would have the dual function of preparing a screening assessment and to give advice to the court in respect of the feasibility of infilling all the water bodies, and any other matter which could be of assistance to the court.

145. Based on the evidence to date, the view of the court is that lake 3 and lake 4 should be infilled with a suitable material. The court is sceptical that lake 1 and lake 2 can be completely in filled but it is certainly possible to infill portions of these lakes where they are not so deep and where proper slopes can be developed. The court stresses that this is not the final position of the court in relation to lakes 1 and 2, as the expert to be appointed by the court may take a different view.

146. It would seem sensible to the court that this report and the screening assessment could be carried out by one specialist company or one specialist individual. The report would include the screening assessment and an opinion on the infilling of lakes 1 and lake 2, and any issues with the infilling of lakes 3 and 4, and also any issues in relation to the introduction of topsoil and organic material to the lands, and any other matter of relevance. Mr Mullin on a number of occasions referred to a method statement which would also assist.

147. The cost of preparation of this report should be borne by the Respondent but the court will not finalise any cost if this expert has to give evidence until the conclusion of his or her evidence.

The Planning Authority

148. Concern has been expressed to the court as to the status of the lands subsequent to the outcome of these proceedings and the absence of substitute consent. The present status of the lands is that unauthorised development has been carried out and has not been rectified legally. The Planning Authority, Meath County Council, has parallel rights of enforcement pursuant to the provisions of the Planning Acts. In addition to the statutory relief of s. 160, it is entitled to utilise other statutory powers namely the service of warning letters, statutory notices, and the instigation of criminal proceedings. This Court does not have jurisdiction to prevent the Planning Authority from taking these steps.

149. The court is conscious that the Planning Authority is not a party to these proceedings but there is undisputed evidence that it did not follow up on the conditions it laid down. If condition 12 of the planning permission TA/2005 had been adhered to by ensuring that the Respondent carried out monitoring tests on the water table and furnished these, and if it had taken its enforcement responsibility seriously, the breach of the water table would not have arisen.

150. There were other matters not attended to particularly there was no final landscape restoration furnished by the Respondent. The Planning Authority changed the financial conditions which do not seem to have been recorded in writing or in any form of official amendment to the planning permission. Any inspection of the quarry over the period of its operation would have shown that the Respondent was not carrying out its responsibilities to progressively restore the lands as directed.

151. It would be surprising if in those circumstances the Planning Authority now decided to take separate enforcement proceedings pursuant to s. 160 of the Act or pursuant to other statutory rights when there has been an exhaustive hearing in the High Court on the Applicants s. 160 application where the court has been at hearing for fourteen days and considered detailed expert reports on the planning status of the property and the proposals for restoration. This Court is conscious that the Planning Authority may not have been provided the resources by central government to bolster its role of enforcement, but it has been surprised that such serious breaches of planning permission had gone unnoticed for a substantial period of time in particular when a water table was breached in proximity to an aquifer. This Court hopes that in future a blind eye will not be turned to this degradation of the environment.

152. Once the parties have an opportunity to read the court's judgment and to make any further submissions, the court will give detailed directions in the form of an order.

153. The court is conscious that either party may wish to appeal matters of substance in relation to the principles set down by the court before the court appoints an expert and makes final orders as appropriate.

154. There should also be proper consultation with the parties as to how the expert is appointed. This Court has no objection if the parties wish to put forward an expert who is suitable for consideration by the court. The court has also to finalise the costs of the preliminary issue and the substantive hearing.

155. When the relief to be granted pursuant to s. 160 of the Planning Acts 2000, is finalised while not an ideal solution to the problem faced by the Applicant, and the Respondent it will provide comfort to the parties if the scheme of restoration and remediation ordered by the court is complied with. The restoration and remediation to be carried out does not require planning permission and although the status is not as ideal as a development which has had the benefit of planning permission or a Section 261A consent in the circumstances of this case, it would to the best possible extent resolve the status of the property.