THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 398 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING OF DEVELOPMENT ACT 2000, (AS AMENDED)

BETWEEN

BULRUSH HORTICULTURE LTD

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WESTMEATH COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

FRIENDS OF THE IRISH ENVIRONMENT

SECOND NAMED NOTICE PARTY

[2013 No. 424 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING OF DEVELOPMENT ACT 2000, (AS AMENDED)

BETWEEN

WESTLAND HORTICULTURE LTD, WESTMEATH PEAT LTD AND CAVAN PEAT LTD

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WESTMEATH COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

FRIENDS OF THE IRISH ENVIRONMENT LTD

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 8th day of February, 2018.

Background:

1. As can be seen from the above titles, these are two judicial review proceedings that essentially involve similar facts and issues of law.

2. In the first set of proceedings, the applicant is Bulrush Horticulture Ltd (hereinafter referred to as "Bulrush"). Since 2003, Bulrush has operated a milled peat production facility at Camagh Bog, Doon Castlepollard, County Westmeath, which is located in the northwest of Westmeath between Lough Derravaragh and Lough Sheelin. The area including settlement ponds, yards, factory and peat extraction area is approximately 94 hectares. The actual area which is subject to peat extraction is approximately 80 hectares. The extraction of peat from the subject lands began in or about 1983.

3. By letter dated 14th November, 2011 the second named notice party sought a declaration from the first named notice party, pursuant to s. 5 of the Planning and Development Act 2000 (as amended) (the "Act of 2000"), as to whether the drainage of bog lands, peat extraction, accesses from public roads, peat handling activities, and other associated activities and works carried out by Bulrush is or is not development and is or is not exempted development.

4. A report, dated 18th January, 2012, was prepared by the planning officer of the first named notice party which concluded *inter alia* that, given the legal complexity of the issues raised, the matter should be referred to the respondent for determination. A letter dated 24th January, 2012 referred the matter, pursuant to s. 5(4) of the Act of 2000, to the respondent for its decision.

5. Following an exchange of correspondence and submissions made by Bulrush, by order dated 15th April, 2013 the respondent determined that:-

> "The drainage of boglands, peat extraction, accesses from public roads, peat handling activities and other associated activities and works at Camagh Bog, Doon Castlepollard, County Westmeath are development and were exempted development until the 20th day of September, 2012, after which it is development and not exempted development."

6. In the second set of proceedings, the first named applicant has, at all material times since 1993 in relation to the lands at Coole,

Mayne, Ballinealloe, and, since 1999 in relation to the lands at Clonsura, been engaged in peat extraction operations on a commercial scale. The first named applicant leases the subject lands from the second named and third named applicants respectively and owns a small land holding in its own right which abuts and adjoins the leased lands. The total area of the subject lands leased from the second and third named applicants is approximately 272 hectares. For ease of reference, I shall refer to the applicants in these set of proceedings as "Westland".

7. The second named notice party sent a letter to Westland in similar terms to that sent to Bulrush, referred to at para. 3 above.

8. As with the case of Bulrush, the first named notice party referred the matter to the respondent for determination. Following submissions and correspondences, by order dated 15th April, 2013 the respondent determined that:-

> "The drainage of boglands, peat extraction, accesses from public roads, peat handling activities and other associated activities and works at Lower Coole, Mayne, Ballinealloe, Clonsura near Coole, and Fineagh, County Westmeath, are development and were exempted development until the 20th day of September, 2012, after which it is development and not exempted development."

Judicial review proceedings:
9. By order of the President of the High Court, dated 30th May, 2013, Bulrush was granted leave to apply by way of an application for judicial review for:-

> 1 An order of *certiorari* quashing the decision of the respondent dated 15th April, 2013, in respect of a referral made pursuant to s. 5(4) of the Act of 2000 (as amended) whereby the respondent decided that drainage of boglands, peat extraction, accesses from public roads, peat handling activities and other associated activities and works at Camagh Bog, Doon Castlepollard, County. Westmeath are development and were exempted development until the 20th day of September, 2012, after which it is development and not exempted development;
>
> 2 A declaration that the said decision was and is *ultra vires*, invalid and of no legal effect;
>
> 3 A declaration that the said decision is so unreasonable as to be invalid.

10. By order of Feeney J., dated 6th June, 2013, Westland were granted similar reliefs in respect of its lands at Lower Coole, Mayne, Ballinealloe, Clonsura near Coole, and Fineagh, County Westmeath.

Legislation:
11. The relevant legislation is both domestic and EU legislation.

12. The provisions of the Local Government (Planning and Development) Act 1963 ("Act of 1963"), are the starting point.

13. Section 24 provides:-

> "Subject to the provisions of this Act, permission shall be required under this part of this Act:
>
> > "(a) In respect of any development of lands, being neither exempted development nor development commenced before the appointed day and …"

Section 3 defines "development" as:-

> "… save where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any structures or other land…"

Section 4 provides:-

> "(1) The following shall be exempted developments for the purposes of this Act:
>
> > (a) development consisting of the use of any land for the purposes of agriculture…"

Section 2 defines "agriculture" as follows:-

> "includes horticulture, fruit growing, seed growing… the use of land for turbary…"

Thus it can be seen that the activities carried out by Bulrush and Westland on their respective lands fall within the definition of "exempted development" and therefore no planning permission was required under the Act of 1963.

14. The Act of 1963 was repealed by the Planning and Development Act 2000 ("the Act of 2000").

15. As in the Act of 1963, the use of land for the purpose of agriculture was an exempted development. However, under the Act of 2000 the definition of "agriculture" was amended so as no longer to include "the use of land for turbary".

16. Any possible negative effects on Bulrush or Westland by reason of the removal of "the use of land for turbary" from the definition of agriculture were mitigated by reason of the provisions of Article 11 of the Planning and Development Regulations, 2001 (past pursuant to the Act of 2000) which provided:-

> "development commenced prior to the coming into operation of this Part and which was exempted development for the purposes of the Act of 1963 or the 1994 Regulations, shall notwithstanding the repeal of that Act and the revocation of those Regulations continue to be exempted development for the purposes of that Act.."

Thus, in effect, the activities of Bulrush and Westland continued to be an "exempted development" notwithstanding the provisions of the Act of 2000.

17. Domestic planning law was supplemented by legislation from the European Union. The EU legislation emphasised, in particular, the

effects that planning and development may have on the environment. Two Directives are directly relevant to the issues to be determined in these proceedings. Firstly, Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the Environmental Impact Assessment Directive) and Council Directive 92/43/EEC, on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive").

18. I shall firstly consider the provisions of the Environmental Impact Assessment Directive. This Directive underwent a number of amendments and was ultimately codified in Directive 2011/92/EU.

Article 1(2)(a) states that "project" means:-

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

Article 2(1) provides:-

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4..."

Article 4 provides:-

> "1 Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.
>
> 2 Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:
>
> (a) a case-by-case examination;
>
> or
>
> (b) thresholds or criteria set by the Member State.
>
> Member States may decide to apply both procedures referred to in points (a) and (b).
>
> 3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account…"

Annex I refers to "peat extraction, where the surface of the site exceeds 150 hectares."

Annex II refers to "peat extraction (projects not included in Annex I);.."

Annex III has the title "SELECTION CRITERIA REFERRED TO IN ARTICLE 4(3)" and has three headings namely, "CHARACTERISTICS OF PROJECTS", "LOCATION OF PROJECTS" and "CHARACTERISTICS OF THE POTENTIAL IMPACT", that are sub-divided into a number of headings.

19. The second Directive that has to be considered is the "Habitats Directive".

Article 2 provides:-

> "The aim of this Directive shall be to contribute towards ensuring bio- diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies…"

Article 3 provides:-

> "1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.."

Article 6 provides:-

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. 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…"

20. Part X of the Act of 2000, is entitled "environmental impact assessment". Section 172(1) provides where a planning application is made in respect of a development referred to in regulations under s. 176, that application shall, in addition to meeting the requirements of the permission regulations, be accompanied by an Environmental Impact Statement. Section 176 provides:-

(1) The Minister may, in connection with the Council Directive or otherwise, make regulations—

(a) identifying development which may have significant effects on the environment, and

(b) specifying the manner in which the likelihood that such development would have significant effects on the environment is to be determined.

(2) Without prejudice to the generality of subsection (1), regulations under that subsection may provide for all or any one or more of the following matters:

(a) the establishment of thresholds or criteria for the purpose of determining which classes of development are likely to have significant effects on the environment;

(b) the establishment of different such thresholds or criteria in respect of different classes of areas;

(c) the determination on a case-by-case basis, in conjunction with the use of thresholds or criteria, of the developments which are likely to have significant effects on the environment..”

21. The Regulations referred to in s. 176 of that Act of 2000 are the Planning and Development Regulations 2001 (“the 2001 Regulations”).

22. Article 93 of the 2001 Regulations provides “The prescribed classes of development for the purposes of section 176 of the Act are set out in Schedule 5.” Schedule 5 refers to:-

“(a) Peat extraction which would involve a new or extended area of 30 hectares or more..”

23. Article 103 of the 2001 Regulations provides:-

“Where a planning application for sub-threshold development is not accompanied by an EIS, and the planning authority considers that the development would be likely to have significant effects on the environment, it shall, by notice in writing, require the applicant to submit an EIS.”

As to the criteria for determining whether a development would or would not be likely to have significant effects on the environment, these are set out in Schedule 7 of the 2001 Regulations. It should be noted that the criteria set out in Schedule 7 repeat the criteria in Annex III, referred to in Article 4(3) of the Environmental Impact Assessment Directive, referred to above.

24. Section 177 (V) transposes the legal requirements of the Habitats Directive into domestic law.

25. Finally, and critically, for the purposes of these proceedings, s. 17 of the Environment (Miscellaneous Provisions) Act 2011 (the Act of 2011) amends s. 4(4) of the Act of 2000 as follows:-

“(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.”

Further s. 17(2) provides:-

“The amendment to section 4 of the Act of 2000 effected by subsection (1) shall not apply as respects development—

(a) begun prior to the commencement of this section, and

(b) completed not later than 12 months after such commencement..”

Submissions of Bulrush and Westland:
26. Bulrush and Westland rely on the definition of “development” in s. 3 of the Act of 2000. They maintain that the extraction of peat is a “use” development as opposed to a “works” development. In its decision of April 2013, the respondent maintained that the extraction of peat was a “works” development. The significance of this is that if the extraction of peat is a “use” development then it would have been a development “completed not later than 12 months after such commencement”, as per s. 17(2) set out in para. 25 above. It would follow from this that the amended s. 4(4) of that Act of 2000 would not apply. The end result would be that the activities of both Bulrush and Westland would continue to be an exempted development.

27. If the amended s. 4(4) does apply, and either an Environmental Impact Assessment or an Appropriate Assessment is required, it would have the effect of depriving the development of its exempted status. Bulrush and Westland contend that such would amount to retrospective legislation and would be contrary to law.

28. Bulrush and Westland rely on the provisions of Schedule 5, Part 2, para. 2(a) of the 2001 Regulations maintaining that their activities do not “involve a new or extended area of 30 hectares or more” and thus do not require an Environmental Impact Assessment.

29. Bulrush and Westland refer to a number of decisions of the European Court of Justice on the application of the relevant Directives which, it is argued, establish that neither an Environmental Impact Assessment nor an Appropriate Assessment is required.

Consideration of issues:
30. The Act of 2000 defines “development” as:-

“... except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land…”

Both Bulrush and Westland submit that peat extraction is a “change of use” rather than “works”. In support of this, they point to the

fact that the definition of "agriculture" in the Act of 1963 and the Act of 2000 is referred to as the "use of land".

31. Reliance is also placed on the fact that lands must be drained prior to the extraction of peat. This drainage delineates the area from which peat will be extracted, thus the extraction of the peat is the completion of the "use" which was commenced by the drainage. In the cases of Bulrush and Westland, drainage had been completed before the exemption given to peat extraction was removed by statute.

32. In its decision, the respondent takes a different view. The respondent concluded that the extraction of peat:-

> "involved the carrying out of works on land in an intensive and sustained manner and that commencement of such works involved a material change in the use of land even if peat extraction had occurred on the same land in an occasional and less intensive manner before then…"

The respondent held that both the material change of use and the works constituted development. It further held that the development consisting of the material change of use was completed at the commencement of the works but that the development consisting of the extraction works remained ongoing.

33. In support, the respondent relied on the Supreme Court decision in *Kildare County Council v. Goode* [1999] 2 IR 495. In this case, a similar argument was made in that it was contended that the extraction of sand and gravel from the lands was a "works" development rather than a "use" development. The court had to determine whether quarrying was to be regarded as a "material change of use" and/or a "works" development. In giving judgment, Keane J. stated:-

> "The fallacy in the submission advanced on behalf of the respondents is that it assumes that the necessary consequence of these statutory provisions is that a particular series of operations must in planning terms be either a "material change in use" development or "a carrying out of works" development. But that is not so. To confine oneself to the facts of the present case, when people began to extract sand or gravel from this land before 1964, the land in question was no longer being used for agriculture, but for a form of industrial or quasi-industrial use; see the definition of "agriculture" in s. 2 of the Act of 1963. However, since that process involved the "excavation" of sand or gravel from the land, it also constituted the carrying out of "works" within the meaning of section 2. Thus, applying the terminology adopted by counsel for the respondents, this was both a "use development" and a "works development"."

34. Both Bulrush and Westland sought to distinguish this decision from the facts in the instant case by noting that what was involved in *Kildare County Council v. Goode* was quarrying not turbary. They submit that in turbary, unlike quarrying, the drainage of a bog defines from the outset the entire area which forms the development and the extraction of the peat is simply a completion of the use which is commenced by the drainage.

35. In my opinion, the decision of the Supreme Court in *Kildare County Council v. Goode* does not support the submission by Bulrush and Westland making a distinction between "use" and "works". It seems to me that the definition of "works" in the 2000 Act is clear:-

> "'works includes any act or operation of construction, excavation, …"

The activities of Bulrush and Westland are the "excavation" of peat. It is very difficult to see how such can be anything other than "works". I cannot see how matters are changed by the fact that before excavation can take place the lands in question must be drained. The peat still has to be excavated. Therefore, in my view, the decision of the respondent on this point was correct.

36. It follows from this that neither Bulrush nor Westland can avail themselves of the provisions of s. 17(2) of the Act of 2011. Therefore, the next issue that needs to be addressed is whether an Environmental Impact Assessment or an Appropriate Assessment is required.

Requirement for an Environmental Impact Assessment or an appropriate assessment:
37. In paras. 18-24 above, I have set out the relevant provisions of both domestic and EU law. Under Article 4(2) of the Environmental Impact Assessment Directive, peat extraction shall be made subject to an Environmental Impact Assessment on a "case by case examination" or under thresholds or criteria set by the Member State".

38. The threshold is "peat extraction which would involve a new or extended area of 30 hectares or more" (see Schedule 5 of the 2001 Regulations) which may not cover either Bulrush or Westland. However, it is still open to the Respondent to carry out a "case by case examination". Criteria for a "case-by-case examination" are of a much more general nature and are to be found in Schedule 7 of the 2001 Regulations (see para. 18 above). I refer to para. 11 of the respondent's inspectors report:-

> "Environmental Impact Assessment
>
> Schedule 5 only refers to peat extraction in new areas of more than 30ha and so does not apply in this case where peat extraction is assumed to have been ongoing since before the Regulations were made. When judged in relation to the criteria set out in Schedule 7, it is clear that the development comprised of the extraction of peat and ancillary works both sites would be likely to have significant effects on the environment and so require an Environmental Impact Assessment as above".

39. This report is reflected in the decision of the respondent:-

> "(f) Having regard to the criteria set out in Schedule 7 of the Planning and Development Regulations 2001, regarding the location and characteristics of the development involved in the continued works to extract peat on the site and its potential impact, it is likely that such development would have significant effects on the environment and so requires an Environmental Impact Assessment…"

In my view, there is a sound legal basis for the respondent's decision thay an Environmental Impact Assessment is required in the case of both Bulrush and Westland.

40. The requirement for "an appropriate assessment" is to be found in the "Habitats Directive", set out at para. 19 above, and s. 177 (V) of the Act of 2000. In considering this, the respondent's inspector wrote as follows:-

> "Appropriate Assessment

> The continued extraction of peat and other ancillary works on each of the sites cited in the request causes a risk of emissions to surface waters that drain to Lough Derravaragh. The conservation objectives of the SPA at Lough Derravaragh include the maintenance of the conservation status of the wetlands habitats there which support species listed in ANNEX 1 of the Birds Directive. The said development would therefore be likely to have significant effects on a Natura 2000 site, and such effects are even more significant when considered in combination with the other peat extraction that takes place in the same drainage basin. It would therefore be necessary for an appropriate assessment of the works to be carried out before public authorities considered whether to agree to their continuation in order to comply with the requirements of Article 6 of the Habitats Directive…"

This is reflected in the decision of the respondent as follows:-

> "(g) Having regard to the location of the site up stream of the special protection area at Lough Derravaragh and the potential for peat extraction and drainage works there to give rise to emissions to water that could effect the habitats down stream, it is considered that the development involved in continued works to extract peat from the site either individually or in combination with any other projects, would be likely to have a significant effect on the said Natura 2000 site and so requires an appropriate assessment…"

In light of the provisions of Articles 3 and 6 of the Habitats Directive and s. 177 (V) of the Act of 2000, I am of the opinion that there is a sound legal basis for the decision that "an appropriate assessment" is required in the case of both Bulrush and Westland.

41. Both Bulrush and Westland relied upon a number of decisions of the European Court of Justice in support of their submission that neither an Environmental Impact Assessment nor an appropriate assessment was required. These decisions included Commission *v. Germany,* Case C-431/92, *Burgemeester v. Gedeputeerde Staaten Noord Holland*, Case C-81/96, the *Commission v. Austria* Case C-209-04 and *Stadt Penburg v. Germany*, Case C-2206-08. These cases are generally referred to as the "Pipeline Cases". The principles distilled from these decisions are illustrated in *Stadt Papenburg v. Bundesrepublik Deutschland*, Case C-226/08. In this case, a local authority (Stadt Papenburg) issued consent to a shipyard to carry out dredging of the River Ems to allow access from a shipyard to the sea in 1994. This decision had the effect of granting permission for future dredging operations. In 2006 the German government indicated that parts of the River Ems situated down river could be accepted as a possible site of community interest within the meaning of the "Habitats Directive". The local authority brought legal proceedings seeking to prevent the defendant giving its agreement to the inclusion of part of the River in a list of sites of community interest. The local authority was concerned that if parts of the river were included in the list, the dredging operations required for the shipyard would in the future and in every case thereafter have to undergo an Appropriate Assessment as required by the Habitats Directive.

42. The European Court of Justice held that if the dredging works could be considered as constituting a single operation then the works could be considered to be one and the same project for the purposes of Article 6 of the Habitats Directive. In that case, the project had been authorised before the expiry of the time limit for transposition of the Habitats Directive and, as such, was not subject to the requirement for an Appropriate Assessment under the said Directive.

43. In my opinion, the decision in *Stadt Papenburg* and other "Pipeline Cases" are of no assistance to Bulrush or Westland. These cases cover situations were permission or consent for a project had been sought before the expiry of the time limit for transposing the Directive in question. This is not the case here. Neither Bulrush nor Westland had any planning permission pending during the time allowed for the transposition of either the Environmental Impact Directive or the Habitats Directive. In my view, the submissions made by both Bulrush and Westland that they are, in effect, "Pipeline Projects" is an aspect of the more general submission that the relevant legislation offends the principle against legislation being retrospective.

Retrospection

44. In its decision, the respondent states:-

> "(h) Because the development involved in continued works to extract peat from the site requires an Environmental Impact Assessment and Appropriate Assessment then, notwithstanding Article 11 of the Planning and Development Regulations, any such works on or after 20th September, 2012, is not exempted development by virtue of s. 4(4) of the Planning and Development Act 2000, as inserted by s. 17 of the Environment (Miscellaneous Provisions) Act 2011."

45. Bulrush and Westland submit that in reaching such a decision, the Board was applying s. 4(4) of the Act of 2000 retrospectively. Making this submission, they relied on, *inter alia*:-

> (i) Section 27(1) of the Interpretation Act 2005:-
>
> "Where an enactment is repealed, the repeal does not—
>
> (a) …
>
> (b) …
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment…"
>
> (ii) Section 265(1)(a) of the Act of 2000 which provides:-
>
> "Nothing in this Act shall affect the validity of anything done under the Local Government (Planning and Development) Acts, 1963 to 1999, or under any regulations made under those Acts."

46. The submission of Bulrush and Westland on the issue of retrospection is based, to an extent, on the acceptance of the submission that their activities are a "use" development rather than a "works" development. If that submission were correct, it would mean that the respondent was, in removing the exemption, applying s. 4(4) of the Act of 2000 retrospectively.

47. In my opinion, such an argument is mistaken in that if it was a "use" development, then both Bulrush and Westland would have had the benefit of s. 17(2) as the "development" would have been completed within twelve months of the commencement of the Act of 2011, in which case s. 4(4) would not apply.

48. In previous paragraphs, I have upheld the decision of the respondent that an Environmental Impact Assessment and an Appropriate Assessment is required. Therefore, under s. 4(4), the "development" by Bulrush and Westland is no longer an "exempted development". The removal of the exemption is not retrospective. Section 4(4) does not make unlawful that which was lawful at the time it was done. The effect of s. 4(4) is prospective. Bulrush now require planning permission for their activities. The wording of s. 4(4) which gives rise to this is clear and unambiguous.

49. For many years, both Bulrush and Westland enjoyed the benefit of their "development" being an "exempted development". Once such a benefit has been given, it does not follow that it can never be limited or removed in its entirety. There are many activities which were once free of regulation but are now subject to regulation. Peat extraction is one such activity which is now subject to regulation arising out of its effect on the environment. As was stated by O'Neill J., in the context of a quarry, in *M&F Quirke & Sons v. An Bord Pleanála* [2009] IEHC 426:-

> "Over the years the area in which a quarry is located may change significantly, so that the effects of the quarrying operations on the surrounding area may be very different to the effects in 1964. Developments in environmental science may now make apparent environmental damage from quarrying which was not known in 1964. Apart from statutory provision, the law of nuisance has long recognised that activity carried out on land may be restrained where that activity causes deleterious effects to escape which cause damage to adjoining property. It could never be said that there was an unrestricted right to use property for any activity, including quarrying, regardless of the effects that activity had on the enjoyment of other persons of their lives, health and properties. Many activities are regulated and restricted in a variety of statutory codes in the interest of the common good. I see no difference in principle or in substance between these statutory regulatory regimes and the type of regulation provided for in s. 261(6). In all cases the activity restricted by statute would have been unregulated or unrestricted before the enactment of that type of legislation."

Further Matters

50. Bulrush and Westland seek to impugn the respondent's decision as it covers "access from public roads" and "peat handling activities". However, it would appear that peat handling activities and access roads are clearly linked to peat extraction activities.

51. The Environmental Impact Assessment Directive defines project as:-

> " - The execution of construction works or other installations or schemes.
>
> - Other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources…"

52. It seems to me that peat handling activities and access roads would form part of the peat extraction "project" for the purpose of the said Directive. Therefore, I would uphold the decision of the Board in this regard.

Conclusion

53. It follows that neither Bulrush nor Westland are entitled to an order of *certiorari* quashing the decision of the respondent dated 15th April, 2013.