Judgments Of the Supreme Court

Judgment

Title: An Taise- The National Trust for Ireland v **McTigue Quarries** Ltd & ors

Neutral Citation: [2018] IESC 54

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Composition of Court: Clarke C.J., McKechnie J., MacMenamin J., Charleton J. Edwards J.

Judgment by: MacMenamin J.

Status: Approved

Result: Appeal allowed

THE SUPREME COURT
[Appeal Nos. 12/17 & 52/17]

Clarke C.J.
McKechnie J.
MacMenamin J.
Charleton J.
Edwards J.

IN THE MATTER OF THE PLANNING & DEVELOPMENT ACTS, 2000 TO 2011, AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING & DEVELOPMENT ACT, 2000

BETWEEN:

AN TAISCE/THE NATIONAL TRUST FOR IRELAND
APPLICANT

V.

McTIGUE QUARRIES LIMITED, GARY McTIGUE AND CAROLINE McTIGUE

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 7th day of November, 2018

Introduction

1. For more than a decade, the respondents ("**McTigue**") have operated a quarry located in the townlands of Cartron and Emina in rural County Galway, approximately seven kilometres south-west of the town of Tuam and 1.5 kilometres south-west of the village of Belclare.

2. The appellants ("An Taisce") contend the quarry is an unlawful development and contravenes s.2 of the Planning and Development Act, 2000, as amended ("the PDA 2000"). They initiated proceedings in the High Court seeking a declaration to that effect, and for an order under s.160 of the same Act restraining the respondents from continuing to operate the quarry.

Decision of the High Court

3. The key to this case lies in one apparently simple statutory provision. In the High Court, [2016] IEHC 620, Barrett J. concluded the quarry was unauthorised. He interpreted s.177O of the Planning and Development (Amendment) Act, 2010 (the "PD(A)A 2010") by reference to the judgment of the Court of Justice of the European Union (the "CJEU") in *Commission v. Ireland* (Case C-215/06) [2008] ECR I-04911. But, observing that he was sitting at a remove from the factual situation in the local area, he declined to grant an injunction under s.160 of the PDA 2000. Instead, he remitted the question of any further enforcement to Galway County Council as the local authority involved. The judge also delivered a second judgment with the same title, [2016] IEHC 701, which addressed An Taisce's application pursuant to s.3(4) of the Environmental (Miscellaneous Provisions) Act, 2011, as amended, granting a protective costs order. This Court did not grant leave to appeal on this latter judgment.

Overview of the Parties' Positions in the Appeal

4. An Taisce stand over the trial judge's conclusion on the first issue, but appeal his decision on the second issue, that is, the refusal to grant a s.160 injunction. They say the judge erred in concluding that it was not incumbent upon him to grant such an order. **McTigue**, for their part, appeal the High Court judge's determination that the quarry is unauthorised, although are obviously also concerned by the decision to remit the question of enforcement to the local authority. As a matter of logic, the first issue for determination in this appeal is whether the continuing operation of the quarry is lawful. If it is lawful, then no injunctive relief can be granted.

Section 177O of the Planning and Development (Amendment) Act, 2010, PD(A)A 2010

5. Section 177O, as set out in the PD(A)A 2010, relates to "Enforcement", and provides:

> *"(1) A grant of* ***substitute consent shall have effect as if it were a permission granted under section 34 of the Act*** *and where a development is being carried out in compliance with a substitute consent or any condition to which the consent is subject it shall be deemed to be authorised development."* (Emphasis added)

Sub-section (2) then provides:

> *(2) Where a development has not been or is not being carried out in compliance with a grant of substitute consent or any condition to which the substitute consent is subject it shall, notwithstanding any other provision in this Act, be unauthorised development."*

6. **McTigue**'s case is, in one sense, stark in its simplicity. They contend that s.177O should be interpreted literally; that they received such a "substitute consent"; and that this has effect in law as if it were a permission granted under s.34 of the PDA 2000, which deals with the procedures normally applicable in a range of circumstances.

European Union Law

7. The issues in this appeal can only be fully understood against the historical background of European Union ("EU") law, and the legislative intention of the PD(A)A, 2010, the statute where s.177O is to be found. As this judgment seeks to explain, the section in question is not to be seen as some remote and isolated island, but rather, as attached to an extensive and revealing legislative hinterland which lends perspective.

The EIA Directive of 1985

8. In 1985, the European Commission promulgated European Community ("EC") Directive 85/337 ("the Environment Impact Assessment Directive"; "the EIA Directive"). This was later amended by Directive 97/11/EEC and codified in Directive 2011/92/EU, as amended by Directive 2014/52/EU. This instrument and its successors set out rigorous conditions in the area of environmental law, especially the need to assess the environmental impact of developments identified in Annexes to the EIA Directive. Counsel for **McTigue**, in a focused submission, submits the EIA Directive was addressed to member states and cannot be applied "horizontally"; that is, between two private parties. He says that this, in effect, is what the trial judge did in interpreting the section. Whether the EIA Directive, in fact, has direct effect was not developed fully in argument before this Court. The point is, of course, highly important, and in itself could potentially have been determinative of the first issue. But, as will be seen, what is contained in the EIA Directive is nonetheless central to establishing the legislative intention behind s.177O.

9. The recitals in that EIA Directive make clear that, in a development with environmental effects, such effects are to be taken into account at the earliest possible stage in the decision-making process for planning permission. Referring then to planning authorities, the Directive defined the concept of "development consent" as being "the decision of the competent authority or authorities which entitles the developer to proceed with the project". Article 2(1) requires that an environmental impact assessment ("EIA") should take place *before* consent is given. As a consequence, the twin concepts of "development consent" and an EIA are closely and inextricably linked. While not directly necessary

for the determination of this case, other decisions of the CJEU must now be briefly discussed. In light of the fact that certain of these decisions had not been referred to in argument at the original hearing, the Court permitted the parties to address questions arising from these decisions in a resumed hearing some months later.

Other CJEU Case Law

10. Consideration of these other background case law must start with *R (Delena Wells) v. Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] ECR I-00723 which has been cited to this Court, and *R (Diane Barker) v. London Borough of Bromley* (Case C-290/03) [2006] ECR I-03949. The CJEU laid emphasis on the point that development consent must be received *prior* to a development (*Wells*, at paras. 42 and 43). In *Barker*, the Court explained that the term "development consent" itself remained a "Community concept", and therefore its meaning fell to be determined exclusively within what was then EC, and is now EU, law (*Barker*, at para. 40). Thus, classification of a planning decision as a "development consent" within the meaning of Art.2 of the EIA Directive must, therefore, be carried out pursuant to national law, but in a manner consistent with what is now EU. (*Barker*, at para. 41). The CJEU explained that, whether the development referred to one or more stages, it was a matter for the national court to identify whether each stage in a consent procedure, considered as a whole, constituted a "development consent" for the purposes of the Directive. (*Barker*, at para. 46). (See, generally, Áine Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Hart Publishing 2009) at pp. 133-135, a text which sets out this background with admirable clarity).

***Commission v. Ireland* (Case C-215/06)**

11. The important judgment of the CJEU in *Commission v. Ireland* (*op.cit.*, at para. 2) is even more directly on point. The factual background is well known. A decision was made to develop an expansive windfarm on a bog at Derrybrien in County Galway. Due to considerable development and foundation work, the bog itself became unstable, causing a huge landslide. It transpired that the windfarm had been developed without an EIA ever having been carried out. Instead, Galway County Council, the planning authority, had granted what was then defined under the PDA 2000, in its unamended form, as a "retention permission". The European Commission complained to the CJEU that Ireland had inadequately transposed Arts. 2, 4 and 5-10 of the EIA Directive, both in its original form and as amended by Directive 97/11/EC. The Commission submitted that Irish law allowed a developer to seek "retention permission" for unauthorised development *after* that development had begun, and thereby defeated the preventative objectives of the EIA Directive.

12. In its subsequent and far-reaching judgment delivered on the 3rd July, 2008, the CJEU emphasised the meaning and effect of Art. 2(1) of the EIA Directive. This stipulated that Member States were to adopt "*all measures*" necessary to ensure that *before* planning consent is given, projects likely to have significant effects on the environment, by their nature or location, were made subject to an EIA with regard to those effects. The Court did make reference to Art. 2(3) of the Directive which provides that Member States might "in exceptional cases" exempt a "specific project" in whole or in part from the provisions laid down in the Directive. This wording is significant, and will be referred to later. The CJEU observed that the wording of Art. 2(3) was entirely unambiguous

and was, therefore, to be understood as meaning that *unless* an applicant had successfully applied for the required development consent, and had *first* carried out an EIA when it was required, works could not be commenced without disregarding the requirements of the Directive. (para. 51). The court pointed out that this analysis was valid for all projects falling within the scope of the Directive. (para. 52). The court recalled Recital 5 of the Preamble to the subsequent Directive 97/11/EC, which points out that a project for which an assessment is required should be subject to a requirement for development consent, and the assessment should be carried out "***before*** *such consent is granted*". (para. 53). (Emphasis added)

13. Having observed that the then Irish legislation did provide that EIAs and planning permissions could be obtained prior to the initiation of works, the CJEU remarked that, *per contra*, it was undisputed that Irish legislation *also* established the concept of:

> *"retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed."* (para. 55).

The court went on to point out that, in the absence of exceptional circumstances, the grant of retention permission, which Ireland accepted as having been "common" in planning matters, had the result that the obligations imposed by the EIA Directive would be considered to have, in fact, been satisfied *post hoc*. (para. 56). The court went on to warn that while Community law could not preclude the applicable national rules from "*in certain cases*" allowing the regularisation of operations or measures which are unlawful under its rules, such a possibility must not "*offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.*" (para. 57). The Court highlighted the fact that a system of regularisation by retention permissions could have the effect of encouraging developers to forgo the process of ascertaining whether intended projects satisfied the criteria of Art. 2(1) of the Directive. (para. 58).

14. It is helpful to pause to reflect on some of the phraseology which the CJEU adopted. The court criticised the fact that retention permission could, in effect, be "*equated*" to that of an *ordinary* planning permission which preceded the carrying out of works and development. (para. 55). The word "*equated*" can only be a cause for hesitation in an unthinking acceptance of an interpretation of s.177O for which **McTigue** contend. The quarry owners submit simply that a substitute consent "shall have effect ***as if it were*** a permission granted under s.34 of the Act." (Emphasis added) One might observe that there may be a certain resonance between the word "*equated*", as used by the CJEU, and the words "*as if*", contained in the section. The CJEU was, indeed, prepared to countenance the possibility of allowing for regularisation *in certain cases*, but affirmed that such a possibility should not result in a circumvention of Community rules. The question in this case is the extent to which the general statements of principle can be reconciled with the interpretation which is urged by **McTigue**?

15. In subsequent case law (*World Wildlife Fund and Others v. Autonome Provinz Bozen and Others* (Case C-435/97) [1999] ECR

I-05613), the Court of Justice went so far as to hold that an exemption, as provided for under Art.1(5) of the EIA Directive, required that it be stipulated by a *specific act of national legislation* containing all the elements that might be relevant to the assessment of the effects of the project on the environment. (*Bozen*, at para. 59; Ryall, *op.cit.*, at para 10; at p. 138).

16. Although not cited, other more recent judgments of the Court of Justice are material to this case.

17. In the case of *Stadt Wiener Neustadt v. Niederösterreichische Landesregierung* (Case C-348/15) [2016], the CJEU considered the EIA Directive in the context of the lawfulness of a decision in which the Government of the Land of Lower Austria took the view that the operation of a substitute fuel treatment plant should be *deemed* authorised. The CJEU held Art.1(5) of the EIA Directive, as amended by Directive 97/11, was to be interpreted so as to cover a project which has been the subject of a decision taken in breach of the obligation to carry out an EIA, in respect of which the time limit for an action for annulment had expired, and was regarded under national law as lawfully authorised. The CJEU held EU law precludes such a national legislative provision insofar as it might provide that a prior EIA may be deemed to have been carried out for such a project. The court held that member states must make good any harm caused by the failure to conduct an EIA. Thus, the competent authorities are required to take all general or particular measures for remedying the failure to carry out the EIA (paras 45-48). This decision raises what can only be described as a rather significant point as to how s.177O should, or *must*, be interpreted to accord with EU law.

18. In *Comune di Corridonia v. Provincia di Macerata* and *Comune di Loro Piceno v. Provincia di Macerata* (Joined Cases C-196/16 and C-197/16) [2017], the CJEU had to consider whether authorisation of two plants built without an EIA should be annulled on the basis that the law exempting them from an EIA was contrary to the EIA Directive. The Italian court referred a question to the ECJ: whether Art.2 of a subsequent further Directive, 2011/92/EU, required that failure to conduct an EIA under the EIA Directive cannot be regularised, following the annulment of the original consent, by an assessment being carried out after that plant has been built and entered into operation? The CJEU held, rather, that neither the EIA Directive, nor Directive 2011/92/EU, provided for the consequences of a breach of the obligation to carry out a prior assessment. However, the Court did hold that EU law does not preclude national rules which, on an exceptional basis, permit the regularisation of operations or measures which are unlawful in the light of EU law (para. 37 citing *Commission v. Ireland*, para. 57; *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia* (C-416/10) [2013], para. 87; *Stadt Wiener Neustadt*, para. 36). But, it held that such regularisation must be subject to the condition that it does not offer the opportunity to circumvent EU law or to dispense with its application, and that it should remain the exception (para. 38, citing the same references as the previous paragraph). Consequently, in *Corridonia*, the CJEU held that legislation which attached the same effect to a regularisation permission, which could be issued even where no exceptional circumstances are proved, as those attached to prior planning consent, failed to have regard for the requirements of the EIA Directive (para. 39, citing *Commission v Ireland*, para. 61 and *Stadt Wiener Neustadt*, para. 37). Furthermore, the CJEU concluded that an assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the

environment, but must also take into account its environmental impact from the time of its completion (para. 41).

19. In *Stadt Papenburg v. Bundesrepublik Deutschland* (Case C-226/08) [2010] ECR I-00131, the CJEU held that a plan or project likely to have a significant effect on the site concerned could not be authorised without a prior assessment of its implications for the environment (*Landelijke Verenigung tot Behoud van de Waddenzee and Anor v. Nederlandse Vereniging tot Bescherming van Vogels* (C-127/02) [2004] ECR I-07405, at para. 36). If, having regard in particular to the regularity or nature of the maintenance works at issue in the main proceedings or the conditions under which they are carried out, the development could be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, such maintenance works can be considered to be one and the same project for the purposes of Art.6(3) of Council Directive 92/43/EEC ("the Habitats Directive") (para. 47).

20. The decision of the Court of Justice in *Commission v. Ireland* had a considerable impact across many areas of Irish planning law, not least in the area of **quarries**. There were, it seems, a number of **quarries** in the State which were operating in the absence of EIAs. Some of these had received planning permissions granted by local authorities. Other **quarries**, such as the **McTigue** quarry, had never actually received any planning permission, nor had it ever been subject of an EIA.

21. Counsel for **McTigue** argues that, from an EU law perspective, it is immaterial if planning approval is called a "consent", a "substitute consent", a "permission", a "planning permission", an "authorisation", or some other entitled legal construction. I reject this submission. "Development consent" is, in fact, a term of EU law defined, and linked to an EIA, in the EIA Directive which provides such consent must be carried out in accordance with EU law (*Barker*, at para. 41), and the later judgments referred to above. The very concept of development consent, in this context, *hinges* on there being an EIA for the development. Insofar as it is contended that the point of the decision in *Commission v. Ireland* is that existing permissions be simply revoked or suspended to allow an environmental impact statement to be carried out, I also disagree. Such a submission does not reflect the principles set out in *Commission v. Ireland* and subsequent CJEU jurisprudence.

Did the High Court judgment impermissibly give direct effect to the EIA Directive?

22. Counsel on behalf of **McTigue** submits s.177O means that "where a development is being carried out in compliance with a substitute consent or any condition to which the consent attaches, it is deemed to be authorised development." He criticises Barrett J.'s conclusion in the High Court that s.177O, if so interpreted, might contravene EU law, and criticises the fact that he proceeded with the application on the basis of his understanding of the doctrine of direct effect, thereby giving the section a strained meaning. I would comment here that the learned High Court judge's concern regarding contravention of EU law was, at minimum, not unjustified.

23. This raises an issue of quite profound importance. Relying on the cases of *Kolpinghuis Nijmegen BV* (Case 80/86) [1987] ECR I-03969, at para. 13, and *Maria Pupino* (Case C-105/03) [2005] ECR I-05285, counsel for **McTigue** submits that the effect of the

High Court judgment is to impart horizontal effect to the Directive, which he contends is addressed only to member states, and cannot be relied upon by individual private parties.

24. For reasons which appear below, it is unnecessary to decide whether the Directive has direct effect. But again, one might observe, *obiter*, there are indications that, in the opinion of the CJEU, the terms of the Directive *may well* be sufficiently clear so as to be directly and horizontally effective in member states. (See *Commission v. Germany* [1995] ECR I-02189; the opinion of Advocate General Cosmas in *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission of the European Communities* (Case 321/95) [1998] ECR I-01651, para. 58; and *Aannemersbedrijf P. K. Kraaijeveld BV and Others v. Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] ECR I-05403). In *Kraaijeveld*, the CJEU, speaking of the right of an individual to invoke a Directive in a national court, observed that it is for the national courts to take account of whether the relevant competent authority has exceeded the limits of its discretion, be that discretion under Article 2(1) or Article 4(1) of the EIA Directive. In such circumstances, it appears the national court must set aside such a measure (para. 61). The court did not, however, in that case, specify what steps a national court is to take where a specific planning decision is said to be in breach of the requirements of the Directive.

25. However, in *Bozen* (*op.cit.,* at para. 15) and *State of the Grand Duchy of Luxembourg v. Linster* (Case C-287/98) [2000] ECR I-06917, the court went further, imparting what might be described as "direct effect terminology" (*effet utile*), in order to permit reliance upon the Directive to challenge the exclusion from it of a specific project by a national authority, and requiring the setting aside of national rules and measures deemed inconsistent with Article 2(1) and Article 4(2) of the Directive.

26. It is unnecessary to express a concluded view on the effect of these judgments, as the question in this case can be resolved by reference to national legislation, including the Interpretation Act, 2005.

Procedures Adopted in the Aftermath of Commission v. Ireland

27. Arising from the *Commission v. Ireland* judgment delivered by the Second Chamber on the 3rd July, 2008, the Minister for the Environment directed local authorities to carry out a number of preliminary steps for the registration and assessment of **quarries** in order to consider their legal status. The **McTigue** quarry did engage in what could be called three planning "procedures" by Galway County Council. These were, first, a decision by the County Council to "register" the quarry pursuant to s.261 of the PDA 2000 on the 27th April, 2007; second, and subsequent to the enactment of the PD(A)A 2010, a determination by Galway County Council made on the 3rd August, 2012, that the quarry had commenced operation prior to the 1st October, 1964, and was, therefore, eligible to apply for what was by then termed a "substitute consent"; and third, directing the quarry owner to avail of, and apply for, a substitute consent process by a decision pursuant to s.261A(3) of the PD(A)A 2010. This is referred to later in the judgment. Thereafter, An Bord Pleanála ("the Board") decided on the 5th January, 2015, to grant substitute consent to the quarry pursuant to s.261A of the PD(A)A 2010. This, too, is considered later. A subsequent statutory procedure, which allowed for quarry owners to further develop their quarry in conjunction with an

application for substitute consent is considered briefly further on in this judgment, but does not affect the instant case, as it was introduced in 2015.

An Observation

28. I pause here to make an observation. The Planning and Development Acts have been the subject of many judgments of this and other courts. In one, *O'Connell v. The Environmental Protection Agency and Ors* [2003] 1 I.R. 530, Fennelly J. described the legislation then as being a "statutory maze". (At p. 533). One scholar later described the Acts in 2011 as being a "conceptual morass". (Oran Doyle, 'Elusive **Quarries**: A Failure of Recognition' (2011) 34(2) DULJ 180, 197-208). There have been countless further amendments since then. It is not unfair to comment that the present state of the legislation is an untidy patchwork confusing almost to the point of being impenetrable to the public. This is in an area where, of its nature, legislation is supposed to have a strong public participation aspect. Confused legislation engenders litigation which, in turn, causes delays in lawful developments, including infrastructure. The entire subject matter requires urgent codification. (See, generally, Doyle *op.cit.*).

The Planning and Development (Amendment) Act, 2010

29. Historically, events, and CJEU case law, have shown that obligations arising from the EIA Directive did not always "sit comfortably" with certain well established features of national planning law and practice. (See Áine Ryall, 'Case C-215/06 *Commission v. Ireland*' (2009) 18(2) Review of European, Comparative and International Environmental Law 211). The issues in this case concern the protection of the environment. In fact, the legislature did seek to make the statutory *intent* behind the PD(A)A 2010 crystal clear, beginning from its first provision. Thus, by inserting a new section 1A in the principal Act through s.3 of the PD (A)A 2010, it was made clear that:

> *"Effect or further effect, as the case may be, is given by this Act to an act specified in the Table to this section, adopted by an institution of the European Union or, where appropriate, to part of such an act."*

Beneath s.1A is a table which includes eleven different categories of EU legislative instruments, including the EIA Directive and the Habitats Directive. Thus, insofar as national law is concerned, the Court must proceed on the basis that the intent behind this statute was to give effect to the EIA Directive. The interpretative questions in this case must be seen from this starting point. The facility for retention development was removed by virtue of s.39(12) of the PDA 2000, as inserted by s.23 of the PD(A)A, 2010. This new provision set out that a planning authority was to refuse to consider an application for retention where the planning authority decided that, if the application had been made for permission prior to development, an EIA, and a determination as to whether an EIA was required, an appropriate assessment was necessary.

30. The 2010 Act also introduced a number of new concepts. One was that of "substitute consent", a second, the "remedial Environmental Impact Assessment". It commenced further ideas such as "remedial Natura impact statement[s]" also in connection with the substitute consent process. (See, first, s.177A(1)). All are discussed later. But the circumstances in which "*retention permissions*" might be granted by the Board were very limited to a particular category. The Act provided that such applications must be made under ss.177A-Q of the PD(A)A 2010.

31. Thus, s.177B requires close consideration, because it sets out the scope of the amendments. It clearly confines that scope to developments which come within the relevant sections of 177A-Q, that is, to those which, *through error*, had previously received *faulty or flawed planning permissions* because there had been no EIA. Thus, s.177B provides:

> *"(1) Where a planning authority becomes aware in relation to a development in its administrative area* ***for which permission was granted by the planning authority or the Board,*** *and for which -*
>
> *(a) an environmental impact assessment,*
>
> *(b) a determination in relation to whether an environmental impact assessment is required, or*
>
> *(c) an appropriate assessment,*
>
> *was or is required, that a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union has been made that the permission was in breach of law, invalid or otherwise defective in a material respect because of -*
>
> *(i) any* ***matter contained in or omitted from the application*** *for permission including* ***omission of an environmental impact statement*** *or a Natura impact statement or both of those statements, as the case may be, or inadequacy of an environmental impact statement or a Natura impact statement or both of those statements, as the case may be, or*
>
> *(ii)* ***any error*** *of fact or law or* ***procedural error,***
>
> *it shall give a notice in writing to the person who carried out the development or the owner or occupier of the land as appropriate."* (Emphasis added)

Again, the legislative intention is entirely clear. It is, inter alia, to address a final judgment of the CJEU: i.e. *Commission v. Ireland*. This section then goes on to identify the procedure thereby laid down by the legislature to obtain a form of consent in this category. But, critically, the wording of s.177B is that the provisions of the section are to apply to a development *"for which permission* ***was*** *granted by the planning authority or the Board"* (Emphasis added), and for which an EIA or a determination as to whether an EIA had been necessary, or an appropriate assessment ("AA") had been required, but not carried out. The legislative scope of **quarries** eligible relates only to those which received *flawed or erroneous* permissions. It did not include a quarry which was exempt from the requirement for planning permission, by reason of its continued operation prior to the 1st October, 1964, the "appointed day" designated by S.I. 211/1967, promulgated under s.24 of the Local Government (Planning and Development) Act, 1963. Thus, the scope of the section did not include a quarry which had not been obliged to obtain a planning permission in respect of works which "commenced" prior to the 1st October, 1964.

32. This leads inexorably to the conclusion that it claims to have been in operation prior to the 1st October, 1964, while the **McTigue** quarry was never a development for which permission *had been* granted by the planning authority or the Board. It is not disputed that it never held or received a planning permission at any stage prior to the grant of substitute consent. It is not, either, an exempted development under s.4 of the PDA 2000, or Schedule 2 of the Planning and Development Regulations, 2001 (S.I. 600/2001) which sets out categorised exempted development. What was intended by the grant of substitute consent?

33. But against this, it did undergo a certain registration procedure with Galway County Council; it has received a substitute consent from the Board; are such considerations irrelevant? **McTigue** submits one must carefully examine the planning inspector's report, and the Board's subsequent grant of substitute consent, to see what was intended by the Board. It submits that, in this sense, the Board's grant of substitute consent is determinative, and that whatever may be An Taisce's objections to the grant of the substitute consent, the clock cannot be turned back.

34. As will become obvious, the fact that the Board was not joined as a party to this proceeding was, to say the least, a hindrance in reaching any clear conclusion on the Board's full approach, its statutory remit, and the consequences of decisions made. But the question as to whether this quarry was ever eligible for any substitute consent process is unavoidable. While, as pointed out at para. 27 of this judgment, the quarry was indeed "registered", and was later the subject of a County Council "determination" regarding its date of commencement, neither of these processes were preceded by an EIA. Here, it will be recalled, the concept of "development consent" is defined in Art. 1(2) of the EIA Directive as being the decision of the competent authority, or authorities, which *entitles* the developer to proceed with the project. In *Wells*, the CJEU held that the EIA should be carried out *prior* to the implementation deadline. (para. 52). If "development consent" is defined in the Directive, and explained by CJEU jurisprudence, as so closely linked with an EIA, these factors cannot easily be ignored when interpreting s.177O.

35. One turns next to s.177B, which also sets out the procedure to be adopted by a planning authority in cases falling within the scope of the Act of 2010. These include a planning authority giving notice in writing to the person who carried out the development, informing them of the fact that a *defective permission* had *been granted* in the absence of an EIA, a determination, or an AA, and directing the person or entity concerned to apply to the Board for a substitute consent, such application to be accompanied for that purpose by a *remedial* environmental impact statement, or a remedial Natura Impact Statement, or both. (See s.177C of the Act). Again, the scope of the section is clear, and limited to cases where a *permission* was flawed.

36. Section 177D deals with "exceptional circumstances". Subsection (1) provides that the Board is *only* to grant leave to apply for substitute consent where it is satisfied that one of the three categories of assessment was required. Here the antecedent condition as to scope is again relevant. The Board must be satisfied that a ***permission previously granted*** for a development was rendered in breach of law, or invalid, or otherwise defective by a judgment of a court or the CJEU, by reason of any matter contained in, or omitted from, the application for permission. The three qualifying categories of assessment are an error or fact or

law, procedural error, or "*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.*" (s.177D(1)(b)). (Emphasis added)

37. But s.177D(2) provides that, in considering whether exceptional circumstances exist, the Board is to have regard to, *inter alia,* 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…"*

Then, further criteria are set out, including whether the potential to carry out an assessment has been substantially impaired; the actual or likely significant effects on a European site; the extent to which there may be significant effects on the European site which can be remediated; whether the applicant has complied with previous planning permissions granted; or whether an applicant has previously carried out an unauthorised development, as well as such other matters as the Board considers relevant. (s.177D(c) -(g)).

38. In the circumstances where the quarry owners accept that there was, strictly speaking, *never* a planning permission for the quarry, can it then be said that **McTigue** had, or could reasonably have had, a belief that the development was authorised? Could the Board then have lawfully proceeded to determine that **McTigue** had complied with previous planning permissions granted, or should the Board have asked itself whether **McTigue** had previously carried out an unauthorised development? These questions lie outside the scope of this appeal. The Board is not a party to this case.

39. Throughout ss.177A-Q, there is phraseology redolent of the judgment in *Commission v. Ireland*. Thus, remedial environmental impact statements created by s.177F of the Act of 2010 are to identify both the effects which "have occurred or which are occurring or which can reasonably be expected to occur because the development the subject of the application for substitute consent was carried out…" (s.177F(1)(a)), and setting out that what is to be required is:

> *"(b) details of -*
>
> *(i) any appropriate remedial measures undertaken or proposed to be undertaken by the applicant for substitute consent to remedy any significant adverse effects on the environment;*
>
> *(ii) the period of time within which any proposed remedial measures shall be carried out by or on behalf of the applicant…"* (s.177F(1)(b)).

40. But, in response, **McTigue** points out, with some justification, that parts of the language of ss.177A to Q do indeed seem to contemplate future or ongoing work. How is this consistent with mere remediation? For example, what precisely is considered by s.177F(1)(a) when it speaks of the effects on the environment

which *have* occurred, or which "*are occurring*", or which "*can reasonably be expected to occur",* because a development, the subject of an application for substitute consent, has been carried out? To my mind, what is contemplated is that there can only be future remedial work confined to that category of quarry which already had received a permission, but where that permission was flawed because of non-compliance with the EIA Directive. However, surely this can only arise in the context of a quarry which had received permission in the first place. I confine myself to questioning whether uncertainty as to the scope of the PD(A)A 2010 may have created problems of interpretation in cases beyond this one?

41. A *remedial* EIA has an entirely different scope of reference from an EIA proper; the scope of the former is remediation work only in the context of certain developments which originally had received planning permissions, but which did not receive an EIA, a screening, or an AA. A remedial EIA cannot, therefore, be used as a surrogate for an EIA as the scope of reference and "time range" of the two are, or should be, entirely distinct. An operator cannot utilise a remedial EIA without there first having been a "planning permission" which, however flawed, was, at least *prima facie* valid. A remedial EIA, in this context, refers to a situation where permission "was granted" and where an assessment was required. There was never such a permission in this case. The subsequent procedural decisions of Galway County Council, described earlier, cannot be described as consents, but rather pre-registration procedures. Thus, by reference to the Directive, there was never a "development consent".

42. Whether, and even if, there are certain provisions in the Act which might be glossed over as supporting the proposition of an alternative, "forward looking", reading of s.177O, *that* provision itself must only be read within its terms of reference for eligibility within the more general legislative framework; the legislative intent, and in accordance with the Directive, and the terms defined therein in the judgments of the CJEU, including *inter alia*, in *Commission v. Ireland*. It is not, in fact, necessary to interpret the EIA Directive or its successors as having direct effect in order to define the scope of s.177O.

43. Insofar as it might be argued that the judgment in *Commission v. Ireland* does not directly address s.177O, this is, of course, true, as the section post-dates that judgment. But one cannot accept a contention that what is intended by the judgment is that projects which *never* had an EIA should, in some sense, simply be "suspended". The intention reflected in the PD(A)A 2010 is, rather, to create a regularisation gateway for projects which had received a permission, albeit flawed. Insofar as there may be exceptions, they must come within the category of application discussed. It is not correct to argue that, from an EU law perspective, it is "immaterial" how the approval process is characterised. That is not so. There is a world of difference between these procedures and a true development consent. This is predicated on whether or not the correct, or here, any, form of EIA has been carried out.

Pathways to Regularisation

44. The PD(A)A 2010 did set out pathways of regularisation of unauthorised developments which required an EIA, screening for an EIA, or an AA, under the Habitats Directive, but always subject to the caveats laid down by the CJEU in relation to exceptional circumstances, and for achieving substitute consent. One of these is to be found in s.177C(2)(b), which allows a person who has

carried out a development where there should have been an EIA, a screening for an EIA, or an AA under the Habitats Directive, to apply to the Board for leave to seek substitute consent in respect of the development, where the applicant is of the opinion that "exceptional circumstances" exist such that it may be appropriate to permit the regularisation of the development through substitute consent.

Quarries

45. Another pathway is to be found in the special provision for **quarries** contained in s.261A of the Act. This section is extremely lengthy and unwieldy, stretching out over several pages. Insofar as material, it required each planning authority to examine every quarry in its area to ascertain whether development *was carried out* which would have required an EIA, a determination as to whether an EIA would have been required, or an appropriate assessment under the Habitats Directive. Essentially, and to the degree relevant, the section provides that a substitute consent would permit a "regularisation" of what had been done hitherto, as well as the undertaking of certain remedial measures thereafter. However, s.261A does not, itself, allow for continuing or future development of an unauthorised quarry. Rather, such future development would require separate planning permission to be obtained following the issuance of a substitute consent. Neither of these pathways can assist the respondent, however. (See the incisive critique of these provisions in Doyle, *Op.cit.,* at para. 28; at pp. 194-198).

Subsequent Amendments

46. For completeness, one might mention three associated legislative amendments to the substitute consent procedure. These were introduced in 2015, via the European Union (Environmental Impact Assessment and Habitats) Regulations 2015 (S.I. No. 301/2015), commenced with effect from 14th July, 2015; the Planning and Development (Amendment) (No. 2) Regulations 2015 (S.I. No. 310/2015), commenced with effect from 16th July, 2015; and the European Union (Environmental Impact Assessment and Habitats) (No. 2) Regulations 2015 (S.I. No. 320/2015), which was commenced with effect from the 22nd July, 2015. None of these instruments, however, enacted outside the timeframe of this case, have a bearing on the situation which arises for consideration here.

47. It appears that as a result of these amendments, an operator can now apply for substitute consent in respect of a quarry under s.261A which, if granted, might regularise what was done previous to the consent. Under the law as it now stands, therefore, s.37L of the PDA 2000, inserted by Regulation 4 of S.I. No. 301/2015, permits a person to apply for *prospective* permission for *further* development of a quarry. Counsel for An Taisce submits that this new facility to make AN application for substitute consent and planning permission simultaneously is a clear indicator that the substitute consent is not itself a grant of planning permission, and does not have the prospective effect of a grant of permission under s.34. Counsel for An Taisce contends that the requirement for substitute consent being, in effect, a condition precedent, the obtaining of prospective development consent is evident from the terms of s.34(12), that is, one applies for, but does not receive, substitute consent, or if an operator does not apply for substitute consent, but should have, then there has been no retrospective regularisation and, therefore, any application that has been made for prospective consent, if it involves retaining a quarry the subject of an application, should not be granted due to the prohibition contained in s.34(12), and by virtue of the judgment in

Commission v. Ireland. Counsel argues this is consistent with the sequencing of the respective decisions on applications for substitute consent, and prospective permissions, pursuant to s.37L (8), viz. if an operator applies for both, he or she will receive substitute consent first, that is the decision for prospective permission under s.37L should be made as soon as possible after the decision on the application for substitute consent.

48. Here, however, counsel for **McTigue** relies on the statement of Finnegan J., speaking for this Court in *DPP v. Power* [2007] IESC 31; [2007] 2 I.R. 509, where that judge pointed out that it is well settled that the subsequent legislative history of a provision is relevant only as to the view which the legislature took, whether correctly or not, regarding the law with which the enactment deals. I accept this submission. These provisions must, therefore, be disregarded and set to one side, and cannot assist in the process of interpretation. One might, however, comment that, as a consequence, an operator who has already obtained a substitute consent might be precluded thereby from making an application for permission, thereby creating a "Catch-22", which might well impact on the **McTigue** quarry.

The Quarry

49. It is necessary next to consider this quarry, as it stands, "on the ground", in a little more detail. It is common case that it is an active working stone quarry, characterised by benching and cliffs with stockpiling of materials, and processing areas for the screening, crushing and grading of material associated with the plant. The general surrounding area is dominated by agricultural use, but with a relatively high level of predominantly recently constructed dwellings located along the nearby road network. The landscape is relatively flat and low-lying, but the quarry itself is located on the eastern lower slopes of Knockma Hill, a dominant feature in the landscape, which, according to An Bord Pleanála, renders the quarry highly visible from a considerable distance in all directions. The overall site is of 12.11 hectares, irregular in configuration with an extraction area of 8.64 hectares. The main quarrying operation is roughly L-shaped. There is also an area of 3.47 hectares to the west of the active quarry, also part of the registration process, but which has not been excavated.

The Application for Substitute Consent

50. While not directly material to the determination of this case, there was, apparently, considerable controversy at the time surrounding the application for substitute consent. There has been considerable dispute about how long the quarry has been in operation, and whether it could, in any sense, be categorised as a pre-1964 process. Not only was there strong opposition from local residents, but also from a quarry adjoining the **McTigue** quarry operated by a Mr. Frank Mortimer.

51. Much relevance was placed on what was intended by the planning inspector's report, and the Board's substitute consent. As this formed part of **McTigue**'s argument, the judgment, therefore, must next consider the latter part of the process to regulate the legal status of the quarry. This post-dates the registration procedure described earlier. As outlined abover, on the 3rd August, 2012, Galway County Council issued a notice under the provisions of s.261(A)(3)(a) of the PDA 2000, as amended, instructing **McTigue** to apply for substitute consent for the works being undertaken at the quarry. The local authority required that the application be accompanied by a remedial environmental impact statement, and a remedial Natura impact statement. Both of these

are necessary steps for compliance with the regime set up under the PD(A)A 2010. An application for substitute consent is, as a matter of law, brought directly to An Bord Pleanála. As part of the process, the Board requested its planning inspector to examine the site. There were two such inspections, during the course of which it is recorded that Mr. Peter Sweetman, one of the objectors to any grant of substitute consent, contended that in a earlier Board decision, **McTigue** had indicated that the extraction area did not exceed 5 hectares, whereas the application in the instant case was for an extraction area of 8.64 hectares ("the main seam").

Objections

52. It is also part of the record that the objectors, who included Mr. Mortimer, contended that the PD(A)A 2010 could not cover the development of the extra 3.64 hectares over and above the 5 acres, and that this extra extraction had been carried out by **McTigue** wilfully and knowingly. It is recorded that they said this was unauthorised, contrary to the EIA Directive and that **McTigue** should not be "rewarded" with the grant of a substitute consent. The objectors are noted as contending that the quarry should not be granted any "retrospective" consent as it did not fall within the category of "exceptional" circumstances which had been mentioned by the Court of Justice in *Commission v. Ireland*. In fact, they said, the grant of the substitute consent would fly in the face of that judgment. It is said they argued that the quarry was ineligible for any grant of substitute consent as it had not been in operation prior to the 1st October, 1964, the cut-off date as identified in the PDA 2000 for such eligibility. In fact, the objectors went further, saying that the weight of the evidence identified that the true quarrying had commenced in late 1999, or early in the year 2000. An Taisce supported these objections.

53. It is recorded that for its part, **McTigue** pointed out that the pre-1964 status of the quarry had already been determined by Galway County Council; that the remit of the current proposal before An Bord Pleanála was simply in respect of substitute consent; that small amounts of building stone had been extracted on an ongoing basis since the 1950s; and that late in 1999, more intensive mechanised extraction methods had commenced in the quarry.

54. It is true, as **McTigue** submits, that the planning inspector's report contained observations on the principle of the development, the remedial EIA carried out as part of the planning process, and the impact that the operation had on human beings, the environment, noise and vibration, soils, and landscape, in addition to its visual impact. The report referred also to cultural heritage, transport and transportation, and ecology. Similar assessments were carried out under the rubric of an AA and a remedial Natura impact assessment concerning any impact on the integrity of a Natura 2000 site. The report stated that the principle of the development was acceptable, subject to complying with standards as stated in national guidance in relation to the extraction industry, and also development management standards stated in the County Development Plan. Counsel for **McTigue** makes the point, valid insofar as it goes, that compliance with standards would not be relevant if, after the 5th January, 2015, there was to be no further quarrying at all.

55. There are indeed also statements from the Inspector to the effect that the principle of the "subject development" (i.e. the quarry) was "acceptable"; that there could be direct benefits for the proposal in relation to employment; that, while blasting

occurred at the quarry, its frequency was dependent on demand for materials; that the overall impact on air quality would be acceptable, having regard to mitigation measures; and that, taking into account noise and vibration, no additional remedial measures were indicated.

56. It must be accepted, therefore, that there are some passages in the report which are capable of being read in more than one way, and, arguably, are indeed capable of being interpreted as being "forward looking", without being clear as to the scope of what is envisaged, whether it was simply remediation, or completion of the main seam and then remediation. However, there remains the underlying question as to the absence of the detailed range of conditions which one would expect to find in a prospective consent – if that was what was contended.

57. But, in fact, none of these are determinative as a matter of law. Without doubt, when a permission refers to other documents, such as here, "the development described in the application" as Condition 1 puts it, the permission is to be read in a light of those documents (*Readymix (Eire) Limited v. Dublin County Council and the Minister for Local Government*, Supreme Court, Unreported, 30th July, 1974). It is true also that the plans submitted made clear that the quarry seam had not been fully extracted and envisaged that there would be ongoing operations until that was done. But this begs the question: what development was envisaged? Ultimately, none of this is to the point: the issue at hand is the meaning of s.177O.

58. Much play was made of the role of Mr. Peter Sweetman, planning consultant. It was said that he had allied himself with the neighbouring Mortimer quarry while at the same time acting as a consultant to An Taisce. This issue is, frankly, a debating point not relevant to the issue of interpretation now before this Court.

59. Counsel for **McTigue** relies on passages from these reports, submitting that they do not preclude, and are actually consistent with, the concept of continuing development to the exhaustion of the main seam of 8.64 hectares. It must be accepted that these passages might beg a number of questions. But what is in question is interpretation of the section, not the reports, or even the wording of the substitute consent itself.

The Grant of Consent

60. On the 5th January, 2015, An Bord Pleanála granted substitute consent having regard to the provisions of Part XA of the Planning and Development Acts 2000 to 2014. The Board recited that the grant was to be in accordance with the plans and particulars submitted to it. The Board's determination stated that the grant of substitute consent related solely to quarrying development undertaken "as described in the application", but did not authorise any further development, including excavation on the site. One would have thought this was clear. But it must be pointed out that, in this appeal, both parties relied on some of the phraseology in the consent and the planning inspector's report. An Taisce contended that the wording was consistent with the operators being permitted *only* to carry out remedial work to restore the quarry, and no other work. In response, **McTigue** claimed that the wording was coherent with it being permitted to proceed with extraction from the main seam of 8.64 hectares until that was exhausted. They argued that the terms of the consent and the inspector's report only made sense in that context. There is some force in both submissions, as far as they go as debating points. But the question

is, what does the Act say? It must be said that there is ambiguity both in the planning inspector's report and in the decision of An Bord Pleanála.

61. It is, in fact, quite hard to discern whether, in its true meaning, the inspector's report proposed that *all* excavation was to stop immediately and only remedial work was to commence, or whether, rather, it permitted continuance of the works, and if so, what work? The Board's consent itself stipulated that all environmental mitigation measures identified in the remedial environmental impact statement and the remedial Natura impact statement were to be implemented in full. The conditions to the Board's substitute consent set out the headings for a comprehensive plan for restoration of the quarry, including timelines. Unfortunately, even resort to these timelines is not entirely determinative of what was intended by the consent. Did it mean that only restoration work be permitted, or that the operation be permitted to complete mining product work from the main seam before restoration? A certain ambiguity remains, even though conditions were laid down for the removal of certain temporary buildings which had been placed on the site; that **McTigue** was to lodge with Galway County Council a cash deposit as security for satisfactory restoration work; and also to pay a contribution of €25,000 to Galway County Council in respect of improvement works to the local public road network in the area, on the basis that this network had been of benefit to the quarrying development that had taken place. In all, it is fair to say that some of the phraseology in the substitute consent, and the reports it was based on, were in many aspects, rather unclear.

62. But, standing above this is the fact that despite the ambiguities, the *focus* of the substitute consent is undoubtedly on remediation; if the consent did relate to future operation, then an entire range of conditions as to future development were not fully addressed: the extent of the permitted development is not specified; and there are no regulations as to blasting hours, noise, dust, waste, water, and traffic. There are no limits on excavation rates or the area of the development. Standing above this again is the hazard that the effect of interpreting the consent as urged by **McTigue** would be to permit an unregulated quarry, the operation of which would run contrary to EU law, at least in spirit.

The Board's "Note" on the Consent

63. With these considerations in mind, one might advert to a puzzling aspect of the Board's consent. The inspector referred to a series of objections from local residents, some of whom hotly disputed the quarry's pre-1964 operation status, without which it would not be entitled to planning permission in any case. At the conclusion of the Board's grant of substitute consent, there is what is described as "a note", which reads:

> *"The Board noted the points raised by the parties regarding the "pre-1964" status of this quarry. Having undertaken an appropriate enquiry, and on the basis of the documentation provided by the planning authority on this file, and on history files, including the s.261 registration file, (QY71), the Board was not satisfied that the subject quarry had commenced prior to 1964, or was covered by a "pre-1964 authorisation". However, it noted the determination made by the planning authority under s.261A of the Act in this respect, and noted that no review of this determination had been made. The Board, accordingly, considered*

> *that it was not open to it to adjudicate on the matter within the context of an application for substitute consent that was required to be made by this determination."*

64. I would confine myself to commenting that, prima facie, there appears to be some tension, not only between the Board and Galway County Council, the planning authority, but between this "note", on the one hand, and on the other, the provisions of s.177D (2) of the PD(A)A 2010, referred to earlier, which, in its various paragraphs, enjoins *the Board* to have regard to, *inter alia*, whether an applicant for substitute consent could reasonably have had a belief that the development was authorised; whether that applicant had complied with previous planning permissions, or had previously carried out an unauthorised development, and *"such other matters as the Board might consider relevant"*. The significance of the observation in the note regarding "pre-1964 authorisation" touched on earlier is explained when one turns to s.261A of the Act, which sets out special provisions regarding **quarries** which devolved upon planning authorities such as, in this case, Galway County Council. But it also raises a question as to how the Board saw the limits of its statutory role?

Allocation of Statutory Roles

65. The judgment turns next to other submissions by **McTigue** which may best be described as ancillary to the main point. Relying on *Sherwin v. An Bord Pleanála* [2007] IEHC 227; [2008] 1 I.R. 561, and *Grianán of Aileach Interpretative Centre Company Limited v. Donegal County Council (No. 2)* [2004] IESC 43; [2004] 2 I.R. 625, counsel for **McTigue** submitted that there was an allocation of powers between the courts and the Board, and that the Court was not invested with the jurisdiction to consider matters of special skill and competence in planning issues. It is said that this is such a question. I reject this argument. What is in issue here, ultimately, is a matter of statutory interpretation. This is pre-eminently a question for the courts. The Board is not a party to this appeal. I make no other observation.

Literal Interpretation and the Facts "on the Ground"

66. Setting all peripheral considerations to one side, the essence of **McTigue**'s submission is clear: it is that s.177O of the PD(A)A 2010 should be read literally, as imparting to the quarry exactly the same status as a planning permission under s.34 of the PDA 2000. Counsel for **McTigue** unequivocally submits that the "development" permitted in the consent can and does encompass future works on the main seam, given the express meaning of the section. He submits that the quarrying development, undertaken in accordance with the plans and specifications submitted to An Bord Pleanála, on the 7th May, 2013, are permitted, but that development outside of that is not authorised.

67. Looking at the question in its practical effect, one might comment that the substitute permission, read in this way, would allow for the continued insufficiently conditioned extraction from the seam upon which the quarry is presently operating until that seam is exhausted. Presumably, this could take years. But, counsel submits this would not be future development; it would simply be "permitted development". Counsel does concede that any further development, such as extraction from what is called the "reserved lands", not comprised within any pre-1964 use, would be a matter which would constitute future development. But this again begs the question as to whether such an interpretation allows for, or countenances, the continued operation even of this seam of this

quarry without there ever having been an appropriate EIA or an AA, and where the range of conditions one would normally expect in a consent or permission for future operations is absent?

68. It is said that two phases are envisaged in the remedial works. Counsel for **McTigue** argues that Phase 2 of the plan could only arise after extraction had been fully completed. These remedial works simply could not occur until excavation is complete, at which point the development, the subject of the consent, is also complete. But all of this is to ignore the key question: the meaning of s.177O.

A True Construction of the Section

69. As will now be explained, the issue resolves itself as a matter of interpretation of *national law*: what is in question here is not a matter of *imparting* horizontal effect to the EU Directive, nor interpreting a national law in a manner conforming with EU law, as in *Marleasing SA v. La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] ECR 1-04135, but rather interpreting this *national* statutory provision in accordance with the intention of the Oireachtas under s.5 of the Interpretation Act. The PD(A)A 2010 stipulates, in terms, that the intent is to achieve concordance with the EIA Directive. This must necessitate that, in interpreting the section in its appropriate context, terms used in the Directive are given their correct meaning under EU law as defined by the CJEU. The term "development consent" has an autonomous meaning in EU law, which is predicated on there being an appropriate EIA in this category of "development". Thus, for there to be a valid planning permission in this case, there must either have been a valid EIA, or the development must come within the category of development identified in s.177O of the PD(A)A 2010. Neither of these is true in this case.

70. At para. 5 of the High Court judgment ([2016] IEHC 620), Barrett J. expressed himself this way:

> *"At first glance, a reading of s.177O(1) would suggest that the grant of a substitute consent, such as that issued by An Bord Pleanála on 5th January, 2015, is to be treated as if it were a grant of permission under s.34."*

71. **McTigue** submit that this "first glance" is the only construction that s.177O can, or is intended to, bear. But, even on a literal interpretation, this raises a question: if this interpretation is correct, why does the section provide that a development being carried out shall be *deemed* to be authorised development? The section does *not* simply say it shall be *"an authorised development within the meaning of s.34",* which would assist **McTigue**'s case far more. In my view, this usage is consistent with An Taisce's submission that such substitute consent will "only" permit the remedial works which are the subject of a substitute consent for qualifying developments which had previously received flawed permissions.

72. In interpreting s.177O, and the PD(A)A 2010 as a whole, a court should have regard to the overall framework and scheme of the Act. (cf. the recent judgment of O'Malley J., for this Court, in *Cronin (Readymix) Ltd. v. An Bord Pleanála and Ors.* [2017] IESC 36; [2017] 2 I.R. 658, para. 47). What does that framework and scheme tell the reader? The words are consistent only with a legislative intention to comply with the EIA Directive. It is not consistent with a literal interpretation which would permit the

quarry continuing in operation without appropriate conditions as to that operation for perhaps years to come. The Interpretation Act, 2005 makes clear the approach a court should adopt. 73. Section 5 of the Interpretation Act, 2005 provides:

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -*
>
> *(a)* ***that is obscure or ambiguous****, or*
>
> *(b) that* ***on a literal interpretation*** *would be absurd or would fail to reflect the plain intention of -*
>
> *(i) in the case* ***of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas****, or*
>
> *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> ***the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*** (Emphasis added)

73. A literal interpretation of the section would not "reflect the plain intention of the Oireachtas", as the legislative intention can be ascertained from the Act as a whole. The PD(A)A 2010 is to give effect to the EIA Directive. These were the words of the legislature.

74. The PD(A)A 2010 was limited to that category of development where permission previously "was granted" by the planning authority or the Board, where an EIA or an AA had not been carried out, and where the Court of Justice had determined that the permission was in breach of law, or otherwise offended because of an omission of an EIA. But this exceptional category is confined to those applicants who had received an otherwise valid permission (cf. s.177B). Any other interpretation would be entirely inconsistent with the terms of s.177O, coming, as it does, under the rubric of "*Enforcement*". What is argued for is, in fact, not "*enforcement*", but exceptionality.

75. The intention of the Oireachtas, evident from s.1A of the PD(A) A 2010 (See para. 29 above), is to give effect to Acts adopted by an institution of the EU, that is to say, the EIA Directive and the Habitats Directive. The wording of s.177O is, in fact, consistent with this intention, even if the section may be ambiguous. The true intention of the section is manifest by reference to its legislative framework, in particular, the text of each of the provisions of ss.177A-Q. The same intention is reflected in Part XAB of the PD(A) A 2010, relating to appropriate assessment; and in s.261A of the PDA 2000. It is to permit consents only for remedial work within the scope of the Act for developments that had previously received "erroneous" planning permissions.

76. It is true that a literal interpretation could, on the face of things, favour **McTigue**. But what is the effect of this submission? Could it realistically be argued that, contrary to the expressed intent, the actual intent of the Oireachtas was to "carve out" some

"exceptional" legislative regime for a category of non-compliant **quarries** which, under the guise of undergoing preliminary registration procedures obtaining remedial EIAs and substitute consents, would be permitted to continue operation, and thereby navigate a passage around the law, without an EIA ever having been conducted? When the question is posed in this stark way, the contention is untenable.

77. I would, therefore, hold that s.177O of the PD(A)A 2010 is to be interpreted as meaning that where a grant of *substitute consent* is made in accordance with ss.177A-Q of the 2010 Act, such substitute consent has effect for those procedures as if it were a permission granted under s.34 of the PDA 2000, but *only* where there was a prior, albeit flawed or erroneous, planning permission, where a lawful remedial development in compliance with prior conditions laid down in the PD(A)A 2010 is to be carried out in compliance with the terms of that substitute consent, and in accordance with any conditions to which that substitute consent is subject. It is in those circumstances, only, that such a development may be deemed to be an "authorised development".

78. It follows from these conclusions that this quarry is an "unauthorised development" as defined in s.2 of the PDA 2000. For the reasons set out above, I would uphold the High Court judge's decision on this first issue.

The Second Issue: Section 160 of the PDA 2000

79. Section 160 of the PDA 2000, as amended, and, insofar as relevant, provides:

> *"160(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*
>
> > *(a) that the unauthorised development is not carried out or continued;*
> >
> > *(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
> >
> > *(c) that any development is carried out in conformity with -*
> >
> > > *(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject, or*
> > >
> > > *(ii) in the case of a certificate issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban*

> *Renewal Act 1986, the planning scheme made under those Acts to which the certificate relates and any conditions to which the certificate is subject."*

80. Was the High Court judge correct in declining to grant an order under s.160 of the PDA 2000? It is true that the section vests a discretion in the Court. The manner in which that discretion should be operated has recently been considered in detail by this Court, in *County Council of Meath v. Michael Murray and Rose Murray* [2017] IESC 25; [2018] 1 I.R. 189. As McKechnie J., speaking for this Court (Denham C.J., O'Donnell, McKechnie, Laffoy, and Dunne JJ.) pointed out, the s.160 process is intrinsically summary in nature. (para. 35). It is frequently used to address urgent situations requiring immediate action so as to stop or prevent an unauthorised development. (para. 35). There may be cases where a more thorough exploration of intricate issues of law may be necessary in order to determine the outcome. (See para. 35 of *Murray*, and the cases therein cited). However, it is necessary to advert to the fact that, on the fundamental issues facing this Court, there appears to be little factual conflict.

81. Again, as mentioned earlier, Mr. Gary **McTigue** accepts that, "strictly speaking", it may be correct to say the quarry has no planning permission. The form of "authority" relied on is, ultimately, simply the substitute consent, which, in turn, was based only on remedial assessments, both as to the environment and habitat. There was never a lawful planning permission *per se.*

82. *Prima facie*, therefore, the facts fall within s.160(1) of the PD (A)A 2010 (as amended). Here, the Court is concerned with an unauthorised development, which is being "carried out", or "continued", in what would be an unregulated and unconditional manner. The core focus of s.160 is on whether or not there is an "unauthorised development". (See *Murray* para. 52). Any individual, with or without an interest in this development, and whether damnified or not, can invoke s.160 even though the overarching supervisory guardian of planning control at the executive level must be the statutory body established to that end. (*Murray*, para. 60). To refer to the criteria identified in *Murray*, (para. 64), there is no dispute that:

> 1. There exists a quarry, significant in its scale of operations;
>
> 2. It constitutes a "development" within the meaning of that term, as defined in s.3 of the 2000 Act;
>
> 3. Unless some lawful exception exists in respect of such a property, planning permission for its existence and use was required;
>
> 4. The "substitute consent" is not sufficient to warrant the form of continued operation which **McTigue** seeks;
>
> 5. No valid permission exists for its operation or use; and
>
> 6. This situation is not congruent with the duties of the State under EU law and national law.

Statutory Based/Equitably Controlled

83. There is no doubt that what is in question under s.160 is a judicial discretion. (See *Stafford v. Roadstone* [1980] 1 I.L.R.M. 1; *Avenue Properties Limited v. Farrell Homes Limtied* [1982] 1 I.L.R.M. 21, c.f. cited in *Murray*). However, it is not an equitable jurisdiction, as such. Rather, it is a statutory form of injunction which has a basis distinct from the general equitable jurisdiction of the High Court. (*Mahon v. Butler* [1997] 3 I.R. 369; *Murray*, para. 79).

84. At para. 87 of *Murray*, McKechnie J. refers to Henchy J.'s strong observations in *Morris v. Garvey* [1983] I.R. 319, where he observed, at p.324, that:

> *"It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the permission."*

85. With all this in mind, one looks to the factors to be considered in assessing whether a s.160 order should be made. These include:

> (i) The nature of the breach: The breach involved here is not minor, technical or inconsequential. It comes, rather, within the category of something material, significant and gross, as described earlier.
>
> (ii) The conduct of the infringer: It can, of course, be said that, subsequent to 2008, there has been some interaction between the operators and the planning authorities. However, whilst important, even acting in good faith will not necessarily excuse the making of a s.160 order. The issue of the applicability of s.177O to this quarry has been addressed;
>
> (iii) The reason for the infringement: The reason for the infringement here does not come within the category of genuine mistake, indifference, or indeed, culpable disregard;
>
> (iv) The attitude of planning authority: Undoubtedly, there are unusual features in this case. There are suggestions in the correspondence that the planning authority, that is, Galway County Council, has been a customer of the quarry, using stone won from it for infrastructural development work. If true, there is a risk of conflict of roles in such circumstances;
>
> (v) The public interest: There is a strong public interest in upholding the integrity of the planning and development system;
>
> (vi) The public interest, such as employment for those beyond the individual transgressors, or the importance of the underlying activity: The Court has insufficient evidence on these issues to express any view, but this cannot be a bar to an order being made in this case;

(vii) The conduct and, if appropriate, personal circumstances of the applicant: The applicant is a statutory body, entrusted, inter alia, to carry out work relating to the protection of the environment;

(viii) The issue of delay: There is no evidence that An Taisce has been in delay, or has acquiesced;

(ix) The personal circumstances of the respondent: While these are factors, they cannot stand in the way of an order being made; and

(x) The consequences of any such order. This is dealt with below.

Conclusion on the Second Issue

86. To my mind, the factors which have been identified point only towards the granting of a s.160 injunction order. But one cannot be blind to the fact that this will have significant consequences for **McTigue**. This Court has not had the opportunity to hear submissions upon, or consider in detail, any evidence regarding the upshot of the making of an order for the operators and employees of the quarry.

87. In my opinion, an order under s.160 must follow. As the learned High Court judge found, **McTigue** was carrying out an unauthorised development. What is in question here, therefore, is a "notable breach of the planning and development code", as Barrett J. pointed out at para. 12(ii) of the High Court judgment. It seems to me that only the granting of a s.160 order would be in keeping with the obligation of the courts as a judicial organ of the State to give effect to the national law. I would reverse the order of the High Court on this issue, and grant the s.160 order.

88. Counsel may wish to address the Court on any issues arising. There will be a stay of six months on the order to allow the owners to address the legal situation of the quarry.

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