THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 707

RECORD NO. 2013/567JR

BETWEEN

FURSEY MAGUIRE, IVAN PRATT AND FRANK PRATT T/A FRANK PRATT AND SONS

APPLICANTS

- and -

MEATH COUNTY COUNCIL

- and -

AN BORD PLEANÁLA

- and -

IRELAND & THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2020/438JR

BETWEEN

PHOENIX ROCK ENTERPRISES LIMITED T/A FRANK PRATT & SONS LIMITED

APPLICANT

- and -

AN BORD PLEANÁLA

- and -

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Niamh Hyland of 12 December 2022

Introduction

1. This judgment encompasses two sets of proceedings, *Fursey Maguire, Ivan Pratt and Frank Pratt t/a Frank Pratt & Sons v Meath County Council & Ors* (Record No. 2013/567JR) and *Phoenix Rock Enterprises Limited t/a Frank Pratt & Sons Limited v An Bord Pleanála & Ors* (Record No. 2020/438JR). Both cases are concerned with the Moyfin quarry near Longwood in Co. Meath and its status from a planning point of view.

2. The first case concerns a challenge by the owners of the quarry to a decision of Meath County Council (the "Council") in 2012 under s.261A(4)(a) of the Planning and Development Act 2000 as amended (the "2000 Act") that the Moyfin quarry required a mandatory Environmental Impact Statement ("EIS") and an Appropriate Assessment ("AA"). This decision was upheld by An Bord Pleanála (the "Board") by decision of 29 May 2013. Following the Board's decision, the Council served an enforcement notice dated 24 June 2013 on the first applicant and a second enforcement notice of the same date in identical terms on the second and third applicants. The Council's decision, the Board's decision and the enforcement notices are all the subject of challenge in these proceedings.
3. The proceedings are of some antiquity at this point. This is explained by the fact that, when they finally came on for hearing on 12 November 2018, an agreement was reached between the parties that the proceedings would be adjourned pending an application by the operator of the quarry to the Board for leave to seek substituted consent under s.177C of the 2000 Act. Section 177D provides the Board may grant leave where it is satisfied that an EIA or AA AA was or is required and is further satisfied, *inter alia*, that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.
4. That application for leave to apply for substitute consent was duly made by the operator of the quarry, Phoenix Rock Enterprises Ltd. ("Phoenix"), who operates the development pursuant to a licence granted by the first applicant. On 11 March 2020, the Board refused the applicant leave. The second set of proceedings are concerned with a challenge to that decision. The refusal by the Board to grant leave prompted the applicant to set the *Fursey Maguire* case down for determination. It was decided that both cases would be heard together due to the inter-related nature of the issues raised.

5. In both sets of proceedings, the constitutionality of various legislative provisions has been challenged and Ireland and the Attorney General are parties to both sets of proceedings. It has been agreed in both sets of proceedings that the case against Ireland and the Attorney General should not proceed until the case against the other respondents is determined. Therefore, in this judgment, I do not consider the constitutionality of the legislation impugned by the applicants.

FURSEY MAGUIRE PROCEEDINGS

Factual Background

6. Leave was given by Peart J. to bring those proceedings on 15 July 2013 in respect of (a) the decision of the Council of 1 August 2012 that the applicant's quarry required a mandatory EIS and an AA under s.261A(4)(a), (b) the decision by the Board of 29 May 2013 to uphold the decision of the Council; and (c) the enforcement notices issued by the Council on 24 June 2013. The Order of 15 July 2013 granting leave does not in fact stay the enforcement notices but rather gives leave to seek an Order staying the notices. However, as is clear from the documents issued by the Council post the grant of leave, all parties appear to have treated the grant of leave as a stay on the enforcement notices.

Arguments of the Parties

7. Prior to the s.261A decision made by the Council in 2012, the Council had registered the quarry under s.261 of the 2000 Act and imposed conditions in 2007. By so doing, the Council accepted the first applicant's submission that the quarry at Moyfin benefited from pre-1964 user status. The applicants plead in the Statement of Grounds that it is not open to the Council, having determined pursuant to s.261 that the quarry was a pre-1964 quarry, to subsequently change its mind and 7 years later make a new determination to the effect that the development did not commence prior to 1 October 1964 in the context of the

s.261A decision. It is argued that if s.261A operates in a manner to permit an authority to act in this way, then it is unconstitutional.

8. It is also pleaded that the applicants had a legitimate expectation that the determination made under s.261 in 2007, and the conditions attached, would remain binding on the applicants and the Council.

9. The applicants further plead that they were given no opportunity to address the Council in respect of the pre-1964 user of the lands and in particular, no chance to address the Council on the aerial photography considered by it when deciding in 2012 that the quarry did not benefit from the pre-1964 user. It is pleaded the decision was in breach of natural and constitutional justice and fair procedures.

10. It is argued that the applicants have been significantly prejudiced, in that works were carried out lawfully pursuant to the registration and conditions and the Council has now retrospectively deemed those works unlawful. The applicants argue that, had they been aware of the view that the proposed development was not commenced pre-1964 and therefore required planning permission, same could have been applied for, but as of the date of the proceedings it was no longer possible to seek planning permission.

11. It is pleaded that the enforcement notices are contrary to natural and constitutional justice in circumstances where it is accepted by all parties that development occurred on the said lands from the mid-1990s onwards. Accordingly, the development has been carried out for in excess of 7 years. The applicants also plead that, by serving an enforcement notice, the Council is purporting to enlarge the 7 year period within which prosecution or enforcement action could be commenced.

12. As against the Board, the applicant pleads that the Board was wrong to rely upon the aerial photographs in circumstances where the quarry is a sand and gravel quarry and during periods of inactivity the quarry quickly grows over with grass and shrubs and therefore

aerial photography is not conclusive of user. Reference is also made to the fact that three-dimensional projections from the aerial photography clearly demonstrates that there is a hollow in the north-eastern area consistent with the extraction of sand and gravel from this area. The applicants plead that there was no information before the Board or the Council that would entitle them to form the view that no quarrying occurred on the site prior to 1964, and that it was incumbent on the Board to seek further submissions or observations in respect of the aerial photography. Finally, it is pleaded that the quarry is part of a much larger landowning owned by the first applicant and on the appointed day it was always in consideration that the subject lands would be developed as a quarry and extraction works had occurred on the north-eastern end of the site.

13. At the hearing, it was made clear that the arguments against the Council summarised above are also made against the Board.

14. The Board, in its Statement of Opposition of 25 July 2018, pleads that in respect of s.261A(2)(a)(i), it determined that development was carried out after 1 February 1990 which would have required an EIA under the Environmental Impact Assessment Directive (the "EIA directive"). Similarly, in respect of s.261A(2)(a)(ii) it determined that development was carried out post 26 February 1997, that with regard to the Habitats Directive, would have required an AA.

15. Further, with respect to s.261A(4)(a) the Board pleads that it had not been established that the quarrying activity commenced before 1 October 1964 and that no planning permission had been granted in respect of the site. In relation to each of these points, the Board argues it had sufficient evidence upon which to base its conclusion and identifies that evidence. In respect of its conclusion on the lack of pre-1964 quarrying activity, it refers to the documentation on the Council's review file (planning authority register reference number QY23, including aerial photography and details of site registration), the request for review

from the first applicant, the submissions and observations received and the Inspector's reports. The Board pleads that the applicants are not allowed to pray in aid evidence or matters that were not before it.

16. In relation to the review process, the Board pleads that it considered the documentation on the review file and the details of site registration as well as the matters referred to in its decision, coupled with submissions and observations as well as the contents of the applicant's request for review. The Board was under no obligation pursuant to s.131 to seek further submissions. The Board had adequate information to proceed to a decision.
17. In respect of the argument that the Council was precluded from "changing its mind", the Board submits that this is predicated on a misunderstanding of the procedure under s.261. The Board argues that neither the registration process nor the imposition of conditions under s.261 pre-determines the exercise required to be undertaken under s.261A. Additionally, it is argued that neither the requirements set out in the imposed conditions, nor the factual conclusions upon which they were premised, or the manner of their communication, precluded the Board from coming to the determination it did.
18. Because the Board's decision replaces that of the Council, I will refrain from adjudicating upon the legality of the Council's decision, although any arguments made in respect of the alleged illegality of that decision are dealt with in the context of my review of the Board's decision to the extent that they are relevant.
19. Nonetheless, for the sake of completeness, I will briefly summarise the submissions of the Council. First, it argues that the registration and imposition of conditions does not confer any pre-1964 user exemption status on a quarry so registered and no legitimate expectations can arise out of the s.261 process, by reference to case law including *Pierson v Keegan Quarries* [2009] IEHC 550, *McGrath Limestone v An Bord Pleanála* [2014] IEHC 382 and *JJ Flood & Sons v An Bord Pleanála & Ors* [2020] IEHC 195. It is argued

that the imposition of conditions by the Council following the s.261 registration process was not a substitute for planning permission.

20. In respect of the decision of the Council made pursuant to s.261A, it points out that it was made following a detailed examination of the history of the quarry. No such examination was carried out or required by the Council pursuant to the registration process carried out pursuant to s.261. The Council's determination is supported by the material and evidence before it and was not determined by a single photograph as contended for by the applicant.
21. It is denied that the applicants were not afforded any opportunity to address the Council in respect of the pre-1964 user of the land. The applicants only submitted minimal evidence of the pre-1964 use when making submissions. The applicants have sought in these proceedings to rely on additional information in the form of a three-dimensional map of aerial photography, but the Council points out that this evidence was not submitted to either the Council or the Board despite the applicants having been given every opportunity to submit such evidence.

Section 261 and 261A

22. It may be seen from the above summary of the arguments that a core aspect of the applicants' challenge to the decision of the Board is their claim that a 2007 decision of the Council under s.261 of the 2000 Act, whereby the quarry at Moyfin was registered and conditions imposed on its operation, meant that the Board was not entitled to arrive at a decision under s.261A of the 2000 Act that the quarry required an EIA and AA. This argument is based on the theory that the conditions imposed in 2007 amounted to a prior authorisation that prevented a negative finding under s.261A. To understand this argument, it is necessary to describe s.261 and conditions imposed thereunder in some detail, as well as the regime introduced under s.261A.

23. Section 261 was enacted to regularise the position of quarries. As explained in the guidelines for planning authorities issued by the Department of the Environment in April 2004 on quarries and ancillary activities, s.261 introduces a new system of registration for all quarries. The registration system has two purposes – to give a snapshot of the current use of land for quarrying and where necessary, to permit the introduction of new or modified controls on the operation of certain quarries.

24. It required an owner or operator, not later than one year from the coming into operation of the section, to provide to the planning authority in the functional area in which the quarry was situated, information relating to the operation of the quarry. On receipt of such information, the planning authority was required to enter it into a register. The information required included the area of the quarry, including the extracted area delineated on a map, data from quarrying operations on the land, as well as other information. Section 261(6)(a)(i) provided for the imposition of conditions on quarries so registered, provided the quarry had commenced operation before 1 October 1964. Alternatively, under s.261(6)(a)(ii), where a quarry had planning permission, the local authority could restate, modify, or add to conditions imposed on the operation of that quarry.

25. Following the enactment of s.261, the legal landscape changed considerably in relation to quarries. The evolution of the obligations on quarrying operators has been set out in some detail in the decisions of *JJ Flood* and *McGrath Limestone Works Ltd.* and I do not propose to repeat same. In short, the decision of the CJEU in Case C-215/06 *Commission v Ireland* (ECLI:EU:C:2008:380) necessitated the removal of the facility to apply for retention permission for developments requiring an EIA under the EIA Directive other than in exceptional or unusual circumstances. The relevant changes were introduced by the Planning and Development (Amendment) Act 2010 (the "2010 Act") and the Environment (Miscellaneous Provisions) Act 2011 (the "2011 Act").

26. One of the most significant legislative changes introduced in Ireland following the CJEU decision was the enactment of s.261A pursuant to the Planning and Development (Amendment) Act 2010 ("2010 Act"). That required every planning authority to make a determination in relation to every quarry within its administrative area as to whether development carried out after 1 February 1990 would have required an EIA and whether development after 26 February 1997 would have required an AA and whether same were in fact carried out. Assuming the local authority in question concluded that an EIA/AA was required, it was then required to look at the planning history of the quarry under s.261A(3)(a). Only quarries that either had planning permission or had commenced operation before 1 October 1964 and had fulfilled registration requirements under s.261 (if imposed) could automatically seek substituted consent from the Board.

27. If a quarry did not fulfil these conditions, then the local authority was obliged to issue an enforcement notice under s.261A(4)(a). The local authority had no discretion in this regard. As I describe in more detail below, this was the situation the first applicant's quarry was in following the s.261A review because the Council decided the quarry at Moyfin had not commenced operation before 1 October 1964 and therefore was not entitled to seek substitute consent as of right.

28. However, the system of substituted consent for the regularisation of developments coming within the scope of the EIA Directive or the Habitats Directive (introduced by s.57 of the 2010 Act which inserted a new Part XA into the 2000 Act) provided various "gateways" to obtaining substituted consent. One of these was a procedure whereby an applicant could apply to the Board for leave to apply for substituted consent. In deciding whether to grant leave for substituted consent the Board is obliged to consider various matters, including whether regularisation of the development concerned would circumvent the EIA Directive or the Habitats Directive and whether the applicant could reasonably have had a belief that

the development was not unauthorised. Importantly, leave to apply for substituted consent may only be granted where the Board is satisfied of the existence of exceptional circumstances justifying the potential regularisation of the quarry having regard to the matters set out at s.177D.

29. Phoenix sought leave to apply for substituted consent under that procedure. The decision of the Board in 2021 to ultimately refuse Phoenix leave is the subject of the linked proceedings, *Phoenix Rock*, dealt with below.

Registration of the applicant's quarry under Section 261

30. Returning to the situation of the applicants, an application was made by the applicant for registration of the quarry under s.261 on 14 April 2005. It was stated in the application that the lands were acquired in the early 1900's not specifically for quarrying purposes. The relevant form required the applicant to identify the date upon which quarrying commenced on the land. The applicant replied as follows: "*The quarry has been in operation sporadically since the current occupiers' grandfather's occupation of the lands a small area would have been pre-64 as shown on the map. Extended in the last 12 years to current mapped area*".

31. The total area of the quarry was stated to be 9.49 hectares and the extraction area of the quarry was stated to be approximately 3.21 hectares. The type of material being extracted was sand and gravel. An ordinance survey map was included with the form which sets out the current boundary of the site being 9.49 hectares delineated by a red line. What is described as the "current workable area" of 3.21 hectares is delineated by a blue line well within the boundaries of the site with a further very small section, outside that area, but within the site boundaries on the northeast boundary of the site being demarcated as the "old quarry" delineated in green. This is an important map since it was used by the Council as the basis for the imposition of conditions in 2007. I attach this map as Appendix 1 to

this judgment to allow readers to better understand the arguments made by the parties and my determination of those arguments.

32. In answer to the question whether the quarry commenced operation before 1 October 64, the "yes" box was ticked. The annual extraction rate was taken stated to be "*Currently 50,000 tons approx. this rate is divided between 2 quarries Moyfin and Freagh*".

33. On 13 February 2007 the Council suggested a draft schedule of conditions, and submissions were made by the applicant in respect of same. By letter of 16 April 2007, it was stated the Council had decided to impose conditions under s.261(6)(a)(1) on the operation of the quarry. There were 22 conditions in all. Condition number 2 provided as follows:

> *"2. This permission shall be for a period of 10 years from the beginning of the commencement of the date of this order. After this period, all plant and machinery items shall be removed from the site and the land shall be restored to agricultural use. No quarrying/excavation shall be permitted outside the blue line as identified on the site map submitted to the Planning Authority on 21/04/2005, unless a separate grant of planning permission has been obtained."*

34. The map referred to Appendix 1 to this judgment i.e. the map submitted by the applicants when seeking registration of the quarry.

Review of the applicant's quarry under Section 261A

35. In 2012, the Council carried out the requisite review of the Moyfin quarry under the procedure established by s.261A. The process it followed is described in the affidavit of Michael Griffin, Senior Executive Officer with the Council, sworn 14 March 2014. He notes that the newspaper notice required by s.261A(1) was published on behalf of the Council on 6 December 2011. The notice invited submissions to be received by the Council before 25 January 2012. I find that by that notice, the applicants and all other quarry owners

and/or operators affected by same were warned of the possible consequences of the Council's examination. In particular, it was identified that if the Council decided that an EIA/AA was required, that a quarry had commenced operation after 1 October 1964 and that either no planning permission was obtained or the requirements in relation to registration were not fulfilled, then the planning authority would issue an enforcement notice.

36. Insofar as the applicants make a legitimate expectation argument, I observe that the notice refers to the Council potentially deciding that the quarry commenced operation on or after 1 October 1964 without permission being granted or, if applicable, that the requirements in relation to registration were not fulfilled. No reference is made to any previous acceptance of the quarry being a pre-1964 quarry. Properly construed, in my view the notice makes it clear that the Council would, in certain circumstances, decide upon the pre-1964 user pursuant to s.261A. Given the terms of the notice, it was incumbent on the first applicant when making his submission to identify all relevant information to support their contention that the quarry was a pre-1964 quarry.

37. The first applicant made a submission on 23 January 2012 through his agent Mr. Goodwin, environmental consultant. I consider the terms of that submission in some detail below.

38. On 1 August 2012, the Council issued a s.261A(4)(a) notice in respect of the quarry at Moyfin. The Council reference was QY23. It concluded that in accordance with s.261A(2)(a), having regard to the scale (in excess of 5 hectares) and characteristics of the development undertaken post the transposing of the EIA Directive, the traffic volumes generated, and noise and dust emissions from the site, the development was likely to have had significant effects on the environment and thus a mandatory EIS was required. It was also concluded that the development would have required an AA having regard to the proximity of QY23 to the tributaries feeding the River Boyne and Blackwater cSAC.

39. Moving on to its review under s.261A(4)(a), the Council concluded that the subject quarry had commenced operation on or after 1 October 1964 and no planning permission had been granted. That meant that the "gateway" permitting an application for substituted consent to the Board, without leave having to be first sought and granted by the Board, was not open to the applicant. The notice concluded that the Council intended to issue an enforcement notice under s.154 of the 2000 Act requiring the cessation of the operation of the quarry.

Decision of the Board

40. The first applicant appealed the decision to the Board by way of an appeal document again submitted by Mr. Goodwin of Enviroco Management Ltd. of 16 August 2012, not on the basis of its determination in respect of the requirement for an EIA and/AA but rather on the basis that (a) the Moyfin pit is pre-1964, noting that this was previously accepted by the Council in the context of the imposition of conditions and (b) that given the imposition of conditions and the compliance with the conditions, no further action should have been taken. The terms of the submission are considered in detail below.

41. In its decision of 29 May 2013, the Board rejected the appeal and upheld the Council's decision. Its reasons and considerations included the documentation on the review file of the Council, including aerial photography, details of the site registration, s.261, and the scale of operations at the site with an extraction area in excess of 5 hectares in June 2012.

42. In respect of the question of whether the applicant could avail of the gateway to allow it to seek substituted consent from the Board, the Board held that having regard to the fact that it had not been demonstrated to the satisfaction of the Board that the site commenced operations before the date of 1 October 1964 as well as the lack of planning permission, the gateway could not be availed of. Accordingly, the Board confirmed the decision of the Council under s.261A(4)(a).

43. Consequently, on 24 June 2013, the Council issued two enforcement notices on both the owner and the operator of the quarry requiring the cessation of the unauthorised quarrying within 4 weeks of the notice, the removal of all quarry plant and machinery from the lands within 6 months and a securing of the site.

Legal effect of s.261 registration and conditions

44. The applicant raises the question of whether it is open to the Board to uphold the decision of the Council that the quarry at Moyfin was not a pre-1964 quarry, in circumstances where the Council had previously accepted in the context of s.261 that the quarry was a pre-1964 quarry (see paragraph 25 of the applicant's written submissions). This question is at least partly answered by two decisions that post-date the bringing of these proceedings, *McGrath* and *JJ Flood*. It is clear from those judgments that the registration and imposition of conditions under s.261 do not preclude a local authority from subsequently reaching a conclusion under s.261A that an EIA/AA is required and that further steps require to be taken on foot of the absence of same. In *JJ Flood*, Ní Raifeartaigh J. identified the following question at paragraph 76:

> *"iv. Does the fact that a planning authority registered a quarry and imposed conditions upon it pursuant to s.261(6) of the PDA 2000 (as amended) preclude a later decision by the planning authority to direct the same quarry pursuant to s.261A to make an application for substitute consent?"*

45. It is true that the facts of that case were somewhat different in that the quarry in that case had been directed to make an application for substituted consent to the Board i.e. it was found to be a pre-1963 quarry, whereas here the opposite conclusion was reached, meaning the quarry did not meet the conditions permitting it to be directed to apply for substitute consent and was limited to seeking leave to apply from the Board. But that does not undermine the relevance of the conclusion of Ní Raifeartaigh J. since the issue she was

obliged to determine was whether the new regime could apply at all to a quarry registered and conditioned under s.261, and part of the applicants' complaint is that no such regime should have been imposed upon them.

46. At paragraph 100 Ní Raifeartaigh J. held as follows:

"100. For the reasons that follow, I have concluded that the imposition of conditions on a quarry in the period 2006 or 2007 cannot preclude the application by the planning authority (or the Board, on review) of the amendments subsequently introduced under the Planning and Development (Amendment) Act, 2010. This conclusion follows both as a matter of statutory interpretation (there is nothing which limits section 261A in the manner contended for by the applicants) and from first principles. Indeed, arguments in similar terms have been rejected by the High Court in McGrath Limestone."

47. She observes at paragraph 108 that the reasoning underpinning the judgment in *McGrath* is not confined to the case of a quarry which has exceeded its pre-1964 user rights:

"The judgment is predicated, in large part, on the principle that the Oireachtas is entitled to introduce new environmental controls and to apply same to existing development projects, and indeed is under an obligation to do so if this is necessary to ensure compliance with EU law. This principle applies equally to development projects which are fully compliant with their existing authorisations as to those which are not."

48. She explains why the registration and imposition of conditions does not present an obstacle to the planning authority directing the same quarry to apply for substituted consent at paragraph 112:

"112. In my view, it is clear that the entire regime of substitute consent, and the role of a planning authority in granting a direction under s.261A, was designed to bring the regulation of quarries into conformity with the requirements of the Directives. The fact that a developer may not have been at fault in any way under Irish law up to that point

did not absolve the State from having to introduce legislation to bring about compliance, the planning authority from following that legislation, or the developer from having to conform to the Directives. Therefore, even if a planning authority had registered a quarry and imposed conditions under s.261(6), this does not present any obstacle to the same planning authority, some seven years later, directing the same quarry to apply for substitute consent. It will be recalled that such a direction may be given under s.261A(3) to a quarry which has explicit planning permission. The fundamental point is that s.261A was necessary in order to bring Irish law into compliance with EU law, and that no matter what the planning status of the development under domestic law, if it otherwise falls within the scope of the Directives, it needs to regularise its position under the Directives."

49. Those passages make it clear that the argument raised by the applicants in this respect to the effect that a quarry subject to conditions under s.261 cannot be the subject of a decision under s.261A has already been comprehensively rejected. Accordingly, I do not need to consider it further.

Legitimate Expectation

50. The applicants further argue that the case law referred to above does not determine the issue of the entitlement of the Board to uphold the Council's decision on s.261A, in circumstances where previous cases did not consider the position of a quarry that had neither gone outside its pre-1964 user or had stayed within its pre-1964 user, but rather had been treated as a pre-1964 quarry when conditions were imposed pursuant to s.261. It argues that the Council and the Board were not entitled to revisit the question of whether the quarry was a pre-1964 user in the context of the s261A decision on the basis of the doctrine of legitimate expectation. They argue that the Board cannot uphold the decision of the Council that the quarry was not a pre-1964 quarry where the Council had accepted

that proposition in the context of s.261. Of course, even if the Council had treated the quarry as one with pre-1964 user status, the applicants would still have been obliged to seek substitute consent – the only difference would have been that no leave would have been necessary to make such an application.

51. A similar argument was made in *McGrath*. There, the plaintiff quarry owner had challenged a decision of the Board upholding a decision of Mayo County Council to issue a notice under s.261A requiring the quarry to make an application for substituted consent under s.177E of the 2000 Act, in circumstances where the quarry had been registered under s.261 and conditions had been imposed. The parties argued that the doctrine of legitimate expectations precluded such a decision.

52. At paragraph 4.2, Charleton J. quotes his own decision in *An Táisce v Ireland* [2010] IEHC 415 where he observed that even the imposition of conditions consequent upon registration under s.261(5) does not alter the status of a quarry and that it would be wrong for the planning authority or the Board to take the lawful use of the land as having been established or implied by registration. Because of the direct relevance of his judgment to the issues raised by the applicants in this case, I quote from that judgment *in extenso*. Referring to the decision of Irvine J. in *Pierson* identified above, he opined as follows:

> *"4.3 There is no reason why that ruling is not also applicable in this case. Further, the contention of the applicant in the An Taisce case was also rejected in Shillelagh Quarries Limited v An Bord Pleanála by Hedigan J in addition to the Pierson decision therein cited. Nothing in the section enables a local planning authority to make any binding determination that a quarry if registered subject to conditions would thereafter be exempt from the need to apply for planning permission if investigation or admission uncovered, for instance, that any unauthorised development had taken place or that any declared status by quarry owners that they were outside the scope of the planning*

code because of use existing in 1964 was optimistic. That year was now 50 years ago. A lot has changed since in terms of both demand in the economy and the use of technology in quarries. Further, it is 40 years since Ireland joined what has now become the European Union and whereby, in consequence, legislation mandated supra-nationally has become dominant in our legal landscape.

4.4 Even were that not so, how can legitimate expectation seemingly arise from the simple steps taken by Mayo County Council? It is argued that when Mayo County Council did not direct that an application for planning permission be made pursuant to section 261(7) but, instead, imposed conditions under section 261(6), it was decided definitively that the quarry was outside the planning code by reason of use prior to October 1964. Further, it is argued that this decision also represented that its continued operation would not be likely to have a significant effect on the environment or on any European Site. Part of this argument is a contention that in the course of deciding whether a section 261(7) application for planning permission was required of any quarry owner registering a quarry, the planning authority was required to be satisfied that the user of the lands was established and that therefore the quarrying was authorised.

4.5 If there is any ground upon which the principle of legitimate expectation might apply, there would first of all have to exist at least that level of unequivocal declaration that supports estoppel in private law. This is absent on the facts of this case. Reading the correspondence, all that is apparent is that McGrath Limestone Works argues that an environmental impact assessment need not be engaged because of what are claimed to be high existing levels of environmental protection on site and suggest conditions instead. Mayo County Council made no declaration such as that they accepted this or that they had inspected the site thoroughly and that no impact on the environment or

on protected habitats could possibly arise either then or into the future. It would be hard to imagine any local planning authority being inspired into any such declaration. Such a decision would be astonishing. Further, there is nothing on the facts which could amount to declaration, much less an unequivocal representation, that the status of the quarry had been decided for ever and from that point on. Nothing changed in the former status of the quarry either because of registration or because of the imposition of conditions of operation on the quarry. Any representation sufficient to have set up a legitimate expectation would, in this instance, have been a trespass into the sovereign authority of the State under Article 6 of the Constitution.

53. I adopt the reasoning in those paragraphs. As he observes, the imposition of conditions pursuant to s.261 cannot operate as a bar against a local planning authority conducting investigations with a view to enforcing the planning code. He explicitly identifies that even in the context of a s.261 registration, a planning authority could revisit the question of a quarry's pre-1964 status. It is hard to see why a planning authority would be permitted to revisit this issue in the context of s.261 but not in the context of s.261A which required a complete review of the status of quarries all around the country. In this case, a detailed investigation was carried out pursuant to the s.261A process and the Council concluded that the quarry had not in fact operated pre-1964. No such investigation was carried out in the context of the s.261 registration – rather the Council simply accepted the representations of the first applicant in this respect.

54. The question asked by Charleton J. i.e. how can legitimate expectation arise from the simple steps taken by the Council, is particularly apposite here. The simple step in this case was to register the quarry and impose conditions. The precise nature of the representation relied upon by the applicant has not been identified by it, let alone the kind of unequivocal declaration envisaged by Charleton J. The registration and imposition of

conditions had no such representation contained within it. The applicants have failed to even identify the nature of the alleged representation i.e. whether it is a representation that future legislation could not alter the status of the quarry or a representation that the decision of the Council to the effect that the quarry was a pre-1964 quarry could not be revisited.

55. If it is the former, I do not consider that, having regard to the authority of *McGrath, Pierson* and *JJ Flood*, and the terms of the registration and conditions, that it could be said that the imposition of conditions in 2007 was an unequivocal representation that the quarry would not be subject to future legislative provisions that might affect its planning status. No representation or statement to that effect was made, nor could have legitimately been made, that no future legislation would affect the entitlement of the applicants to continue quarrying works for the 10-year period identified in the conditions. The mere reference to a 10-year period cannot in my view be treated as some kind of implicit representation that the quarrying activity will not be in any circumstances affected by legislative change during those 10 years or would in some way be ring fenced or immunised from legislative changes. Even if a representation of that type could have been made – which I doubt, having regard to the comments of Charleton J. in this regard – it would have to be made in the most explicit terms possible. No such representation exists, either in the 2007 conditions or elsewhere.

56. If, on the other hand, what is being alleged is that there was an implicit representation that the decision in relation to pre-1964 use could not be revisited, again that cannot be discerned from the 2007 conditions and no representation to that effect is made. It is certainly the case that, to be permitted to avail of the s.261 regime, it was necessary to be a pre-1964 quarry. However, to treat the Council's decision to apply the s.261 regime as binding it to treat the quarry as a pre-1964 user, either for ever more or for 10 years (it is not specified by the applicant) is simply not warranted by the terms of the registration. In

fact, the 2007 decision does not make any reference at all to the commencement date of the quarry.

57. In the circumstances, the plea of legitimate expectation must fail. The Council was entitled to revisit its acceptance in 2007 that the quarry was operating pre-1964 in the context of an entirely new legislative regime. No representation had been made by the Council that it would not revisit the issue. Accordingly, the applicants cannot succeed on this argument.

Alleged breach of fair procedures by the Council and the Board

58. The next argument raised by the applicants is that, as a matter of fact, the Council and, by definition, the Board, unlawfully determined that the quarry was not a pre-1964 development. That argument has two prongs. The first is that, as a matter of fair procedures, the exercise was not carried out correctly as the applicants did not have an opportunity to be adequately heard and were not sufficiently notified of the material that the Council relied upon. The second is that the material before the Council did not justify a decision that the quarry was not a pre-64 development.

59. To understand the first aspect of this argument, it is necessary to consider in some detail the process of the Council and of the Board when arriving at their respective decisions.

The Council's decision

60. As identified above, the Council published a notice on 6 December 2011 pursuant to s.261A identifying the proposed procedure. That was replied to by letter from Kenneth Goodwin of Enviroco Environmental Consultants of 23 January 2012 on behalf of the applicant in respect of Moyfin (registration QY23). A digital map was submitted with the application. On the second page of the letter, the following statement appears:

> *"QY23 extraction pit at Moyfin was registered with Meath County Council under the requirements of section 261 of the Planning and Development Act 2000. The site was*

submitted as a pre 1964 operation, as extraction commenced in the early 1900's, which was accepted by the Local Authority.

…

Compliance with the 23 conditions, as issued under the S261 of the Planning & Development Act, 2000, was complied with over the previous 3-4 years, by the land owner and operators.

…

We trust that the Council will keep us informed concerning the Section 261A process as it pertains to this development, and should the Council wish to clarify anything they may contact this office at any time."

61. Counsel for the Board draws my attention to the fact that this statement is not the same as that which was made in respect of the application for registration in 2005 where it was stated that the quarry was *"*[*a*]*cquired early 1900s' not specifically for quarrying purposes*" and "[*t*]*he quarry has been in operation sporadically since the current occupiers' grandfather's occupation of the lands a small area would have been pre-64 as shown on the map*". The map referred to in the 2005 application for registration has a very small portion outlined in green at the top right corner which is identified as the "old quarry".

62. No other information was submitted to the Council by the first applicant. As I identify above, the first applicant must be taken to have been aware from the notice of 6 December 2011 of the possible consequences for the quarry of the Council's examination, including the possibility of the issuing of an enforcement notice requiring the cessation of the operation of the quarry if the Council determined that the quarry commenced operation after 1 October 1964.

63. Contrary to the applicants' arguments, it is not true that the first applicant was not afforded any opportunity to address the Council in respect of the pre-1964 user of the land. It may be seen from the extract from the 2012 submission that the first applicant did address the Council on this issue through their agent, Mr. Goodwin, but very little detail was provided.

64. The reasoning underlying the Council's decision that the quarry had not operated prior to 1964 may be seen from the s.261A report of 28 March 2012 sent to Wendy Bagnall, senior executive planner at the Council, from David Caffrey, executive planner. That report clearly underlies the conclusion of the Council in its s.261A determination that the quarry commenced operation on or after 1 October 1964. That report notes:

> *"As detailed the operator stated that the quarry was operational pre 1964, however from an inspection of aerial photography it is clearly evident that no excavation or quarrying works were being undertaken in 1973/74 up to and including 1994/95. Furthermore, mapping dating back to the 1960s would fail to corroborate the claim that there was a quarry on site at that time. Therefore with the information now to hand, and notwithstanding the detail submitted under Section 261 documentation the planning authority is of the opinion that the quarry did not commence pre 1964 and furthermore did not obtain any subsequent planning permissions."*

65. Reference is made in the s.261A report to a report of Mark Farrell, executive engineer, 4 April 2012, which states that the quarry extraction area surveyed was approximately 5.4 hectares and has yielded 490,000 tonnes of sand and gravel. Ordinance survey aerial photographs are attached to that report dating from 1973/74, 1994/1995, 1999/2000, 2004/2005, and 2009/2010. As noted by the Board's Inspector when the matter was appealed, photography from 2009/2010 indicates a substantial increase in quarrying extending over the boundary of the QY23 s.261 registration area. I attach the photo from 2009/2010 as Appendix 2 to this judgment.

66. In relation to an EIA, it is concluded in the s.261A report that excavation did not commence until post-1994 and as such the provisions of the EIA directive were applicable.

67. The crux of the applicants' case in respect of a want of fair procedures is that they were not shown the aerial photographs, they were not invited to comment upon them, that the Council did not enquire or seek further information from the first applicant and that, in those circumstances, they did not have an opportunity to comment upon the material relied upon by the Council to make its decision.

68. In the affidavit sworn by Mr. Griffin, Senior Executive Officer assigned to the planning department of the Council, on 14 May 2014, there is no averment to the effect that the aerial maps were supplied to the applicant or that they were available to the applicant by inspecting the public file. Equally, there is no averment from any of the applicants as to the availability of the maps or any efforts that were made to obtain the maps. There is not even an averment to the effect that any of the applicants did not see the maps, although that premise underlies the argument. It is submitted by counsel for the Council that the maps would have been on the public file, but this is controverted by counsel for the applicants. In short, there is no evidence before me as to the situation in relation to the availability of the maps to the public. However, as I have already observed, there is no necessity for me to decide upon the validity of the Council's decision. Rather I must consider the legality of the Board's decision and accordingly, I must look to the process before the Board in this respect.

The Board's decision

69. In its appeal to the Board against the Council's decision, Enviroco submitted a letter of 16 August 2012 wherein it stated under the heading "*Background to appeal*":

> "*QY23 extraction pit at Moyfin was registered with Meath County Council under the requirements of section 261 of the Planning and Development Act, 2000. The site was*

submitted as a pre 1964 operation, as extraction commenced in the early 1900's which was accepted by the Local Authority.

…

Our client contests the decision by the Local Authority that the Moyfin Extraction Pit is post 1964. Activities commenced within the boundary of the accepted S261 boundary in the 1950's, which was accepted and acknowledged by Meath County Council during the initial registration of this pit. Meath County Council have not furnished any evidence to the landowner, site operator or consultants to contract this previously accepted decision".

70. The last paragraph of that letter provides as follows:

"*We therefore request that the Bord, as the competent body for referral, reviews the files as held by Meath County Council regarding this extraction pit and where evidence is not supplied of the extraction pits pre 1964 status, amend the decision by the Local Authority to either enable the site operators to continue with their activities, or to request of them an EIA/AA".*

71. The submission is remarkable for the absence of material on pre-1964 use. It puts forward no evidence of pre-1964 user at all. In fact the submission is internally inconsistent, on the one hand referring to extraction commencing in the early 1900's (which itself is contrary to what was said in the 2005 application which refers to the site being acquired in the early 1900's not specifically for quarrying purposes) and on the other referring to activities commencing during the 1950's within the s.261 area. It also claims the local authority accepted that activities commenced in the 1950's but does not reference any source for this claim. Most significantly it did not seek to interrogate the material that the Council had used in deciding that the quarry commenced post 1964.

72. The decision of the Council clearly states that the quarry commenced operation after 1 October 1964. In appealing that decision to the Board, the applicant bore the burden of proof. The applicant, on its own case, did not know the basis upon which the Council had come to a decision in relation to pre-1964 use. Indeed, that is clear from Mr. Goodwin's letter, which clearly envisages that the Board should review the evidential basis for the decision in relation to the pre-1964 status.

73. In those circumstances, in my view, the onus was on the applicant to contact the Board to seek to obtain the evidence relied upon by the Council, and to controvert that evidence if it wished to do so. Instead, the expert retained by the applicant simply asked the Board to review the evidence and to act accordingly. That is precisely what the Board did. The supplementary revised Inspector's report of 3 May 2013 by Michael Dillon, Inspector, lists the matters considered by the Council in its assessment. It includes annotated OSI maps and aerial photographs dating from 2009/2010, 2004/2005, 1999/2000, 1994/1995, and 1973/1974. At paragraph 9.1.4 of the Inspector's report, he discusses the aerial photography and indicates that the photography from 1973/1974 indicates no quarrying within the site of QY23 as registered by the Council under s.261. He observes that quarrying on the opposite side of the access road is clearly visible in this aerial photograph. A similar position appears from the photography from 1994/1995. He says the first indication of quarrying at QY23 is on the colour aerial photograph 1999/2000. Colour photography from 2004/2005 indicates an expansion of quarrying. Photography from 2009/2010 indicates a substantial increase in quarrying extending over the boundary of the QY23 s.261 registration area. He notes that since the time of the latest aerial photograph, quarrying has advanced further to the north and to the west.

74. At paragraph 9.2.1, he notes that the Council estimated an extraction area of 5.4 hectares in June 2012, but he estimates the extraction area to be approximately 7 hectares as at the

date of his report. The EIA Regulations 1989 and the Local Government (Planning & Development) Regulations 1990 required quarries with extraction areas in excess of 5 hectares to be subject to an EIA. Given the extraction areas, he says there is no question but that the historical and continued quarrying at this site would have required/does require an EIA.

75. At paragraph 9.4.2 he notes that the owner of the quarry contends the quarry has been operational since the 1900's and that extraction took place in the 1950's. He notes the ordnance survey map from 1912 does not indicate any quarry within this quarry site although a gravel pit is clearly marked on the opposite side of the road to the west. He notes aerial photography from 1973/74 indicates there is no quarry within the quarry site and points out the aerial photograph indicates the quarry does not have the benefit of a pre-1964 user. He concludes that as the quarry neither had the benefit of the pre-1964 user or a valid planning permission the Council had no option but to issue a decision under s.261A(4)(a) notwithstanding that the quarry was registered and conditions attached. He notes that the fact that the Council accepted under s.261 that the quarry had a pre-1964 user does not establish such a use where it would appear from evidence submitted that no such use existed pre-1964. Accordingly, he recommends that the notice requiring cessation of operation should be confirmed.

76. The Board confirmed the Council's decision under s.261A(4)(a) having regard to the fact that "*It has not been demonstrated to the satisfaction of the Board that the site commenced operations before 1st day of October, 1964*" and because no permission had been granted in respect of the quarry.

Fairness of Board's procedures

77. There is no factual basis for the argument that the first applicant had no chance to submit his own view. He made a submission through his consultant, Mr. Goodwin. If the first

applicant had wished to make submissions on the evidence that subtended the Council's decision that the quarry was not a pre-1964 operation, it was incumbent upon him to seek that evidence so that he could put forward contrary evidence to the Board.

78. Had the applicant sought the evidence relied upon by the Council from the Board, he would likely have seen the aerial photography and maps relied upon by the Council and would have had an opportunity to state his views on same. If that material had not been forthcoming, he might well have been able to make the argument now sought to be made i.e. that he had no access to the evidence relied upon by the Council and therefore could not be properly heard on the appeal. However, that is not the factual situation. The applicant's own expert was content to simply ask the Board to review the material without seeking to obtain that material himself.

79. The passage of Ni Raifeartaigh J. in *JJ Flood*, where a similar argument was made, is apposite here:

> *"130. The bottom line, in any event, is that the planning authority published notice of its intention to do what it was required to do under s.261A. The parameters of what was to be examined were explicit. None of this is in dispute. The applicants therefore had notice of what was going to be carried out and had an opportunity to make submissions at that point but chose not to do so. They could have put in any information they wished to at that stage, concerning the facts. They would not have been constrained in any way. The applicants also had, and exercised, the right to make submissions to the Board in the reviews conducted by the Board (on the applicants' request as well as that of An Taisce). The procedures under the section seem entirely acceptable to me, and the problem (if any) seems to be caused by the applicants' failure to submit evidence and make observations after the planning authority published notice of its intention to examine all quarries in its area together with the precise parameters of that exercise".*

80. Many of those observations apply here. The applicants knew the nature of the s.261A procedure and the consequences of a decision that the development came under s.261A(4)(a). They could have sought information they needed, either from the Council or from the Board. They could have advanced any information they wished to the Board in their appeal. They were not constrained in any way. However, the applicants did not put forward any meaningful evidence in relation to the pre-1964 user and were content to leave it to the Board to review the files held by the Council, as identified in Mr. Goodwin's letter of appeal. In those circumstances they cannot now complain of not being heard in respect of the Board's conclusions having reviewed the files. They were not heard on the issue of the pre-1964 user for the simple reason that they did not seek to be heard on this point.
81. In all the circumstances, I cannot agree that there was an absence of fair procedures in the manner the Board dealt with the appeal, or that it failed to allow the applicant to be properly heard.

Alleged lack of evidence supporting Board decision

82. Turning to the second prong of the applicant's argument, it is alleged that there was a lack of evidence supporting the Board's decision. Counsel for the applicant complains about the passage cited above in the Inspector's report, arguing that the only consideration supporting no pre-1964 use is a single photograph. He also argues that there is no reference to the quarrying on the north-eastern side and the applicant had no chance to submit its views, including the arguments raised in these proceedings that grass grows during periods where there is no active quarrying and therefore might obscure the evidence of previous quarrying, as well as those based on the digital map sought to be introduced.
83. I have already recited above the material relied upon by the Inspector to support the conclusion that there had been pre-1964 use. The Inspector's report and the material referred to therein were clearly relied upon by the Board. In its decision, the Board

explicitly has regard to the documentation on the review file including aerial photography and details of the site registration under s.261, as well as the scale of operations at the site with an extraction area in excess of 5 hectares in June 2012.

84. The applicant complains that the only evidence relied upon by the Board was a single photo and that this was an insufficient basis for the conclusion reached. In fact, that is incorrect. The Inspector refers to both a 1912 map – relevant where at least on one of the fact scenarios posited by the applicant the quarrying started in the early 1900's – and to the aerial photograph from 1973/74. The only basis upon which I could disturb the finding of the Board in this respect is if there was no material upon which it could base its conclusion, or the material was manifestly unsatisfactory. That is not the case here. There is a map and a photo, from different eras, both of which support the conclusion of the Board. In the circumstances, the applicant has not made out a basis to disturb the conclusion of the Board in this respect.

85. The applicant argues that the *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 approach cannot be applicable here given that this is a fundamental rights case. Reliance is placed upon the decision of Hogan J. in *Efe v Minister for Justice & Ors* [2011] 2 IR 798, with the applicant arguing that this judgment means that where constitutional rights are at issue, the "no evidence" approach is at odds with those constitutional obligations. To evaluate this argument, it is necessary to closely consider the part of the judgment relied upon. Hogan J. notes that what is at issue is the likely effect of the deportation on the applicant's family in general and children in particular. He notes these decisions engage fundamental rights under Article 41 of the Constitution, the protection of which is the solemn duty of the Court. He observes *"[a]ny rule of law which purported to constrain this Court from protecting these rights…would simply be at odds with these constitutional obligations*." It is clear that his comment was made in the particular context of Article 41 which deals with the family.

This case does not engage any Article 41 rights. Moreover, the evidence relied upon was credible and substantial. In the circumstances I cannot agree that the evidence before me is so scant or unsatisfactory that I should quash the decision.

New evidence and/or arguments sought to be introduced by the applicant

86. In the Statement of Grounds, it is pleaded that during periods of inactivity or low activity, the quarry quickly grows over with grass and shrubs and accordingly aerial photography is not conclusive of the user. It is argued that from 1995 onwards quarrying activities can be seen occurring on the lands. It is pleaded that close examination of the 1973 photo reveals clear activity in the north-eastern quadrant of the site which is consistent with the submissions made by the first named applicant in the context of the s.261 registration.

87. Unfortunately, these arguments all postdate the decision of the Board. In respect of the argument about the grassland, no reason is given as to why that argument was not made to either the Council or the Board. I cannot take that argument into account at this stage of the proceedings, given that I am simply reviewing the legality of the Board's decision and not carrying out a fresh review of my own. Nor did the applicant make any arguments about the correct interpretation of photos to the Board, since as identified above it never sought to obtain the material relied upon by the Council. It cannot do so for the first time now.

88. As noted by the Council in its Statement of Opposition, the applicants went so far as to seek to introduce aerial photography in these proceedings never put before the Board or the Council, to support a proposition that there had been usage pre-1964. In the Statement of Grounds, it is pleaded that three-dimensional projections from the aerial photography clearly demonstrate that there is a hollow in the north-eastern area consistent with the extraction of sand and gravel from this area. It became clear at the hearing that the aerial photography referred to was material introduced only in these proceedings following an

affidavit sworn by the applicant's solicitor at my request during the course of the hearing to clarify the provenance of this photo. This affidavit makes it clear that the photography sought to be relied upon had never been placed before the Board. In the circumstances I cannot take it into account in adjudicating upon the legality of the Board's decision.

89. It is also pleaded in the Statement of Grounds that the quarry was part of a much larger landholding owned by the applicant, that quarrying works have been carried out across the lands, that at the appointed day it was always in consideration that the subject lands would be developed as a quarry, that extraction works had occurred on the north-eastern end of the site and that accordingly the said user was pre-1963. Again, none of this evidence was put before the Board in this respect. In the circumstances I cannot take it into account now.

Enforcement Notices

90. The applicant also challenges and seeks to quash the enforcement notices served on the applicants on 24 June 2013. Those notices were served pursuant to the Council's obligation under s.261A(9) which directs the planning authority to issue an enforcement notice under s.154, *inter alia*, where the Board have confirmed the decision of the planning authority.

91. It is clear from the terms of those provisions that the enforcement notices were issued pursuant to a mandatory statutory provision. The applicant had reviewed the decision of the Council and the Board had confirmed the decision. In the premises there is no basis for arguing the Council acted unlawfully in issuing them. It was obliged to issue them and had no discretion in the matter.

92. Separately, it is argued that s.157(4)(aa) and (ab), are unconstitutional as they purport to enlarge a statutory time limit within which enforcement proceedings may be brought. As previously noted, the arguments raising constitutional issues are not being determined at this point.

Stadt Papenburg

93. In its legal submissions, the applicant seeks to make an argument under Case C-226/08 *Stadt Papenburg v Bundesrepublik Deutschland* (ECLI:EU:C:2010:10) where the CJEU held that if the project has been authorised before the expiry of the relevant time limit for the EIA Directive, it is not subject to requirements relating to the procedure for prior assessment. The applicant seeks to argue that the within quarry operation constituted a single operation in that it comprised a pre-1964 development of lands to a finite point and therefore the need for a development consent and/or EIA did not arise. The applicant acknowledges the decisions in *JJ Flood* and *McGrath* but says those decisions can be distinguished as they concern directions to apply for substitute consent rather than a direction requiring the service of an enforcement notice.

94. There are various problems with this argument. First, no leave was given in respect of it and therefore I do not accept that the applicants are entitled to raise it at this point in time.

95. Even if that were not the case, this is not an argument open to the applicants in circumstances where the Board have held that this is not a pre-1964 development and I have upheld that conclusion. Therefore, the applicant cannot rely on a pre-64 development point. Finally, even if that were not the case, *JJ Flood* and *McGrath* have already decided that the fact of pre-1964 user is not determinative of the issue as to whether an EIA is required. For those reasons I cannot entertain the applicant's arguments in this respect.

Conclusion

96. For the reasons set out in this judgment, I refuse the application for judicial review in respect of the Board's decision of 29 May and the enforcement notices issued by the Council.

PHOENIX PROCEEDINGS

97. I turn now to the next set of proceedings i.e. those brought by the operator of the quarry, Phoenix Rock Enterprises Ltd. ("Phoenix"), challenging the decision of the Board of 11 March 2020 to refuse leave to bring an application for substituted consent.

98. As with the previous case, the issues raised by the applicant against Ireland and the Attorney General i.e. the constitutionality of the legislation, have been left over pending the outcome of this challenge to the Board's decision. Accordingly, I do not address those constitutional arguments in this judgment.

Legislative scheme

99. Because of the centrality of the terms of the statutory test in these proceedings, it is necessary to set it out *in extenso*. Section 177D is in the following terms:

> *"(1) Subject to section 261A(21), the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied –*
>
> *....*
>
> > *(b) that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.*
>
> *(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:*

(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

(e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

(g) such other matters as the Board considers relevant."

Nature of the applicant's challenge

100. There are five core points made by the applicant in its challenge to the Board's decision:

a) Having decided that the s.261 recognition and conditions were not relevant for the purposes of the s.261A decision in 2013, the Board was not then entitled to rely upon alleged breaches of those conditions as the basis for its conclusions that the applicant had failed to meet the conditions under s.177D(2)(b) and (f) concerning unauthorised development.

b) Inadequate reasons were provided for the Board's decision.

c) The Board to failed to apply fair procedures, in that the applicant did not have an opportunity to be heard on the matters that formed the basis for the Board's Decision.

d) The Board incorrectly interpreted the temporal application of s.177D(2)(b).

e) The Board inappropriately applied the criteria in s.177D(2).

101. I will deal with the detail of each of those arguments in the relevant section below, as well as the Board's arguments made in response. First, however, it is necessary to rehearse the sequence of events in relation to the application for leave to apply for substitute consent.

Chronology of events in respect of application to Board for leave

102. An application for leave to apply for substituted consent was made to the Board by Tobin Consulting Engineers on behalf of Phoenix on 5 February 2019. On 12 June 2019 the Board sought further information. On 26 July 2019 the application for leave to apply was withdrawn.

103. On 30 August 2019 a further application for leave to apply for substituted consent was made by Tobin Consulting Engineers on behalf of the applicant. Reference was made in that application to the Decision of the Board of 29 May 2013 to confirm the decision of the Council, to the judicial review proceedings the subject of the previous judgment, and the agreement of the parties in relation to the application for substitute consent. The letter goes on as follows:

"*In terms of the operations, the case was under judicial review since the 15/7/2013. The case reference is MAGUIRE T/A FRANK PRATT & SONS & ORS -V- MEATH COUNTY COUNCIL & ORS 2013/567 JR. No requirement to stop quarrying was imposed by the Judicial review.*

Frank Pratt and Sons believe there is the grounds to apply for section 177 leave to apply for substitute consent

- *The operator believed that there was a recognition of the site under section 261 and operated in accordance the* [sic] *section 261 decision;*
- *There has never been any surface water discharge from the site to the nearby stream or the River Boyne and Blackwater SAC;*
- *The site operated above the groundwater table;*
- *There is no impairment to the ability to carry out a remedial EIAR; and*
- *The applicant has complied with previous planning permissions granted."*

104. On 3 September 2019 the Board wrote to the Council under s.177C(5) requesting the following documents: full documentation in respect of any other planning applications on the lands; all enforcement files in respect of the property; and all enforcement files in respect of the applicant. On 13 September 2019 the Board received from the Council full documentation in respect of QY23, as well as a reminder that information on unauthorised development files relating to that quarry had already been sent in February of the same year in the context of the first application for leave to apply for substitute consent. On this occasion, the Board decided not to seek any further information from Tobin Consulting Engineers, the applicant's agent.

105. On 16 December 2019 the Board Inspector, Ms. McCague, inspected the site. She presented her report to the Board on 23 December 2019. She concluded that, although the subject application provided limited details of the development, the Board had information on two other files with regard to the lands and those provided the Board with sufficient information to consider the application. She acknowledged that the Board had requested information from the developer in the previous application ultimately withdrawn, which information had not been supplied, but concluded that the Board had enough information to decide the application.

106. It appears that the files she refers to are the file in respect of the Board's Decision of 2013 and the file in respect of the application for the registration of the quarry in 2007. References is also made to two unauthorised development ("UD") files in respect of the enforcement notice served by the Council in 2013.

107. The Inspector refers to the existing quarry being operational on the date of her inspection for the quarrying of aggregate and to extensive areas within the quarry having been returned to an elevated mound shape, which she considers can only have been achieved with the importation of material. In her description of the chronology of events, when referring to the judicial review, she observes that no requirement to stop quarrying was imposed by the judicial review.

108. She refers to the Supplementary Revised Inspector's Report of 4 January 2013 on the s.261A review and notes that colour aerial photography from 2009/2010 indicates a substantial increase in quarrying advancing northwards and extending over the boundary of the QY23 s.261 registration area. She observes that since the time of the latest aerial photograph, quarrying has advanced further to the north and to the west. She notes quarrying has extended north over the boundary of QY23.

109. In respect of the "exceptional circumstances" analysis identified in s.177D, she considers whether the applicant could reasonably have had a belief that the development was not unauthorised. She notes development continued after the enforcement notice of 24 June 2013. She notes details of complaints received and inspections carried out by the Council that show the ongoing nature of the quarrying operations until February 2018. She points out that, from her inspection of 16 December 2019, quarrying is still taking place. She observes that the application has been made by the operator, Phoenix, whereas the owner is stated to be Fursey Maguire. She concludes that in her opinion neither the owner nor the operator could reasonably have had a belief that the development was not unauthorised.

110. The Council enforcement files are exhibited to the affidavit of Pearse Dillon, Senior Executive Officer of the Board, sworn 15 June 2021. They include a report from Mark Farrell, executive engineer with the Council, of 1 July 2014. He notes that a complaint was received regarding quarrying being carried out causing danger to the public road. He notes that on inspection on 29 May 2014, further extraction had taken place on lands outside those registered as a quarry under s.261. In his evaluation he notes he informed a Mr. Michael Griffin of the continued extraction on the lands outside those permitted under quarry registration QY23.

Board Direction and Decision

111. In its Direction of 9 March 2020, the Board focuses upon two of the criteria identified in s.177D(2). In respect of (b), i.e. whether the applicant could reasonably have had a belief that the development was not unauthorised, it decides that the applicant could not reasonably have had a belief that the development was not authorised having regard to the planning history and enforcement history of the subject lands. In respect of the criteria at 177D(2)(f) i.e. whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development, the Board states that it is evident the applicant had previously carried out unauthorised development, particularly having regard to the terms of Condition 2 of QY23, referring to the 10 year limit and the blue line that delineates the extent of permissible quarrying. In the circumstances the Board concluded that exceptional circumstances did not exist.

112. In its Direction it included a Note in the following terms:

"Note: In making its decision, the Board noted evidence of inspections carried out by the planning authority, which showed that quarrying had extended beyond the area specified in condition 2 of the conditions imposed by the planning authority under Section 261(6) of the Planning and Development Act 2000, as amended, under file ref

QY/23, and also noted the inspections carried out by Inspectors of the Board in April and December 2019, which showed that quarrying was continuing to take place, well after the expiry in 2017 of the 10-year limit imposed by condition number 2. The Board also noted that the applicants would have been aware of the conditions and limitations imposed by the planning authority, in the light of the extensive correspondence on file from the applicants' agents in relation to other conditions imposed under file QY/23, and accordingly – notwithstanding any argument that might be advanced that compliance with the planning authority's Enforcement Notice of 24th June 2013 was the subject of legal proceedings – could not reasonably have been unaware of the limitations on the operation of the quarry imposed by the planning authority's decision under file ref QY/23, including the spatial extent of the quarrying beyond the area defined in condition 2, and the time limitation to quarrying/extraction on the quarry to the ten-year period from 16th April 2007.

The Board decided not to invoke its powers under section 177L, which enable the serving of a draft direction on the applicants to cease all of part of their activity and operations on or at the subject site, having regard to the enforcement by the planning authority."

113. As may be seen from that Note, the continuation of quarrying well after the expiry of the 10-year limit, and the extension of quarrying beyond the area specified in Condition 2, are emphasised. The Board observes that the applicant would have been aware of the conditions and limitations imposed by the Council in light of the extensive correspondence on file from their agents in relation to conditions imposed in the course of the s.261 registration process. In those circumstances the Board concludes that the applicant could not reasonably have been unaware of the limitations on the operation of the quarry under the 2007 decision.

114. In its Decision of 11 March 2020, the Board refused leave to apply for substitute consent under s.177D on the basis that exceptional circumstances did not exist such that it would be appropriate to permit regularisation of the development. It concluded that the position in relation to conditions s.177D(2)(a)(c)(d) and (e) were satisfactory and did not present an obstacle to leave being granted. However, in relation to s.177D(2)(b) and (f), it:

> *"- considered that the applicants could not reasonably have had a belief that the development that has taken place was not unauthorised, having regard to the planning history and enforcement history of the subject lands,*
>
> *…*
>
> *- considered that, on the basis of the planning history and enforcement information provided by the planning authority (including details of inspections carried out by the authority), it is evident that the applicants had previously carried out unauthorised development, particularly having regard to the terms of condition number 2 of planning authority file reference number QY/23, which limited the duration of quarrying on these lands to a period of 10 years from 16th April 2007, and furthermore which did not permit quarrying/excavation outside the blue line on the site map submitted by the applicants to the authority in 2005, unless a separate grant of planning permission had been obtained."*

115. In relation to development post the enforcement notice of 24 June 2013, a combination of the terms of the Direction and the Decision suggest the Board took the view that it was not open to it to treat the development as unauthorised on the basis of the enforcement notice, given that same had been the subject of a stay in the first set of proceedings.

116. In fact, there is some dispute between the parties about whether a stay was imposed by the leave order of Peart J. of 15 July 2013 in circumstances where the Order provides *inter alia*:

"And on hearing said Counsel IT IS ORDERED that

1. *The Applicants do have leave to apply by way application for judicial review for the reliefs set forth at paragraph D in the aforesaid Statement on the grounds set forth at paragraph E therein."*

117. Those reliefs included "*(5) An Order staying the enforcement notices served on the Applicants dated the 24th of June 2013*". Leave was given to seek a stay, but no further steps were taken. Nonetheless, as I identify in the course of the *Fursey Maguire* judgment, the parties appear to have treated the Order as a substantive stay on the enforcement notice. Happily, that debate does not need to be resolved in circumstances where I am satisfied that the Board did not in fact rely upon a failure to comply with that enforcement notice as evidence of unauthorised development.

118. I conclude that to be the case, both because there is no reference to a breach of the enforcement notice in the Board's Decision and because it is apparent from the Note to the Direction that the unauthorised development focused upon is the failure to operate the quarry in accordance with Condition 2 and not the lack of compliance with the enforcement notice. I therefore proceed on the basis that the Board's conclusions in respect of unauthorised development were based on the breaches of Condition 2.

Entitlement of the Board to invoke breach of Condition 2

119. The applicant mounts a sustained attack on the Board's reliance upon breach of this Condition and argues that the Decision must be quashed on this basis. It points out that it was not allowed to rely upon the registration and imposition of conditions and its compliance with those conditions under s.261 in 2012, when the development was treated as unauthorised development and was the subject of an enforcement notice (those decisions being the subject of the proceedings in *Fursey Maguire*). Accordingly, it argues that it cannot be correct that those same conditions can now be used to treat it as having

carried out unauthorised development. In other words, it contends that if registration cannot be used to protect it against a finding that the development was unauthorised, it equally cannot be treated as legally relevant after that date. Accordingly, the conditions contained therein cannot be treated as operative or in any way legally significant and the breach of Condition 2 cannot be invoked by the Board as the basis for its Decision.

120. The Board reiterates that registration under s.261 does not change the status of a quarry. The s.261 process did not determine finally the pre-1964 status of the quarry. At the same time however, it resulted in the clear imposition of conditions on the operation of the quarry. The Board cites the decision in *Pierson* and the dicta of Irvine J. where she notes that registration subject to conditions does not alter the status of the quarry. The Board concludes that there is nothing illegal or inconsistent in it relying on the clear and undeniable fact that the quarry has operated in breach of Condition 2.

121. At paragraph 11 of its Statement of Opposition, the Board pleads that it was entirely appropriate for it to consider the breach of conditions and the planning history and enforcement information, *inter alia* in circumstances where the applicant sought leave to apply for substitute consent expressly on the basis of its contention that the operator believed there was a recognition of the quarry under s.261 and the quarry operated in accordance with the s.261 registration.

122. On one level, the applicant's argument is compelling. Superficially, one can see the seeming paradox in the fact that compliance with conditions imposed by the Council was insufficient to prevent the issuing of enforcement notices following a decision under s.261A(4), but non-compliance with those same conditions was sufficient to establish unauthorised development in the context of an application for leave to apply for substitute consent. Put more succinctly, on the applicant's case, it is unfair and inconsistent that the

compliance with the conditions cannot be relied upon to save the activity, but breach of them can damn the activity.

123. However, that argument fails to take into account the applicant's own conduct. The legal test identified at s.177D(2)(b) is directed to the *bona fides* of the developer. The question that the Board must consider is whether the developer had a reasonable belief that the development was not unauthorised. The very first ground identified by the applicant's agent in seeking leave to apply for substitute consent was the following: "*The operator believed that there was a recognition of the site under section 261 and operates in accordance the [sic] section 261 decision."*

124. In other words, consistent with its position in the *Fursey Maguire* proceedings, where it is argued that the decision under s.261A could not lawfully be made given the existence of the conditions, the applicant is relying on the conditions and its compliance with same as the basis of its entitlement to continue operating the quarry and as the justification for not being subject to the regime introduced by s.261A. It continued to operate the quarry after the enforcement notice of 2013 on the basis of its position that it was entitled to operate by virtue of the conditions.

125. In those circumstances, the Board was in my view entitled to take that argument at face value and consider if the development was authorised having regard to the terms of those conditions and whether, in accordance with the statutory test, the applicant had or could reasonably have had a belief that the development was not unauthorised. In those circumstances, it is difficult to see how the applicant can coherently argue – as it now seeks to do in these proceedings – that its failure to observe the conditions could not be taken into account by the Board in considering whether unauthorised development had previously been carried on or the applicant's belief in that regard. Where the applicant neither ceased operating following a finding that an EIA/AA was required, nor operated

in accordance with the conditions that it relied upon to assert its entitlement to continue operating, it is difficult to see how the Board were wrong in concluding that the applicant could not have reasonably believed the development was "not unauthorised".

126. In short, the applicant cannot ask the Board to treat Condition 2 as having no legal effect where it was the applicant's alleged compliance with Condition 2 that, on its own case, formed the basis of its continuing operation during the period post the Board's decision in 2013.

127. Separately, I note that the 2000 Act specifically addresses the question of the failure to comply with conditions imposed in the context of registration. Section 261(6)(aa) was inserted into the 2000 Act by the 2010 Act. It provides that: "*Notwithstanding any other provisions of this Act, the operation of a quarry in respect of which the owner or operator fails to comply with conditions imposed under paragraph (a)(i) shall be unauthorised development*".

128. The conditions referred to are those under s.261(6)(a)(i) i.e. conditions on the operation of quarries commencing operations before 1 October 1964. The effect of the legislation is unambiguous. Any failure to comply with conditions shall be considered unauthorised development. However, this section was not referred to in the Board's Decision and presumably for that reason was not referred to by either party in their pleadings or indeed their legal submissions. The question of the relevance of this provision was raised by me at the hearing with the parties and brief submissions were made on the section. But since it did not form part of the Board's Decision, I think it preferable not to address it any further or to treat it as relevant to my decision.

129. Given that I consider the Board were entitled to consider the question of compliance with the conditions, I turn now to consider whether there was evidence of non-compliance before the Board. In fact, the applicant has not seriously contended that it did not breach

Condition 2. In his affidavit of 29 June 2020, Mr. Pratt avers that during the period 2007-2012 the applicant was operating the quarry pursuant to the registration and that it expended resources and incurred borrowings to comply with the conditions and at all times operated in the belief that they were validly imposed, and the site had permission to operate. In fact, that averment is undermined by the observation made by the Board's inspector that the 2009/2020 photograph showed extensive quarrying activity outside the permitted boundary. But even leaving this aside, and accepting the averment at face value, no similar averment is included in respect of the period post 2012. In fact, no argument is made by the applicant in these proceedings either that it was not aware of the 2007 conditions, or that it was unaware that Condition 2 had been breached both in relation to the geographical scope of development or the temporal limitation. The conclusion by the Board's Inspector in her report that development was being carried out after the expiry of Condition 2 i.e. after 2017 and up to the date of the site inspection on 16 December 2019, and that development was being carried on beyond the boundary identified by Condition 2, is not contested by the applicant. The situation is in my view put beyond doubt by the material referred to by the Inspector, including a photograph exhibited as MG11 taken on 6 December 2013, that shows that extraction went well beyond the blue line at that point. I attach same as Appendix 3 to this judgment. In those circumstances, I can see no factual error in the Board's conclusion that the applicant was in breach of Condition 2.

130. Rather than engaging with the substance of this material, an argument is made by the applicant that the only relevant period of time the Board can look at when considering the conditions under s.177D(2) is from 2007 to 2012 but not later. I address and reject that argument below.

131. Nor do I agree with the argument made by Mr. Pratt in his affidavit i.e. that the Board appears to be concerned only with the development of the site since the expiration of the

10-year period in Condition 2. At page 3 of the Board's Decision, it is stated that it is evident the applicant had previously carried out on authorised development particularly having regard to Condition number 2 which *inter alia* did not permit quarrying/excavation outside the blue line on the site map.

132. Although it was not pleaded, there was some suggestion by the applicant's counsel at the hearing that subsection (f) only applies to "other" unauthorised developments i.e. developments not the subject of the application for leave to apply for substitute consent. However, when one looks at the amended Statement of Grounds, that argument is not made. Rather it is pleaded at paragraph 32 that subsection (f):

> "*applies only to previous planning permissions and unauthorised developments. It has no application to conditions imposed under section 261(7) of the Act nor does it have application to breaches of the planning code that are alleged after the subject development has been carried out."*

133. That argument is hard to understand. No principled basis is identified as to why subsection (f) cannot apply to a failure to observe conditions imposed under s.261. The reference to (f) not applying to breaches of the planning code alleged after the subject development has been carried out is equally difficult to understand in the context of this case. The development here is a continuing one i.e. quarrying, and the development cannot therefore be said to have been carried out and completed at any given point in time. In those circumstances the applicant has not laid the basis for an argument that the Board was not entitled to rely upon subsection (f) in its Decision.

134. There was some attempt at the hearing by counsel for the applicant to argue that it could not have been expected to understand that development contrary to the conditions would be unauthorised and therefore it had a belief reasonably held that the development was not unauthorised. There are various problems with this argument. First, it is manifestly

inconsistent with what was identified in the application for leave by Tobin Consulting Engineers, identified above, i.e. that the applicant was operating in compliance with the conditions.

135. Further, this argument would not dispose of the finding under (f) since no knowledge element is required under (f). It is potentially relevant to the application of (b). But that argument is not pleaded in the Statement of Grounds. Further, there is no evidential basis provided for such an argument. The affidavit of 29 June 2020 of Mr. Pratt, company director of the applicant, identifies that the lands are owned by Mr. Fursey Maguire and that the applicant operates the lands as a commercial quarrying operation under a licence. Between paragraphs 8 – 15 he avers:

"(8) When the applicant took occupation of the quarry, it believed the site to be a bona-fide pre-1963 quarry. At great expense, the applicant as operator of the quarry complied with the said conditions. At no time did the appellant have any grounds for apprehending that the quarry was unauthorised, nor did the applicant apprehend that the quarry was unauthorised. The applicant had been assured the quarry had an established user, a fact recognised and accepted by the Council.

(9) However, some 7 years later in 2012, pursuant to the provisions of section 261A of the PDA 2000, the Planning Authority came to consider the quarry afresh. The applicant made submissions to Meath County Council in respect of the quarry.

(10) Notwithstanding these submissions, to the applicant's great surprise, Meath County Council determined pursuant to Section 261A(4) of the Planning and Development Act, 2000, as amended, that the proposed development was not, as a matter of fact a pre-1964 development. This determination was contrary to the earlier

determination reached by Meath County Council in the context of the Section 261 registration in 2007.

…

(15) During the period 2007 – 2012, the applicant was operating the quarry pursuant to the 261 registration. The applicant was a stranger to the matters that occurred in the 1970s or at any time prior to its association with the site from 2000 onwards, The applicant expended considerable resources and has incurred substantial borrowings in order to comply with the conditions attached to the section 261 conditions and at all times operated in the belief that they were validly imposed and the site had permission to operate."

136. There are no averments about the applicant's state of knowledge or belief post 2012 or about any belief that it was not required to comply with the conditions. Notably there is no averment that the director of the applicant believed the development was not unauthorised after 2012, either because it continued to comply with the conditions or more generally. In those circumstances I do not need to consider this argument any further, both because it is not pleaded and because there is no evidential basis for same.

Temporal effect of s.177D(2)

137. There are two linked parts to this argument. First, the applicant argues that the Board erred in being concerned only with the development of the site since the expiration of the 10-year period outlined in Condition 2 i.e. since 2017. I cannot agree that the Board's Decision was premised exclusively on quarrying after 2017. As identified above, both the Decision and the Direction make it clear that the finding was based both on quarrying outside the permitted time period and outside the geographical area.

138. Second, the applicant complains that the development of the site since the expiration of the 10-year period is not the development in respect of which substitute consent is sought. Paragraph 31 of the Statement of Grounds is in the following terms:

> "*The purported requirement for substitute consent arose before the 2012 section 261A decision. The site exceeded the 5 hectare area in 2012 and while the applicant maintains the development remained a pre-63 development, the need for EIA identified by the Board arose at that time. This is the period under section 177D that is of relevance in the context of awareness of unauthorised development, not the period after April 2017*."

139. The applicant goes on to plead that, given that s.177D(2) uses the definite article i.e. whether the applicant had or could reasonably have had a belief that the development was not unauthorised, it is the development that is relevant for the purposes of the section, i.e. that which gave rise to the need for substitute consent.

140. The Board notes that this argument would only have validity if, in fact, the applicant had been directed to apply for substitute consent via the s.261A process in 2012. If that had been the case, obviously the applicant's state of mind in 2012 would have been examined. However, what happened was that the applicant continued to quarry and then applied on 30 August 2019 for leave to apply for substitute consent. There is no basis to say that the application in 2019 was only for, and limited to, the development that was of concern in the s.261A process.

141. In my view, when one looks to the wording of s.177D, it is difficult to accept the applicant's approach. As identified at the start of this judgment, s.177D provides the Board shall only grant leave to apply for substitute consent where "*it is satisfied that an environmental impact assessment … was or is required in respect of the development*

concerned …. and that exceptional circumstances exist such that the Board consider it appropriate to permit the opportunity for regularisation of the development …".

142. The section is clearly drafted in the present tense such that the Board shall only grant leave to apply for substitute consent where, *inter alia,* it is satisfied that an EIA either was or is required and at the time of the application exceptional circumstances exist. In considering whether such exceptional circumstances exist the Board shall have regard to identified matters. The analysis relates to the development the subject of the application for substitute consent where that development either was or is required to have an EIA/AA. Here, the development was required to have an EIA/AA from the time it exceeded the 5 hectare threshold – likely in 2012 – and continues to be so required. The wording in relation to the state of mind of the applicant is in the past tense - *whether the applicant had or could reasonably have had a belief that <u>the</u> development was not unauthorised* - but there is no suggestion that the time period during which the applicant's state of mind is to be analysed is to be necessarily limited to the time when it was first decided that an EIA/AA was required.

143. An ordinary reading of the section suggests that when the Board is reviewing the application for leave and considering an applicant's belief as to whether the development was authorised, it may consider the entire time period relevant to the facts of the particular case. Where, as in the instant case, the development is an ongoing one, I see no basis for ringfencing any given time period such that the applicant's state of mind is immunised from review during that period, whether that be after the date upon which the necessity for substitute consent first arose, or any other date. The mere use of the past tense in s.177D(2)(b) cannot justify such an interpretation.

144. One can envisage a situation such as that posited by the Board in its submissions, where the development takes place at a fixed point in time. There, the relevant time to analyse a

person's belief may be when it committed the unauthorised development, and any later period may be irrelevant to an analysis of a person's state of mind. But that is not the situation here.

145. In short, I consider that the correct interpretation of the legislation is that the Board is obliged to consider the applicant's belief over the relevant period. This will vary depending on the factual situation. There is nothing in the legislation to suggest the Board is limited in this case to considering the applicant's belief exclusively when a decision was first made that an EIA/AA was required or when the 5 hectare threshold was exceeded. There is no reason in principle advanced as to why this should be so. In the circumstances, I cannot agree that the Board erred for the reasons identified above.

Reasons for the Board's decision

146. The applicant mounts a sustained attack on the Board's explanation for its Decision, arguing there are insufficient reasons for same. It will be recalled that the conclusion of the Board was that the applicant could not reasonably have had a belief that the development was not unauthorised, having regard to the planning history and enforcement history of the subject lands, and that, on the basis of that history and enforcement information provided by the Council (including details of inspections carried out by the Council), it was evident the applicant had previously carried out unauthorised development, particularly having regard to the terms of Condition number 2 of planning authority file reference number QY23.

147. The applicant contends that the Board fails to explain how the conclusion on subsection (b) was reached. In respect of subsection (f), it is argued that the reference to the determination being informed by the planning and enforcement history is opaque and that it is not clear what this comprises, what matters are alleged, or on what basis. It is also argued that the Board does not identify the unauthorised development and does not provide

evidence of its occurrence. The Decision is said to be unclear as to whether the alleged unauthorised development is confined to breaches of Condition 2. Finally, the applicant says the Inspector's report is of no assistance in understanding the negative findings of the Board as the Board was concerned with post 2017 unauthorised development whereas the Inspector was concerned with pre-2017 unauthorised development. I have already explained above why I do not consider the Board's Decision was confined to post 2017 unauthorised development.

148. The Board argues that its Decision is clear and made with reference to the statutory criteria under s.177D(2). The Board recalls that the quarry was registered in accordance with s.261 and consequent on that registration the Council furnished a draft schedule of conditions to govern the operation of the quarry on which the applicant made submissions. The Council then adopted a list of conditions which included Condition 2. The Board has identified in its Decision that the applicant carried out quarrying in excess of those conditions. It points out that although the applicant says it has no idea what unauthorised development is being referred to, in fact the Direction makes it entirely clear that there have been inspections by the Council which showed that quarrying had extended beyond Condition 2 and that Inspectors had carried out inspections in April and December 2019 and had seen continued activities. The Board observes that the Direction held that, regardless of arguments about the enforcement notice, it was not possible to accept that the operator was not aware of the contents of Condition 2 which have been overtly and clearly breached. The Board cites *Connelly v An Bord Pleanála* [2018] 2 IR 752 and *Mulhaire v An Bord Pleanála* [2007] IEHC 478 where Birmingham J., as he then was, notes that the reasoning of the Board clearly emerged from the decision in that case and that the applicant could not be left in any doubt as to why the decision went against him.

149. At paragraph 10 of the Statement of Opposition, the Board pleads that there is no obligation on it to engage in a discursive narrative analysis, that the order should not be read in isolation and invokes the Note at page 3. It pleads that there is no obligation on the Board to afford the applicant an opportunity to make a submission on the information received from the Council.

150. In considering whether adequate reasons have been given, the essential question is whether the recipient of the decision can understand the core reasoning behind the decision (see *Connelly*). In my view, the Direction (which must be considered part of the reasoning of the Board) makes clear the nature of the development, why it was treated as unauthorised and why the Board arrived at its conclusion in respect of the applicant's knowledge. The Direction included the following information:

    (i) Condition 2 identified an area within which quarrying was permitted and limited the duration of quarrying to 10 years from 2007;

    (ii) Quarrying took place beyond the permitted area and continued after 2017 (on the basis of reports of inspections of the site from the Council and inspections carried out by the Board's own Inspectors in April and December 2019);

    (iii) The applicant was aware of the conditions imposed by the 2007 registration decision, including the extent of quarrying permitted and the limitation period.

151. The applicant has argued that the evidence the Board had regard to was ambiguous. In my view there is nothing ambiguous about the evidence I summarise above. In short, the Direction and Decision read together concluded that the applicant had breached Condition 2 and must have known of the requirements of Condition 2.

152. Nor was there any ambiguity about where the unauthorised development took place. The relevant area was marked on a map that was attached to the conditions and there is no

evidence that the applicant was in any way confused about the location of the development or the subject of the Board's Decision.

153. In the face of evidence of development in breach of the conditions in the planning history, reference to that planning history as the basis for a finding that the applicant knew or ought to have known that the development was not authorised is in my view sufficient for the applicant to understand why the Board had come to this conclusion. The Board's conclusion did not in my view need to be explained further given the clarity of the breaches of Condition 2, which indisputably form part of the planning history of the site.

154. In the circumstances I am satisfied that the reasons were adequate and the applicant's challenge on a lack of reasons must fail.

Alleged Breach of Fair Procedures

155. Finally, the applicant argues that it was not given a chance to address the Board in relation to the matters invoked in its Decision. It argues that the Board had an obligation to put matters to it but failed to do so. It says it was not told what material would be relied upon in coming to the determination. Had it known, it says it could have provided further information. This argument is similar to the fair procedures argument made in the *Fursey Maguire* proceedings.

156. The Board argues that s.177C(5) permits it to seek such information and documents as it sees fit from a planning authority and that the applicant must be presumed to know the terms of the statute it is applying under. Since the applicant has always been fully able to access the information from the Council, the onus was on the applicant to engage with such matters as might be relevant in its application. The applicant failed to engage on the clear point that it had carried out development in breach of Condition 2. Nor, according to the Board, is there any obligation on it to provide a developer an opportunity to mend its hand.

157. In my view, the fair procedures argument put up by the applicant ignores the fact that the application was being made by the applicant under s.177C and as such the onus was on it to persuade the Board that leave should be granted. The applicant was, or should have been, aware of the statutory test that the Board had to be satisfied of, to grant leave i.e. exceptionality, with a focus on unauthorised development under s.177D(2)(b) and (f). It was in a position to tailor its application accordingly and provide the requisite information. The Board's file on its previous Decision in 2013 was available to it, as were the files of the Council from 2012, either from the Council or the Board itself. In my decision on the *Fursey Maguire* proceedings, I cited the dicta of Ní Raifeartaigh J. in *JJ Flood* where she identifies that any problem was caused by the applicant's failure to submit evidence and make observations. I found that equally, this was the cause of the applicant's dissatisfaction with the Board process in 2013, rather than any unfairness in respect of the procedures employed by the Board.

158. A similar situation prevails in respect of the application for leave to apply for substituted consent. If the applicant wished to put forward material to the Board, it could have done so. Instead, its application was premised on a bare statement that the conditions had been complied with, despite the evidence to the contrary that the applicant must have been aware of, including the Supplementary Revised Inspector's Report provided to the Board of 3 May 2013 (described in detail earlier in this judgment) that made it clear that the extraction area had been exceeded by 2009/2010 and was continuing to be exceeded in 2013. Moreover, the applicant was fully aware of the terms of Condition 2, including that it required quarrying to be ceased after 2017. As operator of the site, it must have been aware that there was continuing activity on the site and that the Inspector would have become aware of same on her visit to the site in 2019. It must be taken to be aware of the conditions under s.177D and that the Board would be looking at whether the development was

authorised and if not, the applicant's knowledge of the unauthorised development. Indeed, the very fact it identified in its application its alleged continuing compliance with the conditions, shows its awareness of the relevance of the issue.

159. In those circumstances the applicant must be treating as having available to it all the information the Board would inevitably have to engage with when deciding upon the applicant's claim that it had complied with Condition 2.Given the nature of the conditions and given the factors set out above, it is impossible to conclude that the applicant was taken by surprise or could not have understood that the Board would consider these issues. The applicant chose to ignore that material and instead assert that it had complied with the conditions without engaging with material that established that it had not so complied. It is hard to see how the Board's decision to address the lack of compliance head on in its decision breached the applicant's right to fair procedures in those circumstances. Accordingly, the applicant cannot succeed on this ground.

Inappropriate application of s.177D criteria

160. Finally, the applicant argues that the Board wrongly interpreted s.177D by concluding that a failure to satisfy two out of seven criteria under s.177D(2) was insufficient to found a negative conclusion on leave, where five of the criteria were deemed to be satisfied. No authority is cited, and there is no textual analysis of the section invoked to support this argument. I can see no basis for same. The Board is required to have regard to identified matters. Should the Board fail to have regard to each of them, that would likely be a ground for quashing the Decision if that failure disadvantaged an applicant. That is not the case here. The Board had regard to each of the criteria. It concluded that the applicant failed to meet two of those criteria. That is a sufficient basis to refuse the application.

161. The applicant also argues that refusal to grant leave was a disproportionate response on the part of the Board given the applicant's success in meeting the other identified criteria.

One can readily understand why the applicant is disappointed with the Board's decision, given that the application was seen by both the applicant and the Council as a possible means of resolving the difficult situation the applicant finds itself in. However, were I to interfere with the Board's evaluation of the criteria simply because the applicant considers the Board ought to have reached a different conclusion – having failed to establish illegality in the negative conclusions the Board reached in respect of two of the criteria – I would be exceeding my jurisdiction. It is for the Board to evaluate and weigh the criteria and decide on leave. Provided it does not do so in breach of law, the Court cannot interfere with the discretion of the Board in this respect. Accordingly, I reject the applicant's argument.

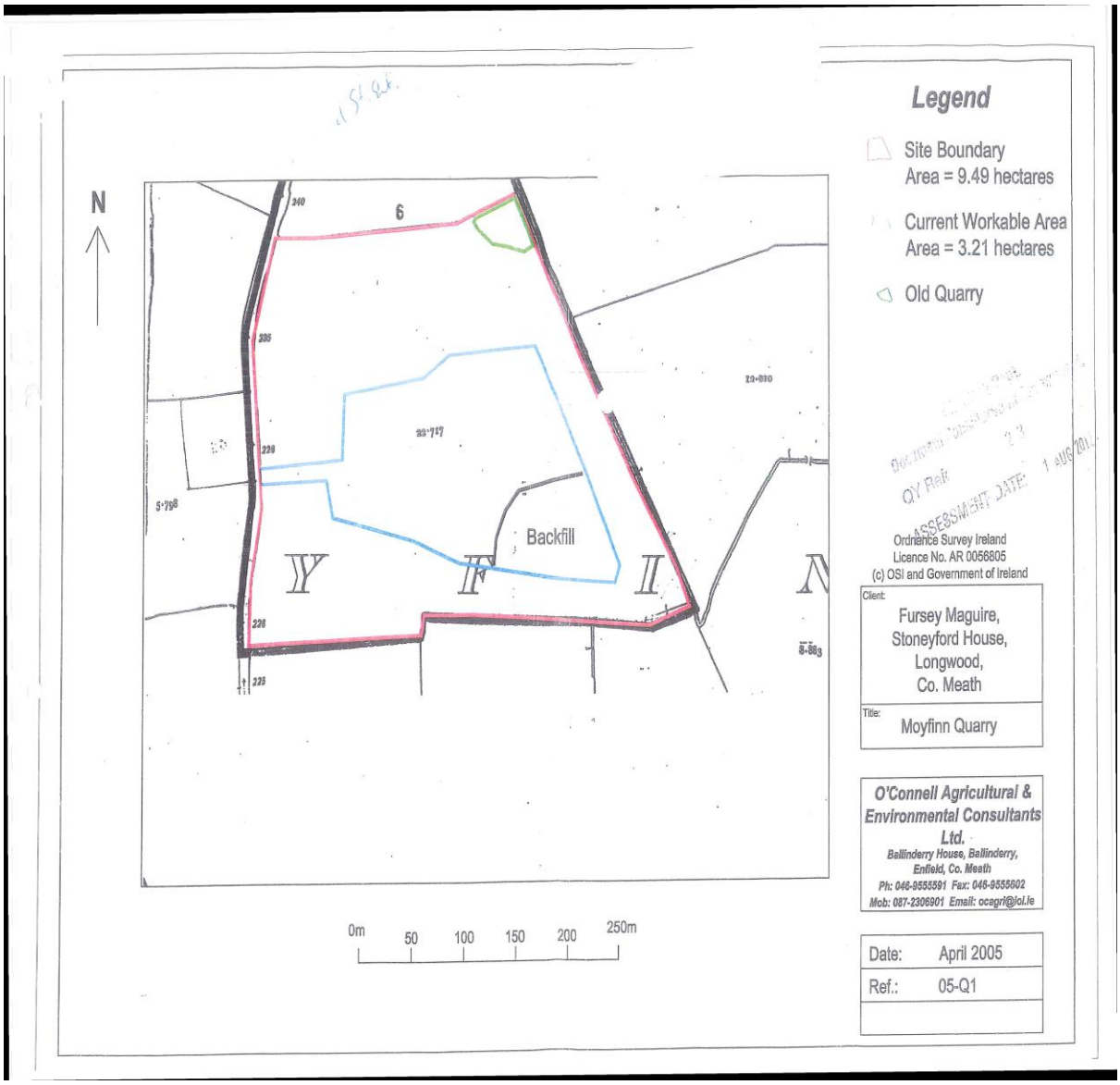
162. The applicant also argues that the Board has failed to operate the section in accordance with its purpose which is, according to the applicant, not to prevent quarries from operating or sterilising their operation but rather to open the door to substitute consent where exceptional circumstances exist. Again, this argument goes to the exercise of discretion on the part of the Board. The legislation does not disclose any presumption or intention that the section ought to be operated to facilitate the continued operation of quarries who require substitute consent to be allowed to continue their operation. Indeed, as explained in the *Fursey Maguire* judgment, s.261A and s.177D were adopted in response to Case C-215/06 *Commission v Ireland* which made it clear that the system of retention permission that permitted retrospective consent to be granted for a development requiring EIA or screening for EIA was incompatible with EU law. Section 177D is intended to facilitate leave to apply for substitute consent only in exceptional circumstances. It is hard to square that wording with the interpretation urged on me by the applicant i.e. one that tends towards a presumption that leave for substitute consent ought to be granted to prevent quarries being sterilised. The legislation clearly envisages quarries that do not meet the

exceptionality threshold being prevented from even applying for a route to regularisation. In those circumstances I must reject that argument also.

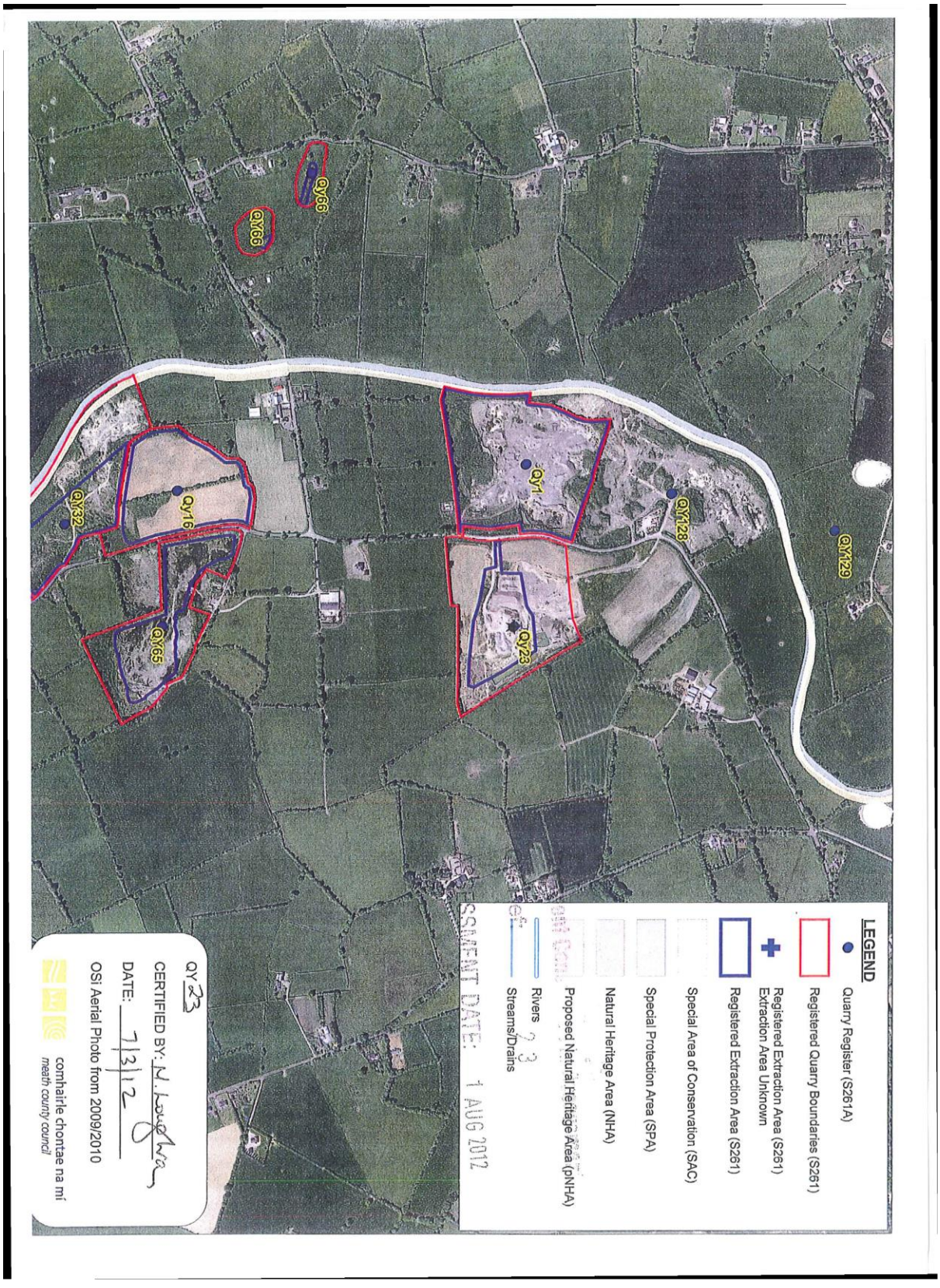
Conclusion

163. For the reasons set out above I must reject the arguments of the applicant and dismiss the proceedings.

Appendix 1


N
6
Backfill
Legend
Site Boundary
Area = 9.49 hectares
Current Workable Area
Area = 3.21 hectares
Old Quarry
Ordnance Survey Ireland
Licence No. AR 0056805
(c) OSI and Government of Ireland
Client:
Fursey Maguire,
Stoneyford House,
Longwood,
Co. Meath
Title:
Moyfinn Quarry
O'Connell Agricultural & Environmental Consultants Ltd.
Ballinderry House, Ballinderry, Enfield, Co. Meath
Ph: 046-9555591 Fax: 046-9555602
Mob: 087-2306901 Email: ocagri@iol.ie
Date: April 2005
Ref.: 05-Q1
0m 50 100 150 200 250m

Appendix 2


QY66
QY66
QY32
QY16
QY65
QY1
QY23
QY128
QY129
LEGEND
Quarry Register (S261A)
Registered Quarry Boundaries (S261)
Registered Extraction Area (S261)
Extraction Area Unknown
Registered Extraction Area (S261)
Special Area of Conservation (SAC)
Special Protection Area (SPA)
Natural Heritage Area (NHA)
Proposed Natural Heritage Area (pNHA)
Rivers
Streams/Drains
SSMENT DATE: 1 AUG 2012
QY 23
CERTIFIED BY: N. Loughran
DATE: 7/3/12
OSi Aerial Photo from 2009/2010
comhairle chontae na mí
meath county council

Appendix 3


Extraction since 2011 (Area 2)
Quarry Registered Boundary
Quarry Registered Extraction Boundary
Quarry Surveyed Boundary (2011) (Area 1)
Photography 1D2061134 Peter Barrow, 6th Dec 2013
Quarry QY23
Fursey Maguire