Faolán Bashford

From: Eco Advocacy <info@ecoadvocacy.ie>
Sent: Tuesday 14 May 2024 14:10
To: Appeals2
Subject: SUBMISSION re Application ref. SU17.319397
Attachments: 2024-05-01-EA to ABP-Keegan-OBSERV-SU17.319397-Resized copy 2.pdf; Pierson & Ors -v- Keegan Quarries Ltd.pdf; Copy Court Order-CLONARD.pdf; Court ORDER_ 1929100-Newcastle.PDF; Fowler -v- Keegan Quarries Ltd Judgments & Determinations Courts Service of Ireland.pdf; SCHEDULE – EXCERPTS from VARIOUS COURT JUDGEMENTS.docx

SUBMISSION re Application ref. SU17.319397

Dear Sir/ Madam
Please find attached submission together with enclosures in respect of the above referenced substitute consent application.

- Submission re SU17.319397,
- Court Orders and Judgements (x4)

I should be much obliged if you could kindly confirm receipt of this submission and attachments.
Kieran Cummins

Eco Advocacy
Truth | Justice | Sustainability

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The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1

11th May 2024

SUBMISSION re Application ref. SU17.319397

Substitute Consent

Reference: ABP:	**SU17.319397**
URL:	https://www.pleanala.ie/en-ie/case/319397
Application Lodged:	20th March 2024 (Wednesday)
Appeal Deadline:	14th May 2024 (Tuesday), (8 Weeks)
Dev. Address:	Tromman Quarry, Tromman, Rathmolyn, Co. Meath
Applicant:	Keegan Quarries Limited
Description:	**Substitute consent for quarry and ancillary precast concrete manufacturing yard**
Submission Fee:	N/A

Dear Sirs

Please find attached observation in respect of a recent application submitted to *An Bord Pleanála* Application for permission under Section 37L. There are **31 pages** in this submission inclusive of cover page.

Public participation: We take this opportunity to remind the planning authority of its obligations regarding public participation, which is provided for in ***European Communities (Public Participation) Regulations 2010 (S.I. No. 352 of 2010)*** and in ***Directive 2003/35/EC*** of the European Parliament. Moreover, public participation is also enshrined in the ***UN Aarhus Convention***, which was ratified by Ireland on the 20th June 2012. Ireland have thus far relied upon Section 34 of the planning & Development Act 2000 to satisfy its obligations to involve the public. It is arguable that Irelands obligations go much further than section 34 and which predate the above directives and convention. Accordingly it is imperative that the planning authority carefully considers all aspects of submissions made to it, in connection with the current planning proposals and to meaningfully engage with and involve the public.

Yours sincerely,

Kieran Cummins,
Director, Eco Advocacy CLG

OBSERVATION SU1 7.31 9397– Substitute Consent

DEVELOPMENT DESCRIPTION

1. *"The development at the quarry and the ancillary precast concrete manufacturing yard, totalling some 21.64Ha in extent, consists of the unauthorised construction of an electrical substation, a concrete batching plant with technical lab and associated lagoon system; additional settlement facilities; a Limestone Powder plant, comprising feed hopper, crushing and screening plant, dispatch points, drying plant, storage sheds and gas tank fuel storage and the unauthorised construction of a precast concrete manufacturing industrial unit. In addition, the unauthorised continuation of extraction and associated mineral processing activities and the continued use and or operation of previously authorised structures; to include a block yard, office, canteen, weighbridge and wheelwash (00/2075), a precast manufacturing facility, associated batching plant and fuel storage (TA20408); an administrative office, septic tank, workshop, weighbridge, wheelwash, fuel store, pump house, steam cleaner and ancillary development (TA130400 & TA130581) beyond the expiry of extraction consents on the 5 August 2018 to which the ancillary consents for buildings plant and structures were co-terminus."*

2. It is helpful to break this down into its component parts: -

    a. *"The development at the quarry and the ancillary precast concrete manufacturing yard, totalling some 21.64Ha in extent,*
    b. *consists of the unauthorised construction of an electrical substation,*
    c. *a concrete batching plant with technical lab and*
    d. *associated lagoon system;*
    e. *additional settlement facilities;*
    f. *a Limestone Powder plant, comprising feed hopper, crushing and screening plant, dispatch points, drying plant, storage sheds and gas tank fuel storage and*
    g. *the unauthorised construction of a precast concrete manufacturing industrial unit.*
    h. *In addition, the unauthorised continuation of extraction and associated mineral processing activities and*
    i. *the continued use and or operation of previously authorised structures; to include*
        i. *a block yard,*
        ii. *office,*
        iii. *canteen,*
        iv. *weighbridge and*
        v. *wheelwash (00/2075),*
        vi. *a precast manufacturing facility,*
        vii. *associated batching plant and fuel storage (TA20408);*
        viii. *an administrative office,*
        ix. *septic tank,*
        x. *workshop,*
        xi. *weighbridge,*
        xii. *wheelwash,*
        xiii. *fuel store,*
        xiv. *pump house,*
        xv. *steam cleaner and*
        xvi. *ancillary development (TA130400 & TA130581) beyond the expiry of extraction consents on the 5 August 2018 to which the ancillary consents for buildings plant and structures were co-terminus."*

3. This quarry operator has a long history of operating from unauthorised (illegal) developments from sites across three counties. We shall begin by assessing the history of unauthorised developments to demonstrate that there are no 'exceptional circumstances' as provided for in the legislation, but restricted in Mr. Justice William M. McKechnie in *AN TAISCE, PETER SWEETMAN & Others v. AN BORD PLEANÁLA and Others* [9/19, 42/19 and 43/19] and also EU law.

CASE LAW & EXCEPTIONAL CIRCUMSTANSES

4. **3rd July 2020**: the Irish Supreme Court in *AN TAISCE, PETER SWEETMAN & Others v. AN BORD PLEANÁLA and Others* [9/19, 42/19 and 43/19], Mr. Justice William M. McKechnie stated that the public should have an input at the earlier s.177 (c) stage and specifically cited the Aarhus Convention. They also stated that where substitute consent is applied for that the exceptionality test must be applied.

5. Moreover given **C-215/06**: Commission v. Ireland: Failure of a Member State to fulfill obligations – No assessment of the environmental effects of projects within the scope of Directive 85/337/EEC – Regularisation after the event is not permissible under EU law where E.I.A. and A.A. (Habitats) should have been prepared **prior** to any development. Case **C-215/06** related to the construction of a wind-farm development together with associated works at Derrybrien, County Galway. In that case, it was held that by failing to adopt all measures necessary to ensure that the development consents given were preceded by an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337/EEC, Ireland has failed to comply with the obligations that it has under Articles 2, 4 and 5 to 10 of the said Directive 85/337/EEC. This same case came up a second time under ref. **Case C-261/18** which was an application for an order to pay a penalty payment and a lump sum). In 2022, the Derrybrien, County Galway ceased to operate in order to comply with the ruling of the European Court of Justice.

6. In light of the EU cases of **C-215/06 and 261/18** together with the welcome clarity by the Irish Supreme Court in *AN TAISCE, PETER SWEETMAN & Others v. AN BORD PLEANÁLA and Others* [9/19, 42/19 and 43/19], it is therefore not legally permissible for the Irish Authorities to facilitate any further retention applications to this applicant in light of the planning history.

7. Given the history of recorded unauthorised developments pertaining to the Keegan Quarry at Trammon together with its history across a number of other quarries, it is virtually impossible for it to satisfy the 'exceptionality test'. The amount of documentary evidence now available demonstrates conclusively that the operators had conducted numerous unauthorised developments in a flagrant abuse of planning and environmental requirements both of domestic law (Irish) and also of European law. It is considered that the Irish Authorities would find it impossible to facilitate any further retention applications to this applicant in light of the planning history and having regard to EU and Irish law as confirmed in **C-215/06 and 261/18** (European Court of Justice) together with *AN TAISCE, PETER SWEETMAN & Others v. AN BORD PLEANÁLA and Others* [9/19, 42/19 and 43/19], Irish Supreme Court.

COMPLIANCE HISTORY DEMONSTRATES NO EXCEPTIONAL CIRCUMSTANSES

8. This quarry has had a long history of exceeding permitted boundaries. This first occurred in 2003 when ***Meath County Council*** issued an enforcement notice ref. **03/192**. A retention application was subsequently submitted under ref. TA/30334 [PL 17.206702]. This included a large element of retention: *"...the retention of extension at quarrying over an area of 4.88 hectares, storage of overburden material, settlement lagoon and stilling pond, office and workshop area, septic tank and percolation area..."*

9. In 2009 the applicants applied to extend the quarry under ref. TA/900976 [PL 17.235960]. This was granted [subject to conditions] on the **3rd August 2010**. That development was described as follows: - *"PROPOSED DEVELOPMENT: Extension of approximately 2.85 hectares to the existing permitted extraction area, ... and associated accommodation works to include landscaping and boundary treatments, restoration proposals including construction of berms ... on a total site area of 4.274 hectares at Tromman, Rathmolyon, County Meath."*

10. The Order further stated in a paragraph before the planning conditions were listed: -
"In relation to visual amenity, the Board agreed with the Inspector that, as proposed, the quarry extension would have an unacceptable impact. However, the Board considered that the development would be acceptable, if reduced in extent to allow for a 60 metre wide buffer zone along the frontage with the regional road. Such buffer zone would also enhance public safety and aid dust suppression.
Reason: In the interest of visual amenity, public safety and dust suppression"

[Emphasis added]

11. **Condition 2** of the order specifically stated: -

    "The area of the quarry extension shall be reduced so that the edge of the extraction area is not less than 60 metres from the boundary of the site with the R156 regional road. Revised drawings in this regard, including in respect of landscaping and site restoration, shall be submitted to the planning authority for written agreement before development commences.
    Reason: In the interest of visual amenity, public safety and dust suppression."

12. By way of warning letter dated 22nd March 2018, *Meath County Council* advised the site operator: - *"It has come to the attention of the Planning Authority that unauthorised development may have been or is being carried out on lands at Trammon, Rathmolyon , Co Meath namely: - Breach of condition 2 as per Planning Permission TA900976 / PL.17.235960."* [ref. **17/004**] Notwithstanding this notice, a campaign of extraction continued to occur within 60 meters of the road over the following years.

13. The 60-meter limit was clearly provided for in the order form *An Bord Pleanála* after an EIA assessment. This planning application had been subject to a full EIA assessment. It follows that an EIA infringement has occurred with a prolonged campaign of blasting over several years where the operator clearly knew he should not be working. The developer therefore knew that an EIA offence was occurring but continued to dig/ extract. The operator must admit culpability for this offence; there is absolutely no excuse for it. They had been specifically precluded from quarrying there and issued with a warning letter in 2018, but continued to extract from this area in the years that followed.

The Road [R156] to the left of the quarry. Note the proximity of the quarry to the road. They were required not to quarry within 60m of the road. This was ignored.

The road [R156] is immediately behind the quarry in this frame. Blasting occurred much closer to the road than permitted.

14. Offences committed after the **3rd July 2008** are significant. That was the date on which **C215/06 [Commission v. Ireland]** was handed down by the European Court of Justice. That decision is significant in that it provided that Regularisation after the event not permissible under EU law where E.I.A. and A.A. should have been prepared prior to development. In that case it was held that with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337/EEC, Ireland has failed to comply with the obligations that it has under Articles 2, 4 and 5 to 10 of the said Directive 85/337/EEC.

15. There were several blasts in this area of the quarry right up to and including 2024. This can't be accidental. A warning letter had even issued in 2018. It is submitted therefore that *An Bord Pleanála* are obliged to find that the operators should not responsibly not have know that what they were doing was not unauthorised. They were specifically precluded from going into a particular area and knowingly did it. This is not a once off event; there was an entire comparing of blasting to remove that amount of stone. This was contrary to the permission following EIA and was therefore contrary to the EIA directive. This conduct specifically offended the outcome of the past EIA by non-compliance with the conditions. There is no basis to permit this quarry / operator to access the substitute consent process. It follows that the section 177E application should be rejected on that basis.

16. **Condition 3** of the order specifically stated: -
"There shall be no excavation below a level of 50 metres OD.
Reason: In the interest of clarity and protection of ground water resources."

    The quarry also appears to be well below 50 a.O.D. The board should ascertain the status of the floor levels within the quarry.

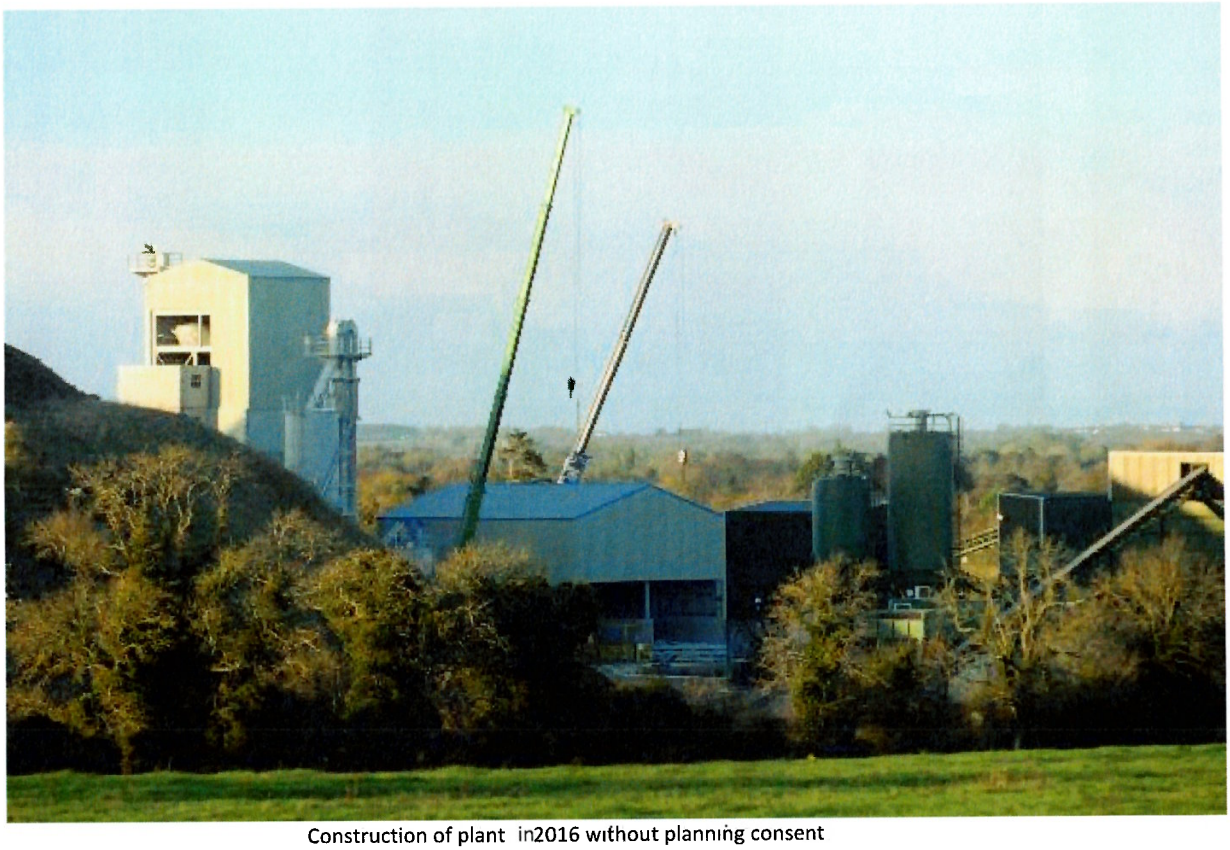
17. Planning consent expired in August 2018 for that which had been permitted. Notwithstanding it has continued in operation ever since and continued to expand regardless of a previous Judicial Review and regardless of a pending section 160 on the matter.

18. Having regard to the Large Concrete Products Factory constructed in c.2017, this never had planning consent. This is a massive factory and a very substantial operation. This is in turn being supported from a quarry that does not have planning permission and much of it from an area where they were specifically precluded from working (please see above). This operator is a major regional player operating without planning permission.

Concrete Products Factory; there is no planning consent for the long building to the fore of the screen

The majority of the structures in this frame were constructed without planning consent.

Construction of plant in 2016 without planning consent



Construction of plant in2016 without planning consent

19. Planning Regs Schedule 5 sets out classes of development which come under the EIA Directive. Part B deals with Member State Thresholds. Class 10 Infrastructure Projects (a) Industrial estate development projects where the area would exceed **15 hectares**. It follows that all activities which do not fall within the definition of quarrying may well have created a separate EIA offence. If follows that industrial activities in excess of 15 HA require a separate EIA. This should be examined by the board.

2003 APPLICATION & a.O.D.

20. Having regard to the application of 2003, which was largely concerned with retention; ref. TA/30334 [PL 17.206702], this grant is problematic. Condition 4 of the parent grant of planning for this quarry ref. 97/1868 provided that "*Extraction shall not take place below the level of **62.00m O.D.** as defined on the extraction plan drawing (Drawing No.2) J486-D02 submitted on the 31/08/98. Reason: In the interest of development control and protection of local water supplies.*" An engineers report on the planning file by Paul Donlon to David Keyes states that "*The survey has confirmed that the level of 62.00 OD has been **exceeded by approximately 4m**.*" The implication that the level was **58m OD**.

21. Having examined the subsequent application, we were unable to find any element of the application seeking to quarry beneath this level. Yet condition 18 of the grant by Meath County Council specifies "*There shall be no excavation below the level of 7.0 meters A.O.D. Malin head.*" This was repeated in condition 2 of the subsequent grant from *An Bord Pleanála*. On the face of it, this planning permission as deficient in that this was not applied for. Notwithstanding, it follows that no assessment was conducted by the planning authority. It appears therefore that the subsequent planning permission is erroneous. Therefore reliance on this baseline for future planning consents is also highly questionable having specific regard to EIA requirements.

[Emphasis Added]

CONCRETE BATCHING PLANT

22. **May 2013**, a large Concrete Batching Plant was removed from a site situate at *Keegan Quarries Plant, Aghar*. This plant had previously been the subject of *Meath County Council* consent TA/20055, (which was a retention permission) and which was for 5 years from 2000. This in itself had been grossly exceeded as the time permitted 5-year time frame had long since elapsed. It was re-erected at the quarry in Trammon without any planning consent whatever. It cannot reasonably be claimed therefore that it could in any way have been exempted from planning consent. UD ref: **14/134**.

Concrete Batching Plant which was previously subject to a retention planning consent on the former Keegan site at Aghar a few miles away. This was moved to the Trammon site in May 2013. [ref.0395] ©

PREVIOUS SUBSTITUTE CONSENT

Newcastle, Enfield, County Meath
Meath County Council, Planning Enforcement

23. The site is bounded on one side by the river Blackwater which flows in a northwest direction into the River Boyne and River Blackwater Special Area of Conservation ('the SAC'). It is common case that otters, a qualifying interest species of the SAC, travel up the river to the subject site. The site had been used for [unauthorised] quarrying of sand and gravel. On or about **23rd October 2014**, *An Bord Pleanála* granted substitute consent (i.e. retrospective planning permission and EIA) for unauthorised quarrying at this site.

24. In its decision to grant substitute consent in 2014, *An Bord Pleanála* its decision conditioned the restoration of the quarry within 24 months of the agreement of a restoration plan with the planning authority. Any remedial Environmental Impact Assessment ('EIA') conducted by the Board could only have considered the unauthorised extraction up to the date of its decision.

25. The restoration condition in the 2014 decision of the Board was not complied with. Neither did the quarry close. Unauthorised extraction continued at the quarry after the grant of substitute consent (retrospective consent for part of the historic extraction) and was the subject of subsequent enforcement action by ***Meath County Council*** who by way of enforcement notice ref **15/077** and dated 29th April 2015 stated that *'The unauthorised development consists of: The unauthorised extraction of sands and gravels.'* It further ordered that *'Cease all quarrying activity on site on lands outside those lands highlighted in Blue on attached Enforcement Map UD 15/077'* by 1 May 2015 at 17.00 hours.

26. Notwithstanding the enforcement notice, I believe that extraction continued and that the matter came before *Judge Mary O'Malley of Trim Circuit Court* on Tuesday 5th February 2019, wherein the Judge ordered the cessation of unauthorised quarry development and to *"remove all material that isn't waste material"* from the site within a period of 3 months and that the site be restored to 'conservation status' within a period of 6 months. ***Trim Circuit Court*** ref. **18/00123**.

27. The above demonstrates that substitute consent was previous disregarded and unauthorised quarrying continued. This is demonstrative of an apparent pattern of the way quarries have been operated by this developer.

Newcastle, Enfield, County Meath
Waterways Ireland

28. In 2010, *Keegan Quarries* were rapidly removing sand and gravel from this site and encroached very close to the banks of the Royal Canal together with a plot of ground owned by Waterways Ireland. Waterways Ireland became very concerned and their solicitors wrote to *Keegan Quarries* about this mater by way of letter dated the **11th October 2010**. The following are excerpts from a solicitor's letter that issued from Waterways Ireland: *'That the excavation carried out by you has made Waterways Ireland property unstable, and the boundary line is susceptible to erosion.' 'That the excavation has rendered Waterways Ireland open property unsafe, as the public can access the vertical face at the boundary, from the towpath over its property.'*

CESSATION ORDER IS REQUIRED

29. It is noted that when a section 177(c) matter appeared before **MR JUSTICE SIMONS** in a Judicial Review ref. 2019 No. 441 JR of an earlier decision by *An Bord Pleanála* ref. ABP-303334-19 to grant consent, Mr. Simons J questioned why *An Bord Pleanála* had not invoked section 177J of the Planning and Development Act which provides it with the power to order the person/ entity seeking an application for substitute consent to order it to cease operations for a defined period of time while the matter is being considered. This has operated since 2018 without planning consent; it is therefore imperative that it be ordered to cease while this application is being determined.

30. In order to assess the application and the quarry the subject of the application, *An Bord Pleanála* MUST issue a cessation notice. It is not possible to assess an application made in Feb/March, etc based upon reports and surveys prepared in 2023, if that development continues while the application is pending. *An Bord Pleanála* must decide this application and the status quo without the quarry expanding.

    177J.— Specifically provides that: -
    "(1) Where the Board has received an application for substitute consent made in accordance with section 177E and is considering that application, it may give a draft direction in writing to the person who made the application requiring the person to cease within the period specified in the draft direction, all or part of his or her activity or operations on or at the site of the development the subject of the application, where the Board forms the opinion that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site."

NATURA IMPACT ASSESSMENT [N.I.A.]

31. Having examined the NIA, we comment as follows: -

    1.5 **Main Sources of Information**: The list of guidance's stops at 2009 and does not include the most recent guidance's at national and EU level; this suggests the r.N.I.S. is not to current best practice.

    1.5 The very long gap from 2009 to 2023 in which the EMS was not updated is noted given the immense amount of unnauthorised development at the site during that time.

    1.6 **Site Visits**: The 2018/19 site visits could not establish a 'baseline' due to the presdence of so much unauthorised development the subject of this application at that time. It is entirely disingenuous to use it as such, and therefore, the baseline is flawed and it follows that the r.N.I.S. is accordingly flawed.

    1.6 The 2018/19 carried out over 2 consecutive days do not constitute best practice for bat surveys and must be seriously questioned. Several visits over the roosting season would normally be required including dawn and dusk.

    1.6 It is submitted that the static bat detectors were not deployed in time in 2023 and do not constitute a proper bat survey as they are effectively out of season.

    2.1 **Re Location**: Applicants state that neighbouring enterprises of Keegan Quarries Ltd., pre-cast concrete manufacturing facility. This is incorrect; they are integrated developments not neighbouring enterprises.

    2.2 **Description of the Quarry Site**: This does not give the accurate history of the unauthorised development, especially the concrete manufacturing which has been in question for a very large period of time including deliberate offences post 3rd July 2008 (C-215/06);

2.3 **Subjects of this Remedial Natura Impact Statement**: Table 1 – there are not three distinct proposals, there is one large mess of unnautnorised development knowingly carried out and for many years continuing despite knowing that there were EIA and NIA offences with no attempt to curb potential impact post C-215/06.

3.1 **Screening Assessment of European Sites**: This section is deficient as it attempts to start from 2018 instead of the start of unauthorised concrete manufacturing prior to and including the 2013 erection of a readymix plant without permission, noting the knowledge of all operators of **ECJ C-215/06** and the substitute consent process by then, noting the very many Substitute Consent applications requested of Keegan Quarries following the S261A process, very few were submitted that we are aware of.

3.1 **Screening Assessment of European Sites**: Same comment as before about an out of date EMS (2009); i.e. The very long gap from 2009 to 2023 in which the EMS was not updated is noted given the immense amount of unnauthorised development at the site during that time. This didn't/couldn't keep pace with every additional piece of unauthorised development.

4.1 **European Sites Identified within the Screening for Appropriate Assessment**: Table 4 and elsewhere when taking about the closure phase/restoration phase ignores that when a quarry floods and the drawdown cone is removed, then the pollution gathered on the quarry floor; mainly hydrocarbons. In this case cement waste with high cncentrations of chemicals deleterious to water quality including chromium, pass freely into the ground water and on to the wider groundwater body, and then to surface water bodies. This is a real concern; particularly for neighboring properties depending on wells for their potable water supply.

4.3.1 **River Boyne and River Blackwater SAC**: it is submitted that the airborne transmission of cement and other pollutants to water bodies is not properly set out for assessment.

4.3.1 **River Boyne and River Blackwater SAC**: 'Proposal 1' states the settlement lagoons are of relatively recent construction. There is no real effort to look at the risk prior to their construction. Is it the case that prior to their instillation unsettled cementitious water abounded for years?

4.3.1 **River Boyne and River Blackwater SAC**: 2019 data showed discharges 'largely complied' with discharge license limits – that isn't good enough; why is there only 2019 data to be relied on in 2024? There should be data from 2013 right through to the current date. Is this data not being released or does it exist?

REMEDIAL NATURA IMPACT ASSESSMENT: DESCRIPTION OF EUROPEAN SITES AND QUALIFYING INTERESTS / SPECIAL CONSERVATION INTERESTS POTENTIALLY AFFECTED

Chapter 4: generally appears to rely on mitigations in a voluntary and often outdated EMS and which are not reproduced in the r.N.I.S. as having been complied with. That is not a standard satisfying the Kelly [[2014] IEHC 400] threshold and contains many lacunae. Lacunae must be absent. The details are vague and indeterminate. This r.N.I.S. is deeply flawed and cannot be said to meet the requisite standard.

5 CONSIDERATION OF 'IN-COMBINATION' IMPACTS

Chapter 5: Given the proximity of the Kilsaran quarry, there is no real attempt to address cumulative impacts.

Chapter 5: One cannot rely on a 2004 discharge licence, whose parameters are only judged against 2019 data (and is even only substantially compliant in that regard as stated for 2019), bearing in mind that there was no or no serious attempt at AA in the granting of that licence. This licence is way out of date with thresholds which are not suitable for a modern quarry. It follows that assessment against those parameters is not proof of no risk.

6 MITIGATION

Chapter 6: The mitigations now set out appear to reflect a 2019 wish list and does not deal with development and use prior to then. No evidence is given that the settlement lagoons underwent a design process. The water quality data does not discuss pH; a key issue where cementitious material is present.

Chapter 6: states "*On the basis that the mitigation measures outlined in the EMS were in place*" but doesn't confirm that they were – this reduces this document to a paper exercise with no credible value. Moreover, we have in the past observed water leaving the quarry and entering the stream. This water was clearly not as it should have been as demonstrated in the photo hereunder. Furthermore, the base of the receiving stream is very white in color, which suggests a buildup of a lot of lime.

Discolored Waste Water entering the stream at the rear of the quarry in 2004

The stream at the rear of the quarry

The stream at the rear of the quarry joins another river.
Even when water is not flowing, the base of this stream remains very white in colour.

7 CONCLUSIONS

Chapter 7: the first line and final paragraph suggests each of the 'proposals' individually and does not suggest a cumulative assessment of the site's own proposals – this is ridiculous;

Chapter 7: it is submitted that the conclusion do not meet the ***Kelly v An Bord Pleanala*** [2014] IEHC 400, 2013 802 JR, threshold of certainty.

DEVELOPER'S HISTORY OF FLOUTING PLANNING LAW (UNAUTHORISED /ILLEGAL DEVELOPMENTS)

32. This developer has a long history of flouting of planning law not just at this quarry, but across three counties; namely Counties **Meath**, **Westmeath** and **Kildare**. We have assembled a list of these hereunder: **Enforcement Notices/ Warning Letters** (that we know about).

COUNTY MEATH

33. **Enforcement Notices/ Warning Letters**: There have been hugely problematic compliance issues relating to *Keegan Quarries Limited* for many decades now and we outline hereunder a list of enforcement notices (that we are aware of) hereunder.

34. **Trammon, Rathmolyon, County Meath**; Unauthorised development ref. **03/192**. Exceedance of permitted boundaries, (the initial grant of planning permission in 1998 was massively exceeded and abused to such an extent both vertical and horizontally that a very significant application for retention was necessitated in 2003). Enforcement notice issued on the **7th July 2003**.

35. **Trammon, Rathmolyon, County Meath**; Unauthorised development ref. **14/162**. Non-compliance with condition 4 of 00/2075 Re a financial condition to protect water supplies in the area. Warning letter issued on **3rd November 2014**.

36. **Trammon, Rathmolyon, County Meath**; **(As above) May 2013**, a large Concrete Batching Plant was removed from a site situate at *Keegan Quarries Plant, Aghar*. This plant had previously been the subject of *Meath County Council* consent TA/20055, (which was a retention permission) and which was for 5 years from 2000. This in itself had been grossly exceeded as the time permitted 5-year time frame had long since elapsed. It was re-erected at the quarry in Trammon without any planning consent whatever. It cannot reasonably be claimed therefore that it could in any way have been exempted from planning consent. UD ref: **14/134**.

37. **Trammon, Rathmolyon, County Meath**; Unauthorised development ref. **15/284**. Unauthorised construction of electrical sub station and the erection of pre cast concrete units at the rear of the quarry area. Enforcement notice issued on **25th November 2015**.

38. **Trammon, Rathmolyon, County Meath**; Unauthorised development ref. **15/284**. The unauthorised construction of an electrical sub station and the erection of a batching plant and hopper including concrete silos, storage bays/units at the rear of the quarry area without the benefit of planning permission. Enforcement notice issued on **18th November 2016**.

39. **Trammon, Rathmolyon, County Meath**; Unauthorised development ref. **15/284**. The unauthorised newly constructed blockwork electrical sub station, construction or precast concrete units i.e. silos/storage bays, 2 number concrete batching plants and associated plant and a large industrial building. Enforcement notice issued on **30th January 2017**.

40. **Trammon, Rathmolyon, County Meath**; Unauthorised development ref. **15/284**. The unauthorised construction of an electrical sub station and the erection of 2 no. batching plants and hopper including concrete silos, storage bays and the construction of an industrial unit at the rear of the quarry area without the benefit of planning permission. Enforcement notice issued on **31st March 2017**.

41. **Trammon, Rathmolyon, County Meath**; Unauthorised development ref. **17/004**. By way of warning letter dated 22nd March 2018, Meath County Council advised the site operator: - *"It has come to the attention of the Planning Authority that unauthorised development may have been or is being carried out on lands at Trammon, Rathmolyon , Co Meath namely:- Breach of condition 2 as per Planning Permission TA900976 / PL.17.235960."* Notwithstanding this notice, a campaign of extraction continued to occur within 60 meters of the road over the following years.

42. **Bullring, Clondoogan, Summerhill, County Meath**: Unauthorised development ref. **12/192**. Unauthorised quarrying of sand and gravel. Warning letter issued on **24th June 2013**. Despite this, works continued.

43. **Bullring, Clondoogan, Summerhill, County Meath**: Unauthorised development ref. **13/140**. Unauthorised quarrying of sand and gravel. Warning letter issued on **3rd July 2013**.

44. **Duleek, County Meath**; Unauthorised development ref. **14/213**; non-compliance with Condition No. 18 which provided for a cash deposit of €30,000. It is noted that a warning letter was issued in 2015. In short the letter referred to: - *'non-compliance with Condition No. 18 of Planning Permission Ref. 01/4203.'* Condition 18 of a planning consent re providing a cash deposit of €30,000; ref. 14/213. Warning letter issued on **3rd November 2014**.

45. **Rahinston, County Meath**; on the **15th May 2013**, *Meath County Council* issued an enforcement notice ref. **13/092** relating to 'outside of working hours'. Out of hours operation has been a major issue relating to all the Keegan operations for many years and the local residents have had to endure enormous disruption, which has and continues to have an impact on their quality of life.

46. **Bellewstown, County Meath**; Unauthorised development ref. 11/243. Unauthorised storage of material and quarry operations. Warning letter issued **3rd November 2011**. The enforcement letter served on Keegan Quarries stated: - *'It has come to the attention of the Planning Authority that unauthorised development may have been or is being carried out on lands at Bellewstown, Co Meath namely: -* ***'unauthorised use of lands for the deposit / storage of material from quarry operations'***. On the 12th October 2012, planning permission was granted to reinstate under SA110858. Given the current state of the site; it has not been reinstated and the 3 years (as per condition 2).

47. **Newcastle, Enfield, County Meath**: Unauthorised development ref. **15/077**; unauthorised quarrying of sand and gravel on a very large scale much of it from beneath the water-table, Enforcement Notice issued; **29th April 2015**. This matter appeared before *Trim Circuit Court* on the **5th February 2019**; ref. **18/00123**.

48. **Newcastle, Enfield, County Meath**: As above; In 2010, *Keegan Quarries* were rapidly removing sand and gravel from this site and encroached very close to the banks of the Royal Canal. Waterways Ireland became very concerned and their solicitors wrote to *Keegan Quarries* about this mater by way of letter dated the **11th October 2010**. The following are excerpts from a solicitor's letter that issued from Waterways Ireland: *'That the excavation carried out by you has made Waterways Ireland property unstable, and the boundary line is susceptible to erosion.' 'That the excavation has rendered Waterways Ireland open property unsafe, as the public can access the vertical face at the boundary, from the towpath over its property.'*

COUNTY WESTMEATH

49. **Annascannon, Killucan, Co Westmeath**: Unauthorised development ref. **1909**. Unauthorised quarrying of sand and gravel: Warning letters dated **10th June 2019** and also **23rd March 2020** issued to *Mr. John Keegan, Keegan Quarries*, etc dated. *Keegan Quarries* appear to have now vacated this site leaving behind a large lake of water where it had removed an enormous amount of material from beneath the water table.

COUNTY DUBLIN (FINGAL)

50. **Fingal County Council: Long Acre, Thormanby Road, Howth**: Unauthorised development ref. **Enf. No.22/149B**. Non Compliance with Condition 4 (al, (b) and (c) and Condition 5 of approved Planning Permission by An Bord Pleanala ABP-311186-21. This site was purchased in the name of ***Leinster Land Developments Limited***, which is another company in the directorship of Mr. John Keegan.

COURT ORDERS – UNAUTHORISED DEVELOPMENTS

COUNTY KILDARE

51. **Ballyownan, Clonard, County Kildare**: This has been the main source of sand and gravel to the Keegan group since circa 2016. Unauthorised development ref. **UD7387**. There has been wholesale excavation of material from below the water-table. After many years in operation, *Kildare County Council* eventually pursued the matter through the Circuit Court [ref **2021/App19]**. Note that the case was listed for mention only on numerous occasions between 2019 and 2023, but it was frequently adjourned for periods of up to 6 months; the quarry continued to operate during this period.

52. Eventually the matter was heard **July 2023** and the court issued orders (to amongst other items) require the unauthorised quarry to cease extractions below the water table.

53. Notwithstanding, the court order, a long-reach machine has been observed to continue to extract material from beneath the water table as recent as April 2024.

Photograph from adjoining lands April 2024

COUNTY MEATH

THE AGHAR SITE; aka Lands at Clegarrow, Rathmolyon, County Meath

54. **Briefly**: *Keegan Quarries Limited* were to remain 1.4 meters above the water table. This condition was ignored and left 2 very large lakes together with other smaller ones were created. They later removed their plant; much of it to the Trammon site and abandoned the Aghar site and have thus far failed to carry out any reinstatement.

55. **Statutory Enforcement Authorities**: *Meath County Council* failed to take any enforcement action on this site. The owners of the site; the Fowlers' (Lady Jennifer Fowler) ended up having to pursue Keegan Quarries in the High Court by way of a section 160 Planning enforcement action. Mr. Justice Michael White was very critical of *Meath County Council's* failure to take enforcement action against the site operators; Keegan Quarries Limited. High Court determination of ***Fowler v Keegan Quarries Limited*** 2016 IEHE 602/ High Court Record Number: 2012463 MCA. Initial judgment was delivered 28th October 2016. Of note is page 35 re Judges comments on the lack of enforcement by the Planning Authority.

UNAUTHORISED FELLING OF TREES

[THE AGHAR SITE; aka Lands at Clegarrow, Rathmolyon, County Meath]

56. We understand that *Keegan Quarries* illegally felled 69 mature trees at a site in Clegarrow/ Aghar, County Meath. File ref. AIF 19/08. The matter was investigated by their inspector Mr. Kevin Collins who confirmed that 69 trees had been illegally felled. We understand that the trees were removed on dates between 1st April and 2nd May 2008. The case was listed for mention at Trim district court on 23rd April 2009. The case was heard at Trim District Court in December 2009. Mr. Keegan pleaded guilty.

57. We understand that ***Mr. Keegan/ Keegan Quarries Ltd*** was fined **€2,500 + costs**. We further understand that this was appealed and the fine was reduced to **€1,750 + Costs**. Mr. Keegan undertook to replant at lands, which he had recently acquired at Trammon; not at Clegarrow or Rahinston.

58. It would appear that this was on Trammon land known as the Thistle Field; a field which Mr. Keegan has twice tried to develop as a quarry or processing plant. The only planting that was observed to have been conducted in this field was in fact a shelterbelt/ screening boundary.

HILLTOWN LITTLE, BELLEWSTOWN, CO. MEATH

59. Briefly local residents [***Pierson & Ors -v- Keegan Quarries Ltd***] in the Bellewstown of Co. Meath (near Duleek) suffered significant nuisance from an unauthorised quarry, which was operated by *Keegan Quarries*. In the absence of enforcement proceedings by *Meath County Council*, local residents pursued Keegan Quarries themselves. On Friday, October 8, 2010 the Irish Times reported that: -

"Ms Justice Mary Irvine ruled yesterday that the use by Keegan Quarries Ltd of lands at Hilltown, Bellewstown, Co Meath as a rock and stone quarry amounted to unauthorised development materially different from any use to which the lands were previously put. Ms Justice Irvine ruled in favour of the residents. The judge said the present operation of the quarry was "highly mechanised" and generated substantial noise and dust with large volumes of trucks going to and from the premises."

[http://www.irishtimes.com/newspaper/ireland/2010/1008/1224280636497.html]

The case references are: -

Pierson & Ors -v- Keegan Quarries Ltd
High Court Record Number: 2008 20 MCA
Neutral Citation: [2009] IEHC 550
Irvine J. delivered her decision on the 12th August 2009

Pierson & Ors -v- Keegan Quarries Ltd
High Court Record Number: 2008 20 MCA
Neutral Citation: [2010] IEHC 404
Date of Delivery: 10/07/2010

60. In a subsequent order of the court dated the **21st December 2010** the respondents *'KEEGAN QUARRIES LIMITED'* were ordered to restore the lands. Part 2 of the said order provided that: -

'Pursuant to s.160(1)(b) of the Planning and Development Act 2000 that the Respondent restore the lands the subject matter of these proceedings to the condition they were in as of February 2007, or as close as is practicable thereto, the said works to be carried out so as to obliterate all evidence of the present quarry and leave the lands landscaped in the manner outlined in Option 1 of the letter of Malone and Martin Solicitors dated the 19th November 2010 save as may otherwise be required by the Planning Authority; the Respondent to make whatever applications in that behalf may be necessary within 16 weeks of the date of this Order.'

61. Keegan Quarries applied to *Meath County Council* on **15th September 2011** to (ref. **SA110858**): -

*'restoration of c.3.8 hectares of unauthorised quarry workings using inert overburden and soils, of which c. 40,000 cubic metres will be imported soils and stones. The development consists of retention of a site office, workmen's canteen, toilet facilities, existing septic tank system, wheelwash, weightbridge, pump house and other ancillaries on an additional 0.4 hectares of lands for a period of up to **3 years to complete the works**. The application relates to development activity requiring a waste management facility permit. Significant further information/revised plans submitted on this application'*

[Emphasis added]

62. On the 12th October 2012, planning permission was granted to reinstate under **SA110858**. In a further application ref. **AA150917**, this was extended by another 3 years by way of order dated 19th October 2015. It follows that planning lapsed on the **19th October 2018**.

63. Given the current state of the site; it has not been reinstated and the 3 years (as per condition 2) for doing so has long since passed. Moreover it would appear that the High Court order of the **21st December 2010** has likewise not been complied with.

MISLEADING PLANNING APPLICATION – PROTOTYPE SILO

64. It should also be noted that a very serious issue arose in **2017**. The applicant **'Keegan Precast Limited'** (one of the Keegan Group) applied for retention for a 'prototype silo' (which we understand had cost many millions of Euro to construct) and which was under construction for the best part of a year (all without any planning permission).

65. It later transpired that there is a Calcium Carbonate plant. We were subsequently unable to find any reference to a Calcium Carbonate Plant in the planning application documents let alone on the public notices; ref PL 17.248115 (TA/161419). This is contrary to EU law as well as Irish law. Either the description as a 'prototype silo' had the effect of concealing the real purpose of the structure or else there was never an application for the Calcium Carbonate plant.

66. It is also a concern that a 'silo' attracted little or no financial contributions whereas a Calcium carbonate plant would likely have attracted significant contributions. We note that a single financial contribution of **€360** was imposed in respect of public infrastructure facilities.

67. We don't know anything about the potential toxicity of the waste or emissions, as none were provided in the application for a prototype silo. Neither were we informed about treatment of waste and how it is being treated or disposed of? Because the applicant chose to hide its true purpose, there was also no Environmental Impact Assessment [EIA] or Appropriate Assessment [AA] on its operation.

68. When it was discovered that the purpose was entirely different to that which was applied for and granted, a section 5 referral was prepared and submitted to *Meath County Council*. It is believed that this plant should at the very least, have been subject to a screening of some kind, but most likely would have required an EIA [Environmental Impact Assessment]/ AA [Appropriate Assessment under the EU Habitats Directive]. By order dated the 29th November 2017, *Meath County Council* confirmed that this would need specific planning consent. This is a most serious abuse of the planning process.

69. Notwithstanding the above, in 2016, a planning consent attaching to PL 17.248115 (TA/161419) was granted by An Bord Pleanála on the **3rd October 2017**. This application was for a period of three years and therefore would have expired on **3rd October 2020**. Despite that, the plant continues to operate. This planning application was originally made by ***Keegan Precast Limited*** and specified that it was for a 'Temporary three-year retention of a concrete silo structure with a footprint of 99 square metres and measuring approximately 28.6 metres in height, associated with, and ancillary to, the existing permitted precast concrete facility permitted under Preference TA/20408...'

70. Some of the discourse from ***Mr. Paul Caprani, Senior Planning Inspector***, is extremely concerning. He makes the following remarks re non-compliance with previous planning consents.

> ***10.1. Issues of Enforcement and Non-Compliance with Previous Permissions***
> *The planning history associated with the site and the contention that significant issues in respect of unauthorised development and non-compliance with conditions is a major theme of both third party appeals. It is clear that there have been enforcement issues in respect of works undertaken on the site in question. Meath County Council have acknowledged that there have been on-going enforcement issues associated with the site. However, it is clear that the Council do not consider these enforcement issues to be so significant as to warrant a refusal of planning permission for the current application before the Council. I consider that any issues in relation to unauthorised developments and enforcement proceedings are on-going and are a matter between the Planning Authority as the enforcement authority, and the applicant. It appears that the applicant in applying for retention of planning permission for the current development before the Board, is engaging in efforts to regularise any unauthorised activity on site. I consider the application before the Board should be adjudicated on its merits and I do not consider it appropriate to refuse planning permission for the retention of the proposed silo for a temporary three-year period should be refused specifically on grounds relating to failure to comply with the planning code in respect of other works carried out on site. The current application before the Board should be*

evaluated on its merits and in accordance with the proper planning and sustainable development of the area.

[Emphasis added]

71. On the issue of Visual Impact, *Mr. Caprani* states the following: -

> ***10.3 Visual Impact***
> *Finally, in relation to the issue of visual amenity the structure in question is located within an existing precast concrete facility which has the benefit of planning permission and surrounded by a quarry. In my view the character of the area therefore has been significantly altered from a greenfield site in a rural area and this makes the building for which retention is sought more acceptable in my view. In addition, the Board will note that the permission sought under the current application relates to a three-year period only. This suggests that the structure will not be a permanent structure in the landscape over the long term.*

This is a substantial structure and it took over 6 month to construct. It is difficult to see how *Mr. Caprani* could conclude that it was in any way temporary in nature. Moreover, it should be noted that years after the stated three year consent; this structure remains in full operation despite the original planning consent having long since expired!

72. On the issue of Financial conditions *Mr. Caprani* states the following: -

> ***10.5. Nature of Financial Conditions Attached***
> *Section 10 of the local authority planner's report notes that the structure has a site area of 99 square metres which will be charged at an industrial/manufacturing rate of €11 per square metre. However, as the structure relates to a temporary permission only the development will be charged at a rate of 33% of the normal rate. I have assessed the Development Contribution Scheme and I consider that the contribution has been levied in accordance with the above scheme. I specifically note Section 7.1.1 which relates to temporary permissions and it states that temporary permissions shall be levied at a rate equivalent to 33% of the development contribution normally attributed to a permanent development of that class and scale. I am therefore satisfied that the development contribution has been levied appropriately.*

This is very concerning in that the structure is still in operating; years after the three years specified in the original planning documentation. Furthermore; and as previously stated; the structure was for a purpose which had not been stated in the planning documentation at all.

73. Given all of the above, this particular application is considered deceptive if not mendacious. We have again been put to unnecessary loss of time and expense dealing with these applications, which is very unfair and unreasonable. The public participated in good faith with the public participation aspect of the planning application only to then discover that this was essentially a sham in order to cover for something very different. The need to have to constantly spell out why *Keegan Quarries* and related companies should not be granted planning permission for retention applications reflects very badly on the competence of *Meath County Council* staff and its agents.

74. Just after *An Bord Pleanála* granted permission to retain this large tower type structure, it was discovered that the retention application to *An Bord Pleanála* (alluded to in previous point) related to a ***prototype silo*** PL 17.248115 (TA/161419).

75. Is this "prototype silo", which is reputed to have cost in the region of some €4 million to construct, not in fact a Calcium Carbonate Plant?

76. If so, this hid the real purpose of the structure from the public and from the statutory authorities. Moreover, this had the effect of attracting miniscule planning application fees; a mere €360.

77. It turned out that a separate company has been established; namely that of *Keegan Calcium Carbonate Limited* which now had a separate website of its own to advertising the new product.

2016/ 2017 – LARGE NEW FACTORY

78. **2016/ 2017**: While the above referenced application for retention to both *Meath County Council* and later *An Bord Pleanála* was being considered, *John Keegan/ Keegan Quarries Limited* engaged in the construction of further unauthorised and very large factory type structures.

    This was while at the very same time they were also engaged in seeking retention permission for the above referenced tower. It follows that planning inspectors would have had sight of the latest unauthorised developments, but chose still to ignore this and grant planning permission for the earlier unauthorised development which we now know had concealed the true purpose.

79. When *Meath County Council* eventually took action against the site operator, we understand that all sorts of spurious claims were made by the operators to the effect that the developments were exempt and that there was no evidence to prove they were unauthorised. We now know that *Keegan Quarries Limited* also engaged in no less than 3 separate Section 5 referrals over a period of time. We believe that this was nothing more that obfuscation and time delaying tactics so as to buy time to facilitate the completion of the unauthorised development. This is totally unacceptable.

INSPECTORS REPORTS – MEATH COUNTY COUNCIL ENFORCEMENT

80. **Inspectors Reports**: There has been a long list of inspector's reports on this and other quarry sites owned and operated by John Keegan and or Keegan Quarries Limited. This demonstrates the inordinate amount of time consumed by the statutory authorities in pursuing this development. These reports are in marked contrast to the current position adopted by this same local authority (Meath County Council), which is now actively supporting retention for this development. Inspectors reports outline the planning history together with an outline of the unauthorised developments and typically makes statements such as the following: -

    "Evaluation:
    It is my opinion that the works done and the present use of the land is development in accordance with Section 3 of the Planning and Development Acts 2000 - 2014. It is not exempted development and the development has proceeded without the benefit of planning 'permission as required under Section 32 of the Acts. Therefore It is my opinion that the development is unauthorised development.

    Recommendation
    I recommend Issuing a warning letter to ..... for the construction of an electrical sub station and the construction and erection of pre cast concrete units to the rear of the quarry area at Trammon, Rathmolyon without the benefit of planning permission."
    [UD Reference: 15/284 – 2015-10-05]

    "Having reviewed the ongoing unauthorised development at the rear of the quarry works being operated by Keegan Quarries Ltd , including the developers application for exempted development under Section 5 of the Planning and Development Act 2000- 2015 and finally the planners decision with regard to the exemption application under Section 5 of the Planning and Development Act 2000- 2015. I recommend issuing an enforcement notice to the developer..."
    [UD Reference: 15/284 – 2016-11-03]

    "Evaluation
    It is my opinion that the works done and the present use of the land is development in accordance with Section 3 of the Planning and Development Acts 2000 - 2014. It is not exempted development and the development has proceeded without the benefit of planning permission as required under Section 32 of the Acts. Therefore it is my opinion that the development is unauthorised development and the scale of

the development in relation to the existing size of the development requires immediate action. The scale of the development could give rise to increased traffic movements and requires immediate action

Recommendation
Having reviewed the ongoing unauthorised development at the rear of the quarry works, including the developers application for exempted development under Section 5 of the Planning and Development Act 2000-2015 and finally the planners decision making with regard to the exemption application under Section 5 of the Planning and Development Act 2000-2015, it is my opinion that Enforcement action should be taken as a matter of urgency as the works on site continue and are such a scale that this course of action is deemed necessary. Therefore I recommend issuing an Enforcement Notice under Section 155 of the Plannimg And Development Acts 2000 to 2016 to John Keegan c/o Keegan Quarries, Longwood Road, Trim, Co Meath, John Keegan, Longwood Road, Trim, Co.Meath, John Keegan, C/O Malone & Martin Solicitors, Market Street, Trim Co. Meath and Keegan Precast Ltd TRAMMON, RATHMOYLAN, CO. MEATH with an attached schedule of works to be carried out"
[UD Reference: 15/284 – 2017-03-30]

"With regard to the non compliance with items 2, 4, and 7 of the Enforcement Notice and schedule on the 31/03/2017 issued to Keegan Quarries Ltd, I now recommend sending this report to our Law Agents to take legal action to remove the unauthorised industrial units, electrical sub station, 2 No batching plants including silo/storage bays, storage hopper and concrete bases including associated plant and machinery required to operate the same on the lands at Trammon, Rathmolyon, Co Meath."
[UD Reference: 15/284 – 2017-07-04]

81. **Enforcement Notices**: Below is a list of Inspectors Reports relating to the Trammon, Rathmolyon, County Meath

    a. 2003-05-07-Engineers report – David Keyes – 62m OD exceeded by 4 meters
    b. 2015-11-25-Inspectors Report – Bizarrely redacted by Meath County Council
    c. 2016-11-06-Inspectors Report – Bizarrely redacted by Meath County Council
    d. 2017-01-25-Inspectors Report – Bizarrely redacted by Meath County Council
    e. 2017-01-26-Inspectors Report – Bizarrely redacted by Meath County Council
    f. 2017-03-30-Inspectors Report
    g. 2017-04-04-Inspectors Report – Bizarrely redacted by Meath County Council
    h. 2017-07-04-Inspectors Report
    i. 2018-01-31-Inspectors Report
    j. 2018-03-22-Inspectors Report

82. **Enforcement Notices**: Below is a list of Inspectors Reports relating to the Newcastle Site, Enfield, County Meath

    a. 2015-04-07-Inspectors-Enfield-
    b. 2015-05-05-Inspectors-Enfield
    c. 2015-05-14-Inspectors-Enfield
    d. 2015-07-29-Inspectors-Enfield
    e. 2017-06-20-Inspectors-Enfield

83. **Enforcement Notices**: there has been a string of enforcement notices for this and other sites operated by this same operation.

    a. 2003-07-07: Trammon site; exceedance of permitted boundaries,
    b. 2013-05-15: Rahinston site; out of hours operation,
    c. 2013-06-24: Bullring site; unauthorised quarrying of sand and gravel,
    d. 2013-07-03: Bullring site; continued unauthorised quarrying of sand and gravel on a very large scale,
    e. 2015-04-21: Newtown, Duleek; failed to comply with condition 18 of a planning consent re providing a cash deposit of €30,000.

f. 2015-04-29: Newcastle site; unauthorised quarrying of sand and gravel on a very large scale,
g. 2015-11-25: Trammon site; unauthorised development/s (warning letter),
h. 2016-11-18: Trammon site; unauthorised development/s,
i. 2017-01-30: Trammon site; unauthorised development/s,
j. 2017-03-31: Trammon site; unauthorised development/s,
k. 2019-06-10: Warning letter to John Keegan re site at Annascannon, Killucan, Co Westmeath.

SECTION 5 – 2017

84. **Ref: AVS51753**: When it was discovered that the tower type structure was in reality for a very different purpose; i.e. that of a calcium carbonate facility, rather than a mere 'silo', it was decided to seek a declaration of whether these were exempted developments for the purposes of the planning acts. This was duly prepared and submitted to *Meath County Council* together with a fee of €80.

85. Moreover there was at this time a growing list of other enforcement issues at the Trammon and other sites operated by *John Keegan/ Keegan Quarries Limited*. By order dated the 29th November 2017, it was confirmed that the following did indeed require specific planning consent: -

- Distance of the quarry from the road
- Compliance of the quarry extraction area
- Batching plant
- Importation of sand and Gravel
- Large factory on site
- Prototype silo
- Height of overburden mound
- Overburden storage at Trommon, Rathmolyon, Co. Meath

86. **Trammon, Rathmolyon, County Meath**: Planning consents ran out on this quarry on the **5th August 2018**, yet the operator continues to carry on blasting and extracting without the benefit of any planning permission. There had also been long history of unauthorised developments at the Trammon site long before planning consents expired. Unauthorised structures/ activities may be synopsised as: -

a. Construction of electrical sub station,
b. The erection of 2 no. batching plants and hopper
c. Construction of concrete silos,
d. Construction of storage bays,
e. Construction of an industrial unit at the rear of the quarry area,
f. Importation of sand and gravel (confirmed by way of section 5 (November 2017),
g. Construction of calcium carbonate plant (confirmed by way of section 5 (November 2017),
h. Height of overburden, (confirmed by way of section 5 (November 2017),
i. Non-compliance with existing planning consents (confirmed by way of section 5 (November 2017),

87. Leaving aside the above referenced unauthorised developments, the quarry itself ran out of planning permission on the 5th August 2018 and has been operating without any EIA or NIA ever since.

88. Note that extension of duration applications were made to *Meath County Council* in 2013. This was done without any regard to EIA or public consultation and was lodged under section 42 of the planning act for 'extension of duration'. This matter was referred to the ACCC (Aarhus Convention Compliance Committee) in 2013. After 6 years, the ACCC ultimately found that this had infringed Article 6 (10) of the Aarhus convention. That case is ref. ACCC/C/2013/107 (Ireland).

FINANCIALS

OUTSTANDING FINANCIAL OBLIGATIONS

89. Having conducted appropriate inquiries with the planning authority; Meath County Council as to compliance with previous grants of planning consent, we can confirm that there has been significant non-compliance with financial conditions. Based on the information supplied to us, we calculate outstanding financial obligations to be in the region of circa. €470,000 up to 2018.

90. Given that the operation has had no consent at all since 2018, it follows that it's operating without any regulation. We therefore reiterate the need to invoke section 177J of the planning and development act in that a cessation order would be appropriate in the circumstances.

91. The construction sector and the construction service sector is at full employment and I say that all Keegan Group employees would secure alternative local employment with quarry organisations that operate within the confines of the law.

MR. KEEGANS OWN ADMISSIONS

92. **Keegan Quarries Ltd submissions to the Meath County Council in respect of Readymix Ireland's application of 1998 & dated 29th January 1999**: (*copy enclosed*).

    Mr. Keegan was concerned about the level of blasting that would ensue if planning permission were to be granted to an additional quarry. He further stated in that letter that he believed that there was; ***"an adequate number of quarries to meet the demand"***.

    Finally Mr. Keegan states that he was ***"very worried about the unnecessary upset that would be caused to the local people by a second quarry"***.

    He subsequently constructed factory after factory (mostly without any planning consent) and a very large concrete batching plant.

93. **Keegan Quarries Ltd submissions to Án Bord Pleanála in respect of Readymix Ireland's application of 1998 & dated 11th may 1999**: (*copy enclosed*).
    In this letter, Mr. Keegan was worried about the noise levels that would result from a second quarry and states that: -

    "that the people in the locality would have a lot to complain about". The current proposal by Keegan Quarries Ltd would add enormously to the then cumulative effect of two quarries.
    Mr. Keegan was also very concerned about the dust levels that would result from a second quarry and states and admitted that dust is hard to control;

    "Dust is very hard to control, especially in a Limestone quarry"; he further states that he could

    "see a lot of problems with two quarries working side by side". He further states that the traffic ensuing from the 2 quarries combined would ***"have a huge impact on the residences of the area"***.

LEGITIMATE EXPECTATION

94. **Legitimate Expectation**: The initial grant of planning permission in 1998 was for a period of 15 years. That permission envisaged that the quarry and area would have been reinstated by 2013. Sadly, this hasn't happened. Indeed reinstatement is going to be very challenging now, given the amount of unauthorised development that has since occurred. In 2013, the activities at the quarry were in fact granted an additional 5 years (without any public consultation). The community has endured more than their fair share of disruption and nuisance for the benefit of a 3rd party. The community has a legitimate expectation that lands will now be reinstated.

ARCHAEOLOGY

95. There are significant concerns about the attitude of the principal director of the companies within the Keegan Group to the issue of archaeology. In this regard, it is necessary to have regard to the events which occurred on a major archaeological site found to exist in the 'thistle field' situate at Trammon, Rathmolyon, County Meath: -

96. A major archaeological find was unearthed on the southern side of the R156 in 2007 at a site owned by Keegan Quarries (when the applicant had applied to tunnel under the road from an existing quarry to a Greenfield site). Two large early medieval burial grounds were discovered and some 33 sets of skeletal remains were touched on near the surface of the ground. When the National Monuments Service [NMS] placed a protection order over the burial grounds (as published in Ir*is Oifigiúil* in January 2011), the applicant challenged this in the High Court; ***KEEGAN QUARRIES LIMITED -V- MINISTER FOR THE ENVIRONMENT HERITAGE AND LOCAL GOVERNMENT [2011/353 JR]***. We understand that the department consented to an order of *certiorari* on the 16th October 2012. We further understand that part of the order mandated that the burial sites be re-assessed with a view to reinstating the protections. We are informed that this was never done.

    Both burial grounds were subsequently ploughed up and tillage farming (by the applicant) has been practiced over the burial grounds every since.

97. Moreover, the applicant stripped lands in preparation for a quarry extension (adjacent to the main quarry site) during the sever blizzard conditions of November 2011 when approximately half a meter of snow fell (the big freeze). The roads were impassible and it was difficult to even get from Rathmolyon to Trim. These lands were very close to the earlier archaeological discoveries; circa 100 meters. The actual extension didn't happen for well over a year after. Questions arise as to why it was considered necessary to have this work done in blizzard conditions? Of concern is that a photograph contained in an earlier EIA reveled that there were markings in the field which should have been properly investigated during in normal weather conditions. Sadly we will now never know what may have been there.

PROBLAMATIC DEVELOPMENT

98. **Height of Overburden**: There is a large mountainous mound at the centre of the said quarry, which is comprised of quarry spoil and overburden. This has now reached alarming heights and can be seen from all over the area including as far away as Tara hill (22km away by car). This is visually obtrusive. It will be noted that according to the many grants of planning permission, that all: -

    '*overburden stockpiles awaiting use in landscaping shall be covered with topsoil and seeded*'.

    This condition has not been complied with. Today given the size of the overburden pile, it is considered that this would now be logistically challenging and dangerous. Given that the pile has now existed for so long, it cannot be considered a temporary structure.

99. **Progressive Restoration**: We note Condition 14 of consent 98/1868 states:

    '*The Progressive and final reclamation of the quarry shall be in accordance with the details in section 6 of the E.I.S. This work shall be competed within 2 years of the closure of the quarry as defined under condition 2 above whether or not the quarry has been worked to the extent envisaged in the plans submitted. Reason: In the interest of development control and visual amenity.*

    We further note the 2003 application TA/30334, which states PROPOSED DEVELOPMENT: '*The continuance and extension of quarrying of limestone, progressive restoration of the eastern bench to the adjoining property boundary, and associated development and works, and the retention of extension at quarrying over an area of 4.88 hectares.*'

    It is entirely reasonable and appropriate therefore that the quarry should immediately be restored as per the earlier planning consents.

SOCIETAL IMPACTS

ISSUES with UNAUTHORISED DEVELOPMENTS

100. **No Financial Conditions apply to an Unauthorised Developments**: Needless to say; where a development is unauthorised, it operates without any financial conditions. It also operates without any regulation including operating hours together with an appropriate monitoring regime re dust, particulates, air overpressure, water discharge, noise, aquifer, etc

101. **Unfair Competitive Advantage**: given that other permitted developments are subject to planning regulations together with liability in terms of subs for road maintenance, reinstatement, etc it follows that an unauthorised operator will have a manifestly unfair competitive advantage.

DETERRANT

102. A practice of act first/ regulate later appears to have been adopted by *Keeegn Quarries*. This is a pattern whereby a developer engages in significant unauthorised developments and then occasionally follows up with retention applications to 'regularise' the earlier unauthorised development.

PENALTIES FOR UNAUTHORISED (ILLEGAL) DEVELOPMENT

103. There are very significant penalties for unauthorised (illegal) development. Enforcement letters typically carry warnings such like: -

Section 151 of the Planning and Development Acts 2000 (as amended) provides that any person who has carried out or is carrying out unauthorised development shall be guilty of an offence. Section 154(8) of the planning and Development Acts 2000 (as amended) provides that any person on whom an enforcement notice is served who fails to comply with the requirements of the notice within the specified period or within such extended time as the Planning Authority may allow, not exceeding 6 months, shall be guilty of an offence. A person who is guilty of an offence under Section 151 and/or 154 shall be liable to a fine or term of imprisonment or both.

The possible penalties involved where there is an offence are as follows:
Fines of up to €12,697,380.00 on indictment, or 2 years imprisonment, or both,
Or
Up to €5,000.00 on summary conviction or 6 months imprisonment, or both.

104. It is a shameful indictment on the statutory authorities that this was ever allowed to happen. By continuing to grant planning consents of any kind to a developer that has conducted themselves in such a manor is unethical, contrary to the public interest and not best practice. It also likely infringes EU law. Regularisation after the event, is contrary to EU law, sets a poor precedent.

NUISANCE

105. Living beside a large quarry / concrete products manufacturing operation. Below are some examples: -

a. **Blasting**: blasting is particularly disruptive to the lives of local residences and landowners. Pets and animas become upset and some are very spooked with blasts. For local residents, blasting is particularly disruptive. Constant blasting is also a concern for the integrity of their properties with older properties being extremely vulnerable.

b. **Dewatering**: lowering of the water table is very concerning for people who depend on private wells for their water supply. Another issue is that dewatering removes finer particles from the soil leading to a lowering of the land topography in the area. This in turn is known to be responsible for structural damage. Furthermore, the quarry is being de-watered on a 24/7 basis. A large generator and pump is running on a 24/7 basis causing annoyance and loss of amenity to local residents. Some quarry operations can abstract in excess of 30 million liters of water every day – enough to fill 12 Olympic size swimming pools. It would be interesting to to know the abstraction rate of Keegan Quarries at Trammon.

c. **Tonal Bleeping**: This has also a major issue for neighbors. These are beepers which are fitted to machinery for health and safety issues. There are alternatives though and we are aware of a different type of tonal device, which can be fitted and which is only audible around the machine. We believe that these have been fitted to machines in Dublin Airport.

d. **Loading Operations**: The sounds of loading operations has also been a significant issue. Loading operations relate not only to loading of trucks but also to loading of grading and crushing machinery which is used to process blasted rock.

e. **Passing traffic movements**: This is one of the principal nuisance issues, which we encounter. Un-laden trucks can be particularly noisy, while with fully laden trucks, engine laboring under high revs is a cause of great annoyance as they pass up and down the road.

f. **Dust**: Fugitive dust also continues to be a major issue and drenches the countryside with a frequent film of dust on our vehicles and also the vegetation. Muddy roads are a regular issue each winter and keeping vehicles clean is well nigh impossible. Our experience is that limestone quarries do not have a good record in respect of dust suppression. Picking blackberries in this area is now a thing of the past given the level of fugitive dust encountered in the surrounding environment. Silica is also a major constituent of construction materials such as bricks, tiles, concrete and mortar. Dust is generated activities such as cutting, drilling, grinding and polishing. It is commonly called silica or silica dust. Silica dust particles can become trapped in the lung tissue causing inflammation and scarring.

g. **Air Quality**: Particulate Matter [P.M.]. Diesel particulate matter (DPM), sometimes also called diesel exhaust particles (DEP), is the particulate component of diesel exhaust, which includes diesel soot and aerosols such as ash particulates, metallic abrasion particles, sulfates, and silicates. When released into the atmosphere, DPM can take the form of individual particles or chain aggregates, with most in the invisible sub-micrometre range of 100 nanometers, also known as ultrafine particles (UFP) or PM0.1. Exposure to diesel exhaust and diesel particulate matter (DPM) is a known occupational hazard to truckers, railroad workers, and miners using diesel-powered equipment.

h. **Spillages & Blocked shores**: Overloaded trucks has been a major issue with Keegan Quarries. A consequence of overloaded trucks are frequent spillages of aggregates and dust along the roadsides. There are three deep gullies (shores) outside our home and they frequently become blocked and we have to remove significant quantities of quarry related debris. Our drains regularly need to be blown out by a large drain cleaning truck.

i. **Out of Hours operation/ activity**: Out of hour's movements of trucks has always been an issue. It is often the case that truck movements are common as early as 5am thereby severely disrupting our sleep. Likewise, late evening traffic has also been a problematic. Activity in the workshops / factories is also hugely problematic with hammering and banging often an issue at ungodly hours of the night early mornings.

j. **Noise**: Noise is generally regarded as a nuisance if it is so loud, so repeated, of such pitch, or of such duration that it causes annoyance to people. It can be any one, or a combination of these to constitute a nuisance. Our experience at Trammon has been horrendous in that there are multiple sources of sound. Living in the countryside should be a peaceful experience.

k. **Hydrology**: Rocket blasting of Karst limestone is very destructive of rare Karst and cave systems. Extraction to depths of 20m a.O.D. is extremely problematic in that significant dewatering is required to extract to these depths. It follows that significant interference with the ground water table is required. We all have wells to be concerned about; so too those of us with agricultural lands. The ground water aquifer is crucial to the health and wellbeing not only of neighbours, but of a much wider community.

l. **Heavy Vibrations**: heavy vibrations from the activities of the manufacture of concrete products manufacturing facilities has also been hugely problematic. This is thought to be from the block making machinery.

m. **Visual**: The visual impacts of living close to not one but two large quarry operations has also been significant. There is a very large unauthorised mountainous pile of overburden, which can be seen for miles around and as far away as Tara Hill and which is visually obtrusive. It is also a hazard to machine operators and or any person who may wander up on top thereof. We have observed landslides from this in the past.

n. **Night-time Lighting**: We are also subjected to unacceptable levels of night-time lighting from this quarry. This issue has got much worse with the installation of new LED lighting, which has been erected, in both quarries since c.2020. Dark sky's in this rural area is not sadly a thing of the past. This has further denigrated our amenity and enjoyment of our property. It also impacts on biodiversity in that it severely disrupts the natural flow of wildlife together with predator / prey relationships and so on. I have concerns for biodiversity and the welfare of nocturnal mammals such as bats (former EIA's detail many different species of Bat (some of them very rare) which were recorded in the area. Modern LED lighting is particularly bright and problematic.

o. **Biodiversity and loss of agricultural lands**: Given the significant area of lands which are now under quarrying at Trammon, if follows that the loss to pasture and agriculture has been significant. The consequent loss to biodiversity has also been significant. The quarries in the area are constantly expanding, one legally (Kilsaran) and one illegally Keegan Quarries). Even where the quarries seek to expand by way of planning application, they seek to remove large numbers of trees and woodland habitat; the very same habitat that they once promised to hold onto when the quarries were first applied for on a Greenfield site. Moreover there has been a trend in recent years to avoid reinstatement at all and the excuse being proffered is that they wish to leave it for beneficial biodiverse habitat. This is unacceptable and may be described as a form of green washing.

p. **Stockpiling of materials & HGV movements**: we are also raise our concerns re the stockpiling of material on site, together with the current and future level of HGV vehicle movements associated with the quarry on the R156 road.

q. **Loss of time**: Given the constant need to monitor and agitate for enforcement on the part of the statutory authorities, this has been a huge imposition on local people. A truly massive amount if irreplaceable time has been lost pursuing these issues.

CONCLUSIONS

106. We have identified a number of systemic issues relating to Keegan Quarries and other companies within the Keegan Group.

107. Limestone aggregate (**CRUSHED ROCK**) (which is typically mixed with sand and gravel) is currently sourced from the **Keegan Quarry at Trammon, Rathmolyon, Co. Meath**. Rock is obtained by drilling and blasting which in itself is a major cause of nuisance to local residents. This quarry has not had any planning consent since the 5th August 2018.

There is no basis to invoke the exceptional circumstances exception to the rule. We further reiterate that this quarry has had a long history of unauthorised development. It has operated without any consent whatever since 2018. We reiterate the need to invoke section 177J of the planning and development act while the matter is being determined. It is therefore considered that in the interests of proper planning and sustainable development that the appropriate course of action is for *An Bord Pleanála* to decline permission for this development.

ENDS

ENCLOSURES

1. **COPY – COURT ORDERS & JUDGEMENTS**
    a. **Pearson and Others**
    b. **Fowler**
    c. **Kildare County Council**
    d. **Meath County Council**
2. **SCHEDULE – EXCERPTS from VARIOUS COURT JUDGEMENTS**

Judgments

Judgment Title: Pierson & Ors -v- Keegan Quarries Ltd

Neutral Citation: [2009] IEHC 550

High Court Record Number: 2008 20 MCA

Date of Delivery: 12/08/2009

Court: High Court

Composition of Court:

Judgment by: Irvine J.

Status of Judgment: Approved

Link to Memo on Judgment: Link

Neutral Citation Number: [2009] IEHC 550

THE HIGH COURT

2008 20 MCA

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 TO 2006 AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED.

BETWEEN

JONATHON PIERSON, JOHN A. WOODS, GLENN WHITE, DESMOND WOODS, KEVIN GREENE AND JOAN COYLE

APPLICANTS

AND

KEEGAN QUARRIES LIMITED

RESPONDENT

Judgment of Ms. Justice Mary Irvine, dated the 8th day of December, 2009

1. The applicants, in these proceedings, reside in the vicinity of a quarry owned and presently operated by the respondent at Hilltown Little, Bellewstown, Co. Meath.

2. The applicants seek (*inter alia*) an order pursuant to s. 160 of the Planning and Development Act 2000, as amended, ("the 2000 Act") restraining the respondent from continuing to use its lands which are contained in Folio 24022F of the County of Meath as a quarry, which use they maintain constitutes unauthorised development.

3. The present proceedings were commenced by way of notice of motion dated 11th February, 2008 and were remitted to plenary hearing by order of the High Court dated 1st May, 2008. Points of claim were delivered on behalf of the applicants on 12th May, 2008 and thereafter points of objection and defence delivered by the respondent.

4. It was agreed between the parties that following the opening of the applicants' claim that the court would determine a preliminary issue raised by the respondent as to the validity of the present claim. That issue is set out by way of preliminary objection in the respondent's points of objection and defence.

5. Following the opening of the substantive proceedings by Mr. Comyn, S.C. on the applicants' behalf, the court heard the submissions of the parties regarding the respondent's preliminary objection. The parties also delivered helpful written submissions in support of their respective positions which will be rehearsed, albeit briefly in the course of this judgment.

6. The principal objection raised by the respondent to the validity of the applicants' proceedings is a contention that the relief sought under s. 160 of the 2000 Act, which seeks to restrain the respondent's quarrying activities as unauthorised development, amounts to an impermissible collateral attack on a decision of the planning authority to register the respondent's lands as a quarry and to impose conditions on its continued operation under the provisions of s. 216 of the Act of 2000. In this regard the respondent maintains that the planning authority was only entitled to impose conditions upon the operation of the respondent's quarry if it was satisfied that it had been operated as a

quarry prior to the 1st October 1964 and that its use did not therefore constitute unauthorised development. That being so, the respondent submits that the applicants, if they wished to maintain a claim that the development was unauthorised was mandated by reason of the provisions of s. 50 of the 2000 Act to do so by way of judicial review proceedings commenced within eight weeks of the date upon which the relevant decision was made. Having failed to do so, the respondent maintains that the present proceedings under s. 160 of the 2000 Act are misconceived.

7. The second preliminary objection pleaded contends that the proceedings are misconceived insofar as the applicants seek to invoke s. 160 of the 2000 Act to restrain what they contend are quarrying activities being carried out by the respondent in breach of the conditions imposed by the planning authority in its order dated of 23rd April, 2007. However, as counsel of behalf of the applicants has conceded that the procedure provided for in s. 160 of the 2000 Act is not available to the applicants as a mechanism to enforce compliance with any conditions imposed by the planning authority on the operation of a quarry registered pursuant to s. 261 of the Act of 2000, it is not necessary for the court to consider this issue further.

Factual background

8. Whilst it is not necessary for the court for the purposes of the present preliminary application to resolve any of the facts which are disputed between the parties, it is perhaps nonetheless helpful to set out very briefly the facts relied upon by the respective parties. The principal factual dispute is as to whether the lands of the respondent were ever operated as a quarry prior to 1st October, 1964. Of somewhat less importance is the extent of any quarrying carried out on the lands thereafter.

9. The lands, the subject matter of this dispute, were initially part of the Boylan Estate. The applicants maintain that the lands, now being operated by the respondent as a quarry, were purchased by a Mr. Raymond Coyle in 1975 and subsequently sold to a Mr. Lawlor in 1982. They were then purchased by the McGuinness family in 1985 and registered in the sole name of Mr. Michael McGuinness in 2002.

10. In June 2003, Michael McGuinness, according to the applicants, obtained planning permission for a land recovery operation permitting him to spread top soil on the lands so that they could be used for agricultural purposes. Mr. McGuinness, it appears from the applicants' affidavits, sought to commence quarrying activities in 2003 but received a warning letter from the local authority on 26th April, 2004, as a result of which such activities stopped. Since the completion by the respondent of its purchase of the lands from Mr. McGuinness in February 2007 quarrying works have allegedly been recommenced on the lands and are now are being carried out at a hitherto unprecedented level.

11. The applicants are adamant that the lands were never operated as a quarry before 1st October 1964. They assert that prior to February 2007 the only quarrying works to have taken place on the relevant lands were those carried out by Mr. McGuinness in late 2003. A substantial number of maps and photographs were opened to the court in support of the applicants' assertions in this regard. To a like end numerous affidavits have been filed by individuals having knowledge of the lands over the relevant time frame.

12. The respondent, in its affidavits maintains that quarrying had commenced on its land prior to 1st October, 1964. Mr. McGuinness on the respondent's behalf, deposed in his affidavit to the fact that Mr. Lawlor who sold the property to him had pointed out the existence of quarrying pits on the land and that Mr. Edward Boylan, a previous owner of the farm had also informed him that quarry pits had been excavated periodically from 1958. The respondent also maintains that over a nine year period from 1986 until 1995, that Mr. McGuinness and his brother quarried many thousands of tonnes of rock from the quarry and also that a Mr. Gallagher quarried large amounts of materials from the lands between 1995 and 1997.

Application under Section 261 of the Planning and Development Act 2000

13. On 27th April, 2005, the respondent's predecessor in title, Mr. Michael McGuinness applied, as he was legally obliged to do, to have his quarry registered with the planning authority under S 261 of the 2000 Act. He maintained that the quarry had a pre 1964 use. He provided to the planning authority the information prescribed under s. 261(2) and thereafter no further information was sought from him by the planning authority notwithstanding their entitlement in this regard under s. 261(3) .

14. On 13th October, 2005, Meath County Council gave notice that it had registered a number of quarries including that of the respondent bearing reference QY/57 and this fact was notified to Mr. McGuinness on 14th October, 2005. Notice of the registration of Mr. McGuinness's quarry was advertised in the Meath Chronicle on 22nd October, 2005 as required by s. 261(4)(a) of the 2000 Act. That notice advised that no planning permission had been granted for the quarry and that the planning authority proposed imposing conditions on its operation. The notice invited submissions or observations regarding the continued operation of the quarry within four weeks from the date of the publication of the notice.

15. The court has not been advised as to whether any members of the public replied to the notice published in the Meath Chronicle. On 15th December, 2006, the planning authority notified Mr. McGuinness that it had decided to impose certain specified conditions on the operation of the quarry in accordance with s. 261(5)(a)(i)

of the 2000 Act. A draft schedule of some 23 conditions and the reasons for their imposition was forwarded to Mr. McGuinness. In response, Mr. McGuinness exercised his right under s. 261(5)(c) and made submissions and observations regarding the draft conditions. These are contained in a detailed letter dated 30th January, 2007 from William Shields on his behalf.

16. The documentation exhibited demonstrates that the first named applicant, Mr. **Pierson** and his wife engaged to some degree with the planning authority regarding Mr. McGuinness's quarry. The parties in their submissions referred to a report of a Mr Barry Hanley, Executive Engineer which deals firstly with complaints made by Mr. and Mrs. **Pierson** in relation to another quarry at Bellewstown which is referred to as the Killsaran quarry. His report at s. 3 refers to concerns apparently expressed by Mr. and Mrs. **Pierson** regarding Mr. McGuinness's quarry and its potential impact on their lives. The report notes that any breach of the conditions governing the use of the quarry would be investigated by Meath County Council and the necessary action taken. That report at s. 6 also refers to the fact that any information regarding the implementation of s. 261 of the 2000 Act was available for inspection. It also confirmed that any submissions made by an interested party in relation to any development would be considered by a planning authority before a final decision would be taken. The report concludes with a statement that the issues raised by Mr. and Mrs. **Pierson** were under investigation, that Meath County Council would enforce all planning conditions associated with quarrying activities and could assure the **Piersons** that action would be taken if the quarry operator failed to meet any of the conditions associated with its operation.

17. By order of the County Manager, dated 23rd April, 2007, a decision was made under s. 261 of the 2000 Act to impose conditions on the operation of the quarry formerly owned by Mr. McGuinness. The respondent, as already stated, completed the purchase of the quarry in February 2007. The respondent, as it was entitled to do, appealed that decision to An Bord Pleanála by letter dated 18th May, 2007. By further letter dated 22nd June, 2007, the respondent unconditionally withdrew that appeal.

Section 261 of the 2000 Act

18. I will now set out the provisions of s. 261 of the 2000 Act in full for ease of reference.

> "(1) The owner or operator of a quarry to which this section applies shall, not later than one year from the coming into operation of this section, provide to the planning authority, in whose functional area the quarry is situated, information relating to the operation of the quarry at the commencement of this section, and on receipt of such information the planning authority shall, in accordance with section

7, enter it in the register.

(2) Without prejudice to the generality of subsection (1), information provided under that subsection shall specify the following –

(a) the area of the quarry, including the extracted area delineated on a map,

(b) the material being extracted and processed (if at all),

(c) the date when quarrying operations commenced on the land (where known),

(d) the hours of the day during which the quarry is in operation,

(e) the traffic generated by the operation of the quarry including the type and frequency of vehicles entering and leaving the quarry,

(f) the levels of noise and dust generated by the operations in the quarry,

(g) any material changes in the particulars referred to in paragraphs (a) to (f) during the period commencing on the commencement of this section and the date on which the information is provided,

(h) whether –

(i) planning permission under Part IV of the Act of 1963 was granted in respect of the quarry and if so, the conditions, if any, to which the permission is subject, or

(ii) the operation of the quarry commenced before 1 October 1964,

and

(i) such other matters in relation to the operations of the quarry as may be prescribed.

(3) A planning authority may require a person who has submitted information in accordance with this section to submit such further information as it may specify, within such period as it may specify, relating to the operation of the quarry concerned and, on receipt thereof, the planning authority shall enter the information in the register.

(4) (a) A planning authority shall, not later than 6 months from the registration of a quarry in accordance with this section, publish notice of the registration in one or more newspapers circulating in the area within which the quarry is situated.

(b) A notice under paragraph (a) shall state –

(i) that the quarry has been registered in accordance with this section,

(ii) where planning permission has been granted in respect of the quarry, that it has been so granted and whether the planning authority is considering restating, modifying or adding to conditions attached to the planning permission in accordance with subsection (6)(a)(ii), or

(iii) where planning permission has not been granted in respect of the quarry, that it has not been so granted and whether the planning authority is considering –

(I) imposing conditions on the operation of the quarry in accordance with subsection (6)(a)(i), or

(II) requiring the making of a planning application and the preparation of an environmental impact statement in respect of the quarry in accordance with subsection (7),

(iv) the place or places and times at which the register may be inspected,

(v) that submissions or observations regarding the operation of the quarry may be made to the planning authority within 4 weeks from the date of publication of the notice.

(c) A notice under this subsection may relate to one or more quarries registered in accordance with this section.

(5) (a) Where a planning authority proposes to –

(i) impose, restate, modify or add to conditions on the operation of the quarry under this section, or

(ii) require, under subsection (7), a planning application to be made and an environmental impact statement to be submitted in respect of the quarry in accordance with this section,

it shall, as soon as may be after the expiration of the period for making observations or submissions pursuant to a notice under subsection (4)(b), serve notice of its proposals on the owner or operator of the quarry.

(b) A notice referred to in paragraph (a), shall state –

(i) the reasons for the proposals, and

(ii) that submissions or observations regarding the proposals may be made by the owner or operator of the quarry to the planning authority within such period as may be specified in the notice, being not less than 6 weeks from the service of the notice.

(c) Submissions or observations made pursuant to a notice under paragraph (b) shall be taken into consideration by a planning authority when performing its functions under subsection (6) or (7).

(6) (a) Not later than 2 years from the registration of a quarry under this section, a planning authority may, in the interests of proper planning and sustainable development, and having regard to the development plan and submissions or observations (if any) made pursuant to a notice under subsection (4) or (5) –

(i) in relation to a quarry which commenced operation before 1 October 1964, impose conditions on the operation of that quarry, or

(ii) in relation to a quarry in respect of which planning permission was granted under Part IV of the Act of 1963 restate, modify or add to conditions imposed on the operation of that quarry,

and the owner and operator of the quarry concerned shall as soon as may be thereafter be notified in writing thereof.

(b) Where, in relation to a grant of planning permission conditions have been restated, modified or added in accordance with paragraph (a), the planning permission shall be deemed, for the purposes of this Act, to have been granted under section 34 , and any condition so restated, modified or added shall have effect as if imposed under section 34 .

(c) Notwithstanding paragraph (a), where an integrated pollution control licence has been granted in relation to a quarry, a planning authority or the Board on appeal shall not restate, modify, add to or impose conditions under this subsection relating to –

(i) the control (including the prevention, limitation, elimination, abatement or reduction) of emissions from the quarry, or

(ii) the control of emissions related to or following the cessation of the operation of the quarry.

(7) (a) Where the continued operation of a quarry –

(i) (I) the extracted area of which is greater than 5 hectares, or

(II) that is situated on a European site or any other area prescribed for the purpose of section 10 (2)(c), or land to which an order under section 15, 16 or 17 of the Wildlife Act, 1976 , applies,

and

(ii) that commenced operation before 1 October 1964,would be likely to have significant effects on the environment (having regard to any selection criteria prescribed by the Minister under section 176 (2)(e)), a planning authority shall not impose conditions on the operation of a quarry under subsection (6), but shall, not later than one year after the date of the registration of the quarry, require, by notice in writing, the owner or operator of the quarry to apply for planning permission and to submit an environmental impact statement to the planning authority not later than 6 months from the date of service of the notice, or such other period as may be agreed with the planning authority.

(b) Section 172 (1) shall not apply to development to which an application made pursuant to a requirement under paragraph (a) applies.

(c) A planning authority, or the Board on appeal, shall, in considering an application for planning permission made pursuant to a requirement under paragraph (a), have regard to the existing use of the land as a quarry.

(8) (a) Where, in relation to a quarry for which permission was granted under Part IV of the Act of 1963, a planning authority adds or modifies

conditions under this section that are more restrictive than existing conditions imposed in relation to that permission, the owner or operator of the quarry may claim compensation under section 197 and references in that section to compliance with conditions on the continuance of any use of land consequent upon a notice under section 46 shall be construed as including references to compliance with conditions so added or modified, save that no such claim may be made in respect of any condition relating to a matter specified in paragraph (a), (b) or (c) of section 34 (4), or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(b) Where, in relation to a quarry to which subsection (7) applies, a planning authority, or the Board on appeal, refuses permission for development under section 34 or grants permission thereunder subject to conditions on the operation of the quarry, the owner or operator of the quarry shall be entitled to claim compensation under section 197 and for that purpose the reference in subsection (1) of that section to a notice under section 46 shall be construed as a reference to a decision under section 34 and the reference in section 197 (2) to section 46 shall be construed as a reference to section 34 save that no such claim may be made in respect of any condition relating to a matter specified in paragraph (a), (b) or (c) of section 34 (4), or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(9) (a) A person who provides information to a planning authority in accordance with subsection (1) or in compliance with a requirement under subsection (3) may appeal a decision of the planning authority to impose, restate, add to or modify conditions in accordance with subsection (6) to the Board within 4 weeks from the date of receipt of notification by the authority of those conditions.

(b) The Board may at the determination of an appeal under paragraph (a) confirm with or without modifications the decision of the planning authority or annul that decision.

(10) (a) A quarry to which this section applies in respect of which the owner or operator fails to provide information in relation to the operations of the quarry in accordance with subsection (1) or in accordance with a requirement under subsection (3) shall be unauthorised development.

(b) Any quarry in respect of which a notification under subsection (7) applies shall, unless a planning

application in respect of the quarry is submitted to the planning authority within the period referred to in that subsection, be unauthorised development.

(11) This section shall apply to –

(a) a quarry in respect of which planning permission under Part IV of the Act of 1963 was granted more than 5 years before the coming into operation of this section, and

(b) any other quarry in operation on or after the coming into operation of this section, being a quarry in respect of which planning permission was not granted under that Part.

(12) The Minister may issue guidelines to planning authorities regarding the performance of their functions under this section and a planning authority shall have regard to any such guidelines.

(13) In this section –

'emission' means –

(a) an emission into the atmosphere of a pollutant within the meaning of the Air Pollution Act, 1987,

(b) a discharge of polluting matter, sewage effluent or trade effluent within the meaning of the Local Government (Water Pollution) Act, 1977 , to waters or sewers within the meaning of that Act,

(c) the disposal of waste, or

(d) noise;

'operator' means a person who at all material times is in charge of the carrying on of quarrying activities at a quarry or under whose direction such activities are carried out;

'quarry' has the meaning assigned to it by section 3 of the Mines and Quarries Act, 1965 ."

The respondent's submissions:

19. It is as against the background of the aforementioned facts that the respondent makes its preliminary objection to the validity of the present proceedings. I will now briefly refer in a skeletal fashion to the submissions made

by the respondent.

20. The respondent submits that the plaintiff's claim is misconceived and/or amounts to an abuse of process. It contends that the applicants are now impermissibly seeking to use the provisions of s. 160 of the 2000 Act to challenge a previous decision of the planning authority that the respondent's quarry was not an unauthorised development by reason of its use as a quarry prior to 1st October, 1964. That decision was made in the course of the s. 261 application to have the quarry registered. Absent such a determination the respondent submits that the planning authority could not have imposed conditions on the operation of the quarry under s. 261(6)(a)(i). The applicants did not challenge that decision in judicial review proceedings in accordance with s. 50 of the Act of 2000, as substituted by s. 13 of the Planning and Development Strategic Infrastructure Act 2006, within eight weeks from the date of the decision. Hence they are precluded from maintaining these proceedings.

21. Mr. Murphy, S.C. on behalf of the respondent relied upon a number of dates in relation to this submission. He firstly relied upon 13th October 2006, the date of the notice of the Planning Department of its intention to register a number of Quarries including that of Mr. McGuinness, subject to the imposition of conditions. Those conditions could only be imposed, he submitted, if the planning authority was satisfied that the quarry had been operated prior to 1st October, 1964 and did not constitute unauthorised development. That decision, counsel submitted ought to have been challenged by the applicants given that it was a decision governed by s. 50 of the 2000 Act.

22. The second date relied upon by the respondent is that of 15th December, 2006 being the date upon which the conditions to be imposed upon the continued operation of the quarry were notified to Mr. McGuinness. That date followed the period of four weeks given to the public to make their submissions following notification to them in the newspaper of the decision of the Planning authority to register the quarry subject to conditions. Those conditions were then available to the public on the planning file. Once again, the respondent submitted that the imposition of those conditions was only consistent with a prior determination by the planning authority that the quarry was not unauthorised development by reason of its pre 1964 use. Accordingly the applicants, if they wished to challenge that decision, had to do so by way of judicial review proceedings within 8 weeks of the 15th December 2006.

23. The final date relied upon by the respondent was that of 23rd April, 2007, being the date upon which the County Manager, having considered the submissions made on behalf of Mr. McGuinness regarding the proposed conditions, made his order directing that 23 conditions be imposed upon the continued operation of the quarry. Again

Mr Murphy submitted that it was a pre condition to that decision that the planning authority had decided that the quarry was not an unauthorised development by reason of its operation prior to 1st October, 1964. Accordingly, that decision ought to have been challenged by the applicants within 8 weeks by way of judicial review.

24. The respondent submitted that the planning authority was entitled, in the course of the s. 261 registration process to reach a binding conclusion that any quarry in respect of which an application had been made for registration had the status of an authorised development. This was a reasonable interpretation of the section giving the public consultation process provided for therein. The fact that interested parties have no right to appeal a decision made by a planning authority to register a quarry subject to conditions, even if the consequences of that decision is that the lawfulness of the use of those lands as a quarry cannot thereafter be challenged in proceedings under s. 160 of the Act, is a matter for the Oireachtas. There is no obligation on the Oireachtas to provide for an appeals mechanism.

25. Section 261 created, according to the respondent, a stand alone regime for the regulation of quarries and the fact that the planning authority has not been provided with any mechanism to enforce compliance with any conditions as may be imposed on the continued operation of the quarry, is irrelevant. Any such lacuna in the legislation is a matter for the Oireachtas rather than for this Court.

26. Significant reliance was placed on the language of s. 50 of the 2000 Act (as amended) which provides :-

> "50(2) A person shall not question the validity of any decision made or other act done by –
>
> (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act...
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order')."
>
> (6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate."

27. The respondent submits that the applicants should have challenged the decision of the planning authority by way of judicial review within eight weeks of the decision to register the quarry on 13th October, 2003 or alternatively, at latest within eight weeks of the decision of the County Manager of 22nd April, 2003 whereby conditions were imposed.

28. The respondent submits that it would be unjust to permit the applicants to maintain proceedings under s. 160 of the 2000 Act, at this late stage, having regard to the fact that the strict time limits provided for under s. 50 of the 2000 Act derive from the Oireachtas' considered view that as a matter of public policy those affected by planning decisions should be free to rely upon such decisions safe in the knowledge that they are beyond challenge. The applicants were parties to the respondent's application for registration under s. 261 of the Act. The decision of the planning authority could only have been based upon a finding that the quarry had a pre 1964 use and was therefore considered by it to be exempt from the requirement of planning permission. Consequently, any challenge to that decision could not be postponed to be dealt with at the present time under s. 160 of the 2000 Act.

29. The failure of the applicants to challenge the aforementioned decisions of the planning authority are accordingly fatal to their right to maintain the present proceedings. Counsel in this regard relied upon judgment of Finlay C.J. in *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128. The respondent relied upon the words "a person shall not question the validity of any decision made or other act done" and "otherwise than by way of an application for judicial review" to support his contention that s. 50 imposed a strict procedural exclusivity on any party wishing to challenge a decision of the planning authority.

30. Section 50, it was submitted precludes not just direct challenges to the validity of a decision of a planning authority such as its decision to impose conditions on the respondent's quarry in the present case but also any challenge or argument that amounts to a collateral attack upon that decision such as the underlying decision of the planning authority in the present case which was to the effect that the respondent's quarry, by reason of its use prior to 1964 did not amount to unauthorised development.

31. It was established law that decisions made by a planning authority in the course of its operation of s. 261 were amenable to judicial review. In this regard reliance was placed on the Hanna J. in *Pearce v. Westmeath County Council* [2008] IEHC 449.

32. The respondent further submitted that to permit the applicant to maintain the present proceedings by way of a s. 160 application, offended the doctrine of *audi alteram*

partem. The planning authority is not a party to this claim and it is its decision that is that is at the root of the current proceedings particularly insofar as the applicants contend in their points of claim that its decision to register the respondent's quarry is invalid and of no effect. In this regard, the respondent relied upon the decision of Finlay C.J. in *Comhaltas Ceoltoiri Éireann* (Unreported, 1977) wherein it was stated that the planning authority would normally be seen to be in a central party to proceedings seeking such a declaration.

The applicants' submissions

33. The applicants contend that the respondent, to succeed on the present application, must convince the court that the legislature intended that s. 261 would provide a procedural method whereby a quarry, which constituted unauthorised development at the commencement of the registration process, might have its operations in some way authorised so as to absolve it of any need to apply for planning permission at the end of that process. Thus any interested party would be precluded thereafter from seeking to challenge the development as unauthorised and its only legal remedy would be the invocation of judicial review proceeding brought within eight weeks of the final order made by the planning authority under that section. In other words that s. 261 can be used by the owner or operator of a quarry to obtain a type of backdoor planning permission or authorisation for the quarry which might otherwise be considered to be an unauthorised development.

34. The applicants submit that there is nothing in the wording of s. 261 which would entitle the court to infer that the furnishing of information by a quarry owner or operator followed by its registration and/or the imposition of conditions on its continued use entitle the planning authority to confer any change of status or authorisation upon an otherwise unauthorised development. If that had been the intention of the legislature the same would have been explicitly stated in the section, which it is not. The registration of a quarry under s. 261 even if subject to the imposition of conditions, according to the applicants, does nothing to alter the status of an otherwise unauthorised quarry. Reliance was placed upon the maxim *expressio unius est exclusio alterious* and the decision of Murnaghan J. in *McCarthy v. Walsh* [1965] I.R. 246 where he stated:-

> "If the latter was the Legislature's intention, I would have expected that such intention would have been translated into explicit statutory provisions. The fact that this was not done is one reason for thinking that this was not the intention of the Legislature."

35. In support of the submission that the legislature never intended that the registration of or the imposition of conditions upon a quarry could confer upon it a change of status analogous to that of a quarry with planning permission, counsel emphasised the substantial procedural

differences between an application for planning permission and the process for the mandatory registration of quarries under Section 261. He referred to the involvement of the public in the s. 261 procedure which is limited to the right to make observations on the registration of quarry in comparison to the position of a member of the public in relation to a planning application. He referred to the formal requirements pertaining to an application for planning permission including the erection of a site notice, notification in a newspaper and the right of appeal to An Bord Pleanála. He contrasted these rights with those of an interested party in an application made under Section 261. A member of the public had no right to be involved in the s. 261 process after the point at which the planning authority decided in principle upon any conditions to be imposed of a quarry owner. This was in stark contrast to the right of the quarry owner to make submissions on the conditions proposed and to further appeal the final decision of the planning authority in respect of the imposition of conditions to An Bord Pleanála.

36. The applicants contend that there is nothing in the language of s. 261 to indicate that that section does anything other than supplement the normal controls available under the 2000 Act including the right of an interested party to challenge a development as being unauthorised under Section 160 and that had the legislature intended to grant to quarry owners a derogation or protection from the enforcement provisions of s. 160 of the Act that it would have framed the section appropriately. There is nothing in s. 261 to make a registered quarry subject to conditions immune from the enforcement provisions provided for in s. 160 of the Act.

37. The applicants submit that there is nothing in the provisions of s. 261 from which it can be inferred that the legislature intended that an interested party wishing to challenge the alleged unauthorised use of a quarry was to have their right to a factual hearing under s. 160 of the Act reduced to a right to judicially review the decision of the planning authority made in the course of the s. 261 process. They relied upon the limitations of the judicial review process which they described as being wholly incapable of providing a remedy where factual matters were at issue between the parties. Counsel relied upon the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 wherein a very high threshold was set for any claim to be successful by way of judicial review on the grounds of irrationality. He further relied upon the decision of O'Sullivan J. in *Aer Lingus Ltd. v. Ryanair Ltd*. (Unreported, 16th January, 2003).

38. In support of their submission as to the true interpretation of s. 261, the applicants relied upon the ministerial guidelines entitled "Quarries and Ancillary Activities" issued pursuant to s. 28 of the Planning and Development Act 2000. According to the applicants, the purpose of s. 261 was to add controls to quarries which had an authorised status, particularly quarries which had

never received planning permission; had older planning permissions and might therefore not have been operating to the standards of modern quarries or had perhaps been expanding their activities. The applicants relied upon *Planning and Development Law* (2nd Ed.) by Simons wherein it was stated that any belief that registration of a quarry in some way conferred the benefit of exempted development upon unauthorised development was mistaken as was any belief that enforcement proceedings could not be taken once a quarry had been registered.

Decision

39. I agree with many of the broad legal principles advanced by the respondent in the course of this preliminary issue. There is no doubting the reasoning which underlies the provisions of s. 50 of the 2000 Act, namely, the desire to give certainty to those who are affected by decisions of the planning authorities as was stated by Finlay C.J. in *KSK Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128. Also, there is no disputing the fact that a planning permission is on its face valid until such time as it is challenged, as was made clear by Walsh J. in the *State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381. Further, I accept that it is established law that a decision of the planning authority under s. 261 of the Act may be challenged by a member of the public who has the appropriate locus standi so to do, as was held by Hanna J. in *Pearce v. Westmeath County Council* [2008] IEHC 449. However, the questions that need to be resolved in determining the present issue include whether the principles which underlie the provisions of s. 50 apply to the present case and whether or not any of the three decisions made by the planning authority when invoking their powers under s. 261 in relation to the respondent's quarry could, if that quarry was an unauthorised development at the commencement of the registration process have had its status changed such that at the conclusion of the process it can be considered exempt from a need to apply for planning permission. I am satisfied that both questions should be answered in the negative.

40. I do not accept that a decision made by a planning authority to register a quarry subject to the imposition of conditions under s. 261 of the 2000 Act has the legal effect contended for by the respondent. If the quarry constituted unauthorised development at the start of the s. 261 process, its registration subject to conditions does not, in my view, alter its status. Neither does that decision have any legal effect on the right of a party with the appropriate *locus standi*, such as the applicants in the present case, to challenge that development as being unauthorised under s. 160 of the 2000 Act.

41. Whether I am right or wrong on this issue, I cannot find anything in either s. 50 or s. 261 of the 2000 Act that creates the type of procedural exclusivity contended for by the respondent. In my view, it cannot be the case that the only remedy available to a party who wishes to

contend that the use of certain lands as a quarry is unauthorised, notwithstanding a decision by the planning authority to register that quarry, subject to conditions, is the right to challenge that decision by way of judicial review. It is a wholly inadequate remedy for such purpose as I will seek to demonstrate later in this judgment.

42. In coming to these conclusions, I have considered the submissions of the parties, not all of which have been referred to in the earlier part of this judgment, and also the case law and materials made available. In particular, I have had regard to the provisions of s. 261 of the Act which are at the core of the present issue. However, in seeking to interpret that section, I have, of course, had regard to the entirety of the provisions of the 2000 Act, as amended.

Purpose of Section 261

43. In seeking to establish the power of the local authority under s. 261 when dealing with a quarry that may be regarded as unauthorised development, it is helpful to consider the purpose of that section.

44. Simon's in his 2nd Ed. of *Planning Law and Development*, refers to the purpose of s. 261 in the following manner at para. 8 – 128:-

> "What appears to have been intended is that two distinct categories of quarry development be subject to renewed control. The first category consists of quarries the excavation of which had commenced prior to 1st October, 1964. Such quarries had been regarded as having an established use, and did not require planning permission under the Local Government (Planning and Development) Act 1963. The second category consists of quarries with the benefit of what might be described as 'old planning permissions' i.e. planning permissions granted more than five years before the coming into operation of s. 261 on 28th April, 2004."

45. Nowhere in this learned text, is there any support for the proposition that the legislature intended that s. 261 was to be used as some substitute method whereby planning permission or authorisation could be obtained for the use of a quarry that constituted unauthorised development at the date of the application for registration. In fact, the contrary view is expressed by the author at para. 8 – 136 where he states:-

> "The effect of registration is simply to insure that the planning authority and members of the public, have sufficient information to allow the question of what renewed controls, if any, should be imposed to be addressed."

46. In this last quotation, the author was clearly referring to the two categories of quarry referred to at para. 8-128

above. Indeed, the author goes somewhat further, on this issue, when he advises as follows at para. 8 – 137:-

> "Some developers are of the mistaken belief that the registration of a quarry, in some way, confers the benefit of exempted development, or that enforcement proceedings cannot be taken once an existing quarry has been registered. Neither of these assumptions is correct, and s. 261 simply supplements the normal controls. The controls under s. 261 are in addition to – as opposed to in substitution for – the normal controls under the planning legislation. Thus, for example, the creation of new quarry or the extension of an existing quarry is unaffected by s. 261, and will require planning permission in the ordinary way."

47. The applicants submit, and I agree with them, that the respondent's quarry, if it was unauthorised development because it had not been operated as such prior to 1st October, 1964, is not immune from the need to apply for planning permission merely because it has been registered as a quarry subject to conditions by the planning authority in the course of the s. 261 procedure.

48. At para. 8 – 169, Simons continues:-

> "Section 261 merely supplements the normal range of enforcement mechanisms, and, accordingly there is nothing in s. 261 which prevents enforcement action being taken against an unauthorised quarry under Part VIII of the PDA 2000. This is so even if the quarry has been purportedly registered under Section 261."

Ministerial Guidelines issued by the Department of Environment, Heritage and Local Government dated April 2004

49. I accept, as a matter of law, the respondent's submissions based upon the decision of Edwards J. in *Sherwin v. An Bord Pleanála* [2007] IEHC 227 which is to the effect that the court must be careful as to the weight to be attached to guidelines that may be issued by the relevant Minister in relation to any given piece of legislation. I view as an entirely correct statement of law, the following brief passage from the *Sherwin* decision where at p. 580, the trial judge stated:-

> "Finally, I should say something about the guidance material relied upon by the respondent. Nobody is suggesting for a second that the respondent was not entitled to have regard to the guidance material in question. However, they ought to have borne in mind that guidance cannot alter or displace substantive and established law. Legislation cannot be altered by guidance. The guidance must be with respect to how to proceed in a particular legal context. The guidance cannot itself alter or seek to

> alter that particular legal context. In other words a Minister cannot amend or add to existing legislation in the course of issuing guidance. If purported guidance mis-states the law, as it appears to have done in this particular case, with the result that the persons who are entitled, or even obliged, to have regard to that guidance are, or may be, misled then that is most unfortunate and unsatisfactory."

50. I do not, however, accept that any such error has been made in the published guidelines in the present case. Accordingly, in coming to my decision, I have given considerable weight to the purpose of the legislation as outlined in the guidelines and also the advice given therein as to the effect of section s.261 on any quarry that might be unauthorised at the date of application for registration.

51. As to the purpose of s. 261, the guidelines issued by the Department of the Environment, Heritage and Local Government at para. 1.2 states that the registration system has two purposes:-

> "• to give a 'snapshot' of the current use of land for quarrying. This will ensure that local authorities have basic information about a quarry's operations. Planning permission may then be required for any proposed expansion or intensification of its operations;
>
> • where necessary, to permit the introduction of new or modified controls on the operation of certain quarries. These controls may be imposed in two ways. Quarries may have to comply with certain new or modified conditions on their operation. Certain quarries operating since before 1 October 1964 which may have significant effects on the environment, may have to seek planning permission for their continued operation and submit an Environmental Impact Statement. The same sort of considerations will apply to these applications for permission, as apply to all applications for permission for quarries. (see Chapters 3 and 4 of these Guidelines)."

52. As to unauthorised development that comes to the attention of the planning authority in the course of the s. 261 process, the following guidance is given at para. 5.10:-

> "It should be noted that the registration of quarries under section 261 does not confer planning consent for a quarry that is an unauthorised development. Therefore, an unauthorised development remains unauthorised even after registering with the planning authority. In the event of a planning authority becoming aware of an operating quarry which is

> unauthorised development, through the registration process or otherwise, or which has failed to comply with a request for further information or a requirement to apply for planning permission, the planning authority must consider taking enforcement action in accordance with Part VIII of the Planning and Development Act, 2000. It is not necessary to defer the enforcement proceedings until after the registration process is completed. The enforcement action could lead to an end to quarrying activities at the site as well as penalties for persons who carried out the unauthorised development."

53. There is nothing in the guidelines to suggest that if a quarry is unauthorised at the date of its registration that the planning authority can proceed to permit the quarry to operate subject to conditions in lieu of taking enforcement action and/or requiring the owner to apply for planning permission. The guidance just quoted lends strong support to the applicant's contention that this section cannot be used by a quarry owner to obtain planning permissions, so to speak by the backdoor. It is clear that if it comes to the notice of a planning authority in the course of the s. 261 process that any quarry is unauthorised then its obligation is to use the full rigors of the planning code to restrain such use. Accordingly, it must follow that the applicants in the present proceedings retain their right to seek relief under s. 160 of the Act in equivalent circumstances where they maintain that the use by the respondent of its lands amounts to unauthorised development.

Section 261 wording

54. Neither the reasoning stated to underlie the introduction of s. 261 or the departmental guidelines, lend any support to the respondent's arguments as to the effect of the section at the conclusion of the registration process, either as to the status of an otherwise unauthorised quarry or the right of an interested party to invoke the provisions of s. 160 of the 2000 Act. Further, in my view, the plain reading of the section itself makes the respondents arguments untenable.

55. This lengthy and detailed section does not state and neither can it be inferred from its wording, that the planning authority has the power when operating the s. 261 process to make a binding determination that a quarry in respect of which registration is sought, if registered subject to conditions, is thereafter exempt from the need to apply for planning permission, if at the time it applied for registration it was an unauthorised development. If that had been the intention of the legislature, it would have been so stated in the section. Neither does s. 261 provide that any decision made to register a quarry subject to conditions renders that quarry immune from a challenge to its status as an allegedly unauthorised development under s.160 of the 2000 Act. If the decision of a planning authority to impose conditions was intended to have such fundamental and significant legal

implications, I believe that the same would have been clearly set out in the section.

56. It would have been a straightforward task for the legislature to have added to s. 261(6)(a), a provision to the effect that a quarry, which did not enjoy the benefit of pre October 1964 use or a grant of planning permission under Part IV of the 1963 Act, might in the course of registration have conditions attached to its continued use whereupon its use would thereafter be deemed to be authorised to the extent that it did not require planning permission and that any such decision was final subject only to the possibility of challenge pursuant to the provisions of Section 50. There is no such provision.

57. The idea that the legislature intended to make such a fundamental change to planning law through the introduction of a section which is deafeningly silent as to the implications contended for by the respondents is simply to my mind unbelievable having regard to the implications for quarry owners and members of the public should this section be construed in the manner contended for by the respondent. In this regard, the departmental guidelines sit comfortably with the plain wording of the section.

Inferences to be drawn from the provisions of Section 261

58. In support of its submission as to the binding nature and legal significance to be attached to a decision of the planning authority to impose conditions upon the continued operation of a quarry, the respondents place great weight upon the public consultative process which leads to that decision. This consultative process is one meant to give comfort to the court in joining with the respondent on its interpretation of the section.

59. I regret to say that, in my view, the statutory right of interested parties to engage in the consultative process as provided for in s. 261 is extraordinarily limited and lends little support to a contention that the section was intended on the one hand to provide a method whereby the owner of an unauthorised quarry might obtain an authorised status for that quarry without being subjected to the normal rigours of the planning process whilst on the other hand simultaneously eradicating the possibility of any challenge to that status otherwise than in proceedings under s. 50 of the Act

60. Consultation with the public under s. 261 only commences after a quarry has actually been registered and after it has advised, by newspaper advertisement, how it proposes to deal with the application for registration. In this case, the indication given was that conditions would be imposed by the counsel on the continued operation of the quarry.

61. Under s. 261 there is no obligation on the planning authority to furnish to the public any details as to the

conditions that it may be considering imposing at the time their observations are sought. After the four weeks provided for the submissions and observations under s. 261(4)(b)(v), the planning authority is entitled to fix those conditions and notify them to the owner. Thereafter, all subsequent dealings between the owner and the planning authority are hermetically sealed from public participation. Only the owner may make submissions as to the conditions to be imposed. The public have no equivalent right. Thereafter, upon the formal imposition of the conditions, once again, the public have no right of appeal to An Bord Pleanála, a right solely vested in the owner.

62. Whilst, the file regarding an application for the registration of a quarry may be available for inspection to members of the public and the planning authority may choose to engage with the public on matters outside their statutory entitlement, it is only their statutory entitlement that matters in circumstances where the respondent contends that the only challenge open to a decision of the planning authority in such circumstances is an application by way of judicial review. It cannot be inferred from the public's right to make the limited contribution to the s. 261 process just referred to that that the legislature intended that quarries operating as unauthorised developments could have their status legitimised in a binding way in the course of that process. There is simply no comparison between the public's right to make observations under s. 261 and the statutory rights which they enjoy as interested parties participating in the normal planning process.

63. I further accept the applicants' submission that the respondent's contention as to the legal significance to be attached to the imposition of conditions on what might otherwise be considered to be an unauthorised development is significantly undermined by the fact that compliance with any such conditions cannot be enforced under the s. 160 procedure. The implications which flow from the interpretation contended for by the respondent are stark. On the respondent's submission the owner of an unauthorised quarry by applying for registration will, if the quarry is registered subject to conditions, avoid the necessity of applying for planning permission. That quarry owner may appeal the decision imposing conditions to An Bord Pleanála and even if the conditions are upheld, he can operate his quarry in disregard of those conditions in the knowledge that there is no enforcement procedure available to secure his compliance therewith. According to the respondent no member of the public can thereafter challenge the development as unauthorised. Neither can they challenge the nature of the conditions imposed or appeal any part of the decision making process under Section 261. Finally, a member of the public has no mechanism available to enforce compliance by a quarry owner with any such condition as imposed by a planning authority.

Judicial Review: Procedural Exclusivity

64. The final issue to which I wish to refer is a submission made by the respondent that the legislature, when it enacted s. 261, intended not only to permit a planning authority to put beyond challenge the lawfulness of the status of a quarry development by the imposition of conditions on its continued operation but that it also intended that any party aggrieved by that decision would have as their only remedy a right to challenge that decision by way of judicial review in lieu of their right to challenge the nature of the development as being unauthorised under Section 160.

65. Once again, I cannot accept that this was the intention of the legislature. One of the core issues in the present proceedings under s. 160 is a dispute as to fact as to whether or not the respondent's quarry was used as such prior to 1964. This type of factual dispute is simply not amenable to be resolved in any judicial review proceedings.

66. It is valuable to test the reality of the remedy which the respondent contends the legislature has left open to the applicant against the facts of the present case. Take the first decision made by the planning authority in respect of the registration process. That decision was made on 13th October, 2005 by the planning authority. On that date, the quarry was registered and the planning authority resolved to notify the public that the respondent's quarry had been registered and that it was considering the imposition of conditions on its continued operation. At that point in time the planning authority had made the decision to register the respondent's quarry subject to the imposition of some type of conditions. On the respondent's submissions, the decision to impose conditions could only have been made if the planning authority had also decided that the quarry was exempted development by reason of its use as a quarry prior to 1st October, 1964. Accordingly, the applicants, if the procedural exclusivity contended for by the respondent is correct, had eight weeks to judicially review that decision.

67. I ask myself what part of that decision could the applicant challenge and to what useful purpose? At that point in the s. 261 process, the applicants had no statutory right to contribute by way of observation, submission, objection or otherwise. Hence, given that the planning authority had some evidence furnished by the owner to support a decision that its land had been used prior to 1st October, 1964 as a quarry, any judicial review proceedings would have to fail. There could be no claim in respect of illegality or irrationality.

68. Similar problems arise in respect of any efforts that might have been made to challenge the decision of 15th December, 2005 or for that matter the final decision regarding the conditions to be imposed, which was made on 13th April, 2006. By the 15th December 2005, the applicant's opportunity to engage in s. 261 process was at an end and at the time the applicants were entitled to

make their submissions, they had no knowledge as to the nature or the extent of the conditions which the planning authority were considering imposing. These were only notified to them following the expiry of the four week period in which they were permitted to make observations. However, even if during that period they had provided substantial evidence to the planning authority in the hope of demonstrating that the lands had never been used as a quarry prior to the 1st October 1964, once there was any evidence at all submitted to the contrary, the planning authorities' decision in favour of the respondent's evidence would have been unassailable on a judicial review application. Any such proceedings as might have been mounted would have been destined to failure for the want of proof of either illegality or irrationality.

69. The limitations of judicial review as a remedy where there is any dispute as to fact are well described by O'Sullivan J. in his decision in *Aer Rianta Cpt. v. Commissioner for Aviation* (Unreported, 16th January, 2003). In dealing with the threshold for proof of irrationality, O'Sullivan J. put the standard of proof as follows at p. 69 of his judgment, namely:-

> "It is not necessary in this part of my judgment to cite against the lapidary statements of principle from Lord Chief Justice O'Brien and Chief Justices O'Higgins, Finlay and Hamilton.

At the heart of jurisprudence on irrationality review lies the distinction between error and invalidity. A decision is not invalid because it is wrong. It is not invalid because it is very wrong, fundamentally wrong or even absolutely wrong. These epithets are intended to criticise a decision in much the same way as the corrector of an examination paper might condemn the feeble efforts of a weak student or even the weakest student but they do not attempt the castigation reserved by the courts for the chancer who turns up for the exam and writes down absurdities which display no attempt at a meaningful relationship between what is written and the questions asked or, it may be, the obtuse blockhead whose attempt at achieving such a relationship is whimsical, fanciful or hopelessly idiosyncratic. His answers are indeed an insult to the intelligence: both the examiners and his own - but the feeble efforts of the poorest students are in a different category: blameworthy it may be, but not an outrage or an affront to the intelligence."

70. O'Sullivan J. continued as follows:-

> "The type of grievous error so reviewable is of a completely different order. It is not reached by the extension of the line on which are to be found mere errors, serious errors, multiple errors and fundamental errors because that is a line of rational attempt no matter how misguided the outcome. But

> the kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided, could essay. To be reviewably irrational. It is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and in inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality."

71. That quotation from the judgment of O'Sullivan J. ably and graphically depicts the limitations of judicial review as a remedy where a party wishes to dispute a decision made in the face of disputed facts rather than the fairness and lawfulness of the process leading to that decision It is difficult to believe that the legislature, having afforded to members of the public a right to challenge a use of land as unauthorised in the manner provided for in s. 160 of the Act could have intended, as submitted by the respondent, to obliterate such fundamental protections in such a silent and stealthful way by the introduction into the planning code of the provisions of s. 261 of the 2000 Act.

72. Whilst counsel for the respondent relied strongly on the decision of Hanna J. in *Pearce v. Westmeath County Council*, I do not believe that that decision goes any distance to support the respondent's objection to the continuance of these proceedings under s. 160 of the 2000 Act. In that case, the applicant in judicial review proceedings was a lady who lived in close proximity to a quarry owned by the notice party. She brought judicial review proceedings seeking to challenge the decision of the planning authority made under s. 261 of the 2000 Act. The quarry owner had applied for registration of his quarry. The planning authority decided that his quarry fell within the provisions of s. 261(7) of the 2000 Act insofar as it determined that the quarry concerned had a pre 1964 use and had an excavation area of more than 5 hectares. It inserted the statutory notice in the newspaper on 13th October, 2005 indicating its intention to require the quarry owner to apply for planning permission and lodge with that application an environmental impact statement. Observations were made by the public including the applicant following the insertion of this notice. Those observations strongly disputed the use of the lands as a quarry prior to 1964.

73. The planning authority proceeded to make its final order on 19th April, 2006. It required the quarry owner to seek planning permission and to furnish an environmental impact statement. He duly applied for planning permission and obtained it. The applicant appealed that grant of planning permission and the same was under appeal to An Bord Pleanála at the time the judicial review proceedings were heard.

74. A number of reliefs were sought in the judicial review

proceedings including orders seeking to quash the decision of the planning authority on the basis that it had failed to require the quarry owner to submit adequate objective evidence as to the pre 1964 status of the quarry; that it had failed to properly investigate and evaluate the evidence available as to the pre 1964 use of the quarry in reaching its decision and that its decision was irrational and perverse on the evidence.

75. It is common case that the remedy sought by the applicant in that case was by way of judicial review under s. 50 of the 2000 Act. The trial judge determined in the course of his judgment that the applicant, as a lady residing close to the quarry had the *locus standi* to maintain proceedings by way of judicial review. Consequently, the respondent is correct in its submission that a decision of the planning authority under s. 261 is amenable to challenge by judicial review to litigants such as the applicants in the present claim. However, the plaintiff in the *Pearce* decision opted to seek relief by way of judicial review. She did not seek to institute proceedings challenging the quarry owner's development as one which was unauthorised. Indeed, the applicant found herself in precisely the type difficulty to which I have just referred in this judgment, namely, she was not in a position on the facts to demonstrate that the decision made by the planning authority to the effect that the quarry had a pre 1964 use was irrational. The court referred to the fact that in judicial review proceedings, even though the applicant had put forward formidable evidence to the planning authority to demonstrate that the quarry was not used, as contended for by the owner, prior to 1964, that the decision of the planning authority was irrational to the point that it should be quashed.

76. Accordingly, I take the view that the decision of Hanna J. in *Pearce v. Westmeath County Council* does not support the submissions of the respondent in the present case. I also find it interesting to note that in the course of that judgment, the learned trial judge described the planning authority as having taken the view that in coming to its decision that the quarry concerned fell within the scope of s. 261 of the Act, it was doing no more than performing an administrative function.

77. For all of the aforementioned reasons I will dismiss the respondent's preliminary objection to the validity of these proceedings which in my view, are properly maintainable notwithstanding any decision made by the planning authority in respect of the respondent's lands under s. 261 of the 2000 Act. That section simply supplements the controls provided for in the normal planning process. It does nothing to alter the status of a quarry that may constitute unauthorised development at the commencement of the s.261 process. Neither does registration by the planning authority of a quarry, albeit subject to the imposition of conditions, interfere with the right of a party having the appropriate locus standi to challenge a development so registered as one which is

unauthorised by use of the mechanism specifically designed for that precise purpose, namely s. 160 of the 2000 Act."

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Record No:

IF YOU THE WITHIN NAMED KEEGAN QUARRIES LIMITED, MAURA KEEGAN, AND ALL OTHER PERSONS HAVING KNOWLEDGE OF THE GRANTING OF THE JUDGMENT OR ORDER HEREIN, NEGLECT TO OBEY THIS JUDGMENT OR ORDER BY THE TIME THEREIN LIMITED, YOU WILL BE LIABLE TO A PROCESS OF EXECUTION INCLUDING IMPRISONMENT FOR THE PURPOSE OF COMPELLING YOU TO OBEY THE SAME ORDER.

AN CHUIRT CHUARDA
(THE CIRCUIT COURT)

EASTERN CIRCUIT
COUNTY OF KILDARE

Certified To Be A True Copy
Of The Original Order Filed
In The Courts Service Office,
Naas, Co. Kildare.
Dated this 28th day of July 2023
Ciara Ní Mhóráin
Nominated Signatory
By The Combined Office Manager

BEFORE JUDGE NOLAN at ATHY

THE 26th DAY OF July 2023

BETWEEN

KILDARE COUNTY COUNCIL

APPLICANT

-AND-

KEEGAN QUARRIES LIMITED AND MAURA KEEGAN

RESPONDENTS

The Respondents having been duly served with the Application herein and the same coming for hearing before the Court this day.

THIS MATTER coming on for hearing this 24th and 26th day of July, 2023,

WHEREUPON having considered the pleadings and hearing what was urged by Counsel for the Applicant and Counsel for the Respondents, the Court doth make Orders in the within proceedings, in the following terms: -

BY CONSENT THE COURT DOTH ORDER

1. **An Order directing the Respondents to forthwith cease the use of the property, being the lands situate at Ballyonan, Broadfield, in the County of Kildare ('the property'), for the importation and stockpiling of aggregate onto the property for storage, processing and/or distribution, in breach of condition 2 attached to Section 261 decision QR45, An Bord Pleanala Reference no: 09.QC.2168, save for the small importation of maximum 40 tonnes per week of Blending Sand to be used solely as an aggregate mixer/blender in respect of sand and gravel extracted from the property.**

2. Restraining the Respondents, their respective servants, agents, licensees or any person acting in connection with them or on their instruction, and all persons having knowledge of the granting of any Order herein from continuing the said development and use of the property other than in accordance with the Order herein and any other authorised use.

3. An order directing the Respondents to cease all activity and uses of the area outside the as permitted site boundary, as authorised by section 261 decision QR45, An Bord Pleanala Reference No: 09.QC.2168, pertaining to the property and outlined in Red in the map attached hereto, within a period of seven days of the date of service of the within Order on the Respondents, acknowledging that the Respondents have already substantially advanced appropriate restoration.

4. An Order directing the Respondents to complete the restoration works on the area outside the as permitted site boundary, authorised by the section 261 decision QR45, ABP reference no.09.QC.2168 and outlined in yellow on the map attached hereto, within a period of five months of the date of service of the within Order on the Respondents. The said restorations works to include the following-

i) Removal of all aggregates stockpiled on the area outlined in yellow on the map attached hereto and to restore this area to grassland.

ii) Removal of the site office at the entrance to the property, with a stay on such removal pending the determination of the decision of An Bord Pleanala pursuant to section 5 declaration ED900 and/or the submission of a valid planning permission in respect of the site office within a period of 8 weeks from the date of the Order herein and thereafter receipt of a grant of planning permission in respect of the application by Kildare County Council or a dec isionon appeal in respect of this said planning application by An Bord Pleanala.

5. An Order directing the Respondents to comply with the conditions attached to Sections 261 decision QR45, An Bord Pleanala (ABP) Reference no: 09.QC.2168 which pertain to the property, save for condition no.41, within a period of three months from the date of the service of the within Order on the Respondents. For the avoidance of doubt no extraction below the water table is to occur on the property and as regards the pond on the property, where the water table has been breached, no water will be extracted from the water table into this pond and all necessary water shall be tanked onto the property and/or harvested from rainfall.

6. As regards Condition no 3 attached to the section 261 decision, ABP reference no: 09.QC.2168, the property will continue to operate as a quarry for the extraction of sand and gravel and the processing of material so extracted, as authorised by s.261 decision QR45, ABP reference no.09.QC.2168, until 30th April, 2027, by which date all quarry activities and processing shall have ceased and the property shall be restored, in accordance with the restoration and landscaping scheme agreed with the Applicant Council, pursuant to condition 33 of QR45, ABP reference no. 09.QC.2168 on or before 31st December, 2027.

7. Directing the Respondents to discharge the Applicant's costs and expenses of the proceedings, to be taxed in default of agreement.

8. Proceedings are to be adjourned to the next civil sessions in Naas Circuit Court, with liberty to apply.

BY THE COURT

Ciara Ní Mhóráin

NOMINATED SIGNATORY BY THE COMBINED OFFICE MANAGER

AN CHUIRT CHUARDA
(The Circuit Court)

Record No. 2018/00123

EASTERN CIRCUIT

COUNTY OF MEATH

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000 TO 2017

BEFORE HER HONOUR JUDGE MC DONNELL AT TRIM CIRCUIT COURT THIS THE 5TH DAY OF FEBRUARY, 2019

BETWEEN

MEATH COUNTY COUNCIL

APPLICANT

And

KEEGAN QUARRIES LIMITED

RESPONDENT

THIS MATTER coming on for hearing this 5th day of February 2019 **WHEREUPON** reading the Notice of Motion dated the 27th day of February 2018 and the Affidavit of Mark Farrell dated the 22nd February 2018 and hearing what was urged by Counsel for the Applicant and the Legal Representative for the Respondent.

THE COURT DOTH ORDER BY CONSENT an order in terms of paragraphs 1, 2 and 3 of the aforesaid Notice of Motion as follows :

1) An Order directing the Respondent to cease the unauthorised quarry development, being carried out at property situate at Newcastle, Lower Moyfenrath, Innfield, in the County of Meath (hereinafter called "the Property") which includes the following:
    (i) The continued unauthorised extraction of sands and gravels on the lands comprised within Folio 65886F County Meath.
    (ii) The unauthorised extraction of sands and gravels and associated site works on the lands outside the area outlined in blue on site map WS43, submitted to the Applicant on the 27th April, 2005 register reference, ABP No17.QC.2101 (the Section 261 Registration) .
    (iii) The non-compliance with conditions 3, 5, 7, 15, 17, 18, 19, 20 and 21 of An Bord Pleanala reference 17.QC.2101 (QY54) (The Section 261 Registration). These conditions required details to be submitted and agreed by Meath County Council.
    (iv) Unauthorised extraction of sand and gravel in breach of Condition 2 of ABP Reference SU17.SU0074 (the Substituted Consent)
    (v) The unauthorised extraction of sand and gravel, below the ground water table in breach of condition No. 1 of ABP Reference SU17.SU0074 (the Substituted

Consent) in particular by breaching the particulars submitted within Section 1.7 of the Remedial Impact Statement.

(vi) Non Compliance with Conditions 2, 3 and 4 of An Bord Pleanala Reference Number 17.SU.0074 (the Substituted Consent).

2) An Order restraining the Respondent, its servants, agents, licens ees or any person acting in connection with them or on their instruction, and all persons having knowledge of the granting of any Order herein from continuing the said unauthorised development and use of the said lands.

3) An Order directing the Respondent to cease all quarrying activity on the land within a period of seven days of the date of service of the within Order on the Respondent.

THE COURT DOTHFUR THER ORDER :

1. That the Defendant be allowed a period of 3 months within which he's to remove any material which isn't waste material on the site, providing he removes the quar y material and his plant machinery is removed to his own premises'.
2. That in respect of the site thereafter, direct the quarry at a minimum must be stabilised and conditions required by Meath County Council to be done by the Defendant as follows :
   a) Land be returned to conservation status forthwith
   b) In order to provide a Health and Safety barrier, that a fence of 2.5 metres be constructed AND to be person and stock proof around the quarry area.
   c) Keegan Quarries to provide warning signs to the public to show that they should keep out of the area that is dangerous.
   d) That they should slope the edges of the quarry and plant Willow/Hazel thereon.
   e) That they plant screening material at the boundary to allow for the immunity of the area and adjoining land.
3. Direct that all of these conservation status works be carried out within a period of 6 months or such other period as maybe agreed with the parties.
4. Liberty to apply should the Defendant in the meantime obtain full planning permission for a restoration of the site, together with any ancillary permission required.
5. Costs to plaintiff to be taxed in default of agreement.
6. Stay in the event of an appeal.

BY THECOURT

NOMINATED SIGNATORY
ON BEHALF OF THE COUNTY REGISTRAR

I CERTIFY THAT THIS IS A TRUE COPY
OF THE ORIGINAL IN MY CUSTODY
DATED 14/2/19
SIGNED
Nominated Signatory on behalf of the COUNTY REGISTRAR

Judgment

Title: Fowler -v- Keegan Quarries Ltd

Neutral Citation: [2016] IEHC 602

High Court Record Number: 2012 463 MCA

Date of Delivery: 28/10/2016

Court: High Court

Judgment by: White Michael J.

Status: Approved

Neutral Citation: [2016] IEHC 602

THE HIGH COURT

[2012/463MCA]

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

AND IN THE MATTER OF AN APPLICATION

BETWEEN

ROBERT HENRY FOWLER

APPLICANT

AND

KEEGAN QUARRIES LIMITED

RESPONDENT

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

1. These proceedings arise from an originating notice of motion issued on 17th December, 2012, originally returnable for 28th January, 2013, seeking an order pursuant to the provisions of s. 160(1)(a) of the Planning and Development Act 2000, as amended, requiring the Respondent, its servants or agents to cease and/or refrain from carrying out or continuing unauthorised development on at or under

lands located at Clegarrow and Rahinstown in the County of Meath and comprised in Folios 25123 and 12012F Land Registry Co. Meath in circumstances where:-

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

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

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

(iv) there has been unauthorised removal of woodland;

(v) financial conditions have not been complied with;

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

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

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

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

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

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

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

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

reserved.

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

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

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

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

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

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

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

History of the Quarry

14. John Keegan, the managing director of the Respondent first

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

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

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

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

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

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

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

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

22. Permission 10 stated:-

"The rock, sand and gravel extracted from the quarry

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

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

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

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

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

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

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

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

John Fowler."

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

> "Dear John
>
> Further to your letter dated 15th May, 2007, and our subsequent conversations, I would like to clarify our agreement for record purposes.
>
> Keegan Quarries Limited will pay John Fowler a minimum payment of €7,500 per month before withholding tax from 1st March, 2007.
>
> This payment is to include any sand & gravel that Keegan Quarries takes from John Fowler's land in Clegarrow.
>
> If Keegan Quarries takes more than €7,500 worth of sand and gravel from Fowler's land in that monthly period then Keegan Quarries will pay per load in the usual way for any materials taken above the €7,500.
>
> If Keegan Quarries carries in more sand and gravel than is taken out Keegan Quarries will still pay John Fowler the €7,500 per month as above.

The letter went on to state:-

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

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

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

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

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

operations and to provide appropriate proposals for immediate reinstatement of the lands in compliance with the planning permission terms and E.I.S.

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

Conditions of planning permission and compliance

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

Compliance with original permissions.

36. The relevant conditions of permission TA20055 were:-

> Condition 1: the development shall be in accordance with the plans and particulars submitted on the 28th February, 2002, and in accordance with the provisions of the Environmental Impact Statement (EIS) submitted on 28th February 2002 as amended by Addendum A, submitted on 10th September, 2002, except where conditions hereunder specify otherwise.
>
> Reason: In the interest of proper planning and development
>
> Condition 3: The extraction of sand and gravel aggregate material from the extension to the quarry permitted under planning ref 96/633 hereby granted shall be limited to a period of five years from the date of the commencement of quarrying works.
>
> Reasons: In the interest of proper planning and development
>
> Condition 4: There shall be no excavation below the water table. Excavation shall not take place within 1.5m of the water table in the proposed extension to the sand and gravel aggregate quarry. Sand and gravel aggregate extraction shall be limited to the volumes outlined in s. 2 of the Environmental Impact Statement. In the event that quarrying operations give rise to a water table drawdown which seriously interferes with the quantity or quality of the potable water supply from any well serving a property located in the vicinity of the quarry, the developer shall, if requested to do so by the Planning Authority, provide or

arrange for the provision of any alternative supply of portable water to that property.

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

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

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

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

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

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

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

Reason: In the interest of visual amenity.

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

accordance with the Wholesale Price Index - Building and Construction (Capital Goods) published by the Central Statistics Office.

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

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

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

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

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

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

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

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

The silt settlement ponds will be restored once they have reached

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

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

2.5 Restoration and Aftercare

2.5.1 Final Site Restoration Scheme
As discussed in previous sections, restoration of the existing and proposed site will be carried out in a progressive fashion over the life of the operation (refer to Section. 2.4.16). Figure 2.6 shows the final layout of the restoration scheme as cessation of extraction operations, and Figure 2.7 shows sections through this restoration.

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

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

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

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

"Surface Water Regime

Site Hydrology

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

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

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

At 3.4.3, the EIS stated

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

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

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

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

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

> "The Planning Authority is not satisfied with the statement that 'The level of the local water table will be monitored by excavation of test pits, and the floor level altered when necessary to maintain separation distances and is concerned that final excavation levels which are intended to range between 84m and 86m a.O.D. appeared to go below the ground water level as identified

> in two of the three trial holes, undertaken as part of the ground water assessment in s. 3.4.2(iii)(b) of the Environmental Impact Statement. The Environmental Impact Statement should be revised to provide final accurate levels for both the existing local ground water level and the depth of proposed extraction, to clearly demonstrate that extraction will maintain a suitable clearance above the ground water level and will not give rise to an unacceptable risk of ground water contamination.'"

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

40. In respect of planning permission 00/840 which sought permission for the retention of a concrete batching plant which was lodged on 19th April, 2000 and which was subsumed into planning permission TA/20055, the planning opinion of Gavin Lawlor of Tom Phillips and Associates, Town Planning Consultants of 12th March 2013 has not been contradicted by the evidence of the experts adduced on behalf of the Respondent and that opinion has come to the conclusion:-

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

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

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

relevant matters set out in the E.I.S.

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

(i) The Respondent breached the water table to a substantial degree.

(ii) It did not carry out any monitoring of the water table and furnish the results of this monitoring to Meath County Council.

(iii) It brought material other than cement including sand and gravel onto the subject lands for use in a concrete batching plant which was in breach of the planning permission.

(iv) It was obliged to carry out progressive restoration and make sure that the topsoil and overburden were stored separately for the purposes of restoration. This was ignored.

(v) It continued to extract material subsequent to the expiration of planning permission.

(vi) It quarried beyond the lands the subject of the planning permission.

(vii) In addition to this many less serious breaches occurred which are set out in Mr Jennings report.

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

Application for substitute consent pursuant to section 261A of the Planning and Development Acts 2000 – 2011

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

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

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

48. The purpose of the legislation was to determine which quarries having regard to two EU directives (E.I.A. Directive and Habitats

Directive) would have required Environmental Impact Assessment or an Appropriate Assessment in relation to possible effects on the integrity of a European site which had not been subject to any such assessment or determination. This should be distinguished from the enforcement responsibility of the Planning Authority under the Planning and Development Acts.

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

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

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

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

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

> "As you are aware, Meath County Council as the relevant planning authority are obliged to ensure that all quarry operators comply with the law and the conditions of planning. We are extremely surprised that you have failed to take action and to have the illegal activities of Mr. Keegan and Keegan Quarries Limited discontinued. In doing so, we would expect that you would pursue the proper remedial measures required to restore the site.
>
> It is as a result of your failure to act that we have now been forced to issue proceedings against Keegan Quarries Limited for the violations listed in your Notice amongst others. We will also shortly be issuing proceedings on behalf of our client against Mr. Keegan personally.
>
> Our client is not the operator of the relevant quarry. Our client will not be applying for any Substitute Consent and indeed she objects to such consent being issued.
>
> In the circumstances we find your determination that the quarry operators apply for Substituted Consent wholly unsatisfactory. How can any action which is clearly in breach of planning laws be consented to? Indeed, where Mr. Keegan and Keegan Quarries are clearly in breach of

> the terms of the EIS and planning consents already granted (and long since expired), it strikes us that were Meath County Council to grant such substituted consent, it would be in breach of both domestic and European law."

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

> "The decision of An Bord Pleanála informs the steps which they operator and/or the Planning Authority must take. Such steps may include permitting the continued operation of the quarry or the issue of an enforcement notice requiring the cessation of unauthorised quarrying.
>
> Meath County Council will await the outcome of An Bord Pleanála's decision in this regard and will discharge its statutory duty in accordance with s. 261A of the Planning and Development Act."

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

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

> "I therefore recommend the following:-
>
> (a) Confirm the Planning Authority's determination under s. 261A(2)(a)(i)
>
> Reasons and Considerations
>
> Having regard to the size of the extraction area and the scale of the extraction works which were carried out subsequent to 1st February, 1990 and to the 1st May, 1999, together with the nature of the receiving environment it is considered that a sub-threshold Environmental Impact Assessment or determination or a determination as to whether an Environmental Impact Assessment was required would have been necessary in this instance.
>
> (b) Confirm the planning authority's determination under s. 261A(2)(a)(ii)
>
> Reasons and Considerations
>
> Development was carried out after 26th February, 1997 and involves the extraction of material in close proximity to the River Boyne and River Blackwater candidate c.SAC (site code: 002299). The nature of the work carried out after the 26th February, 1997, could potentially impact on the qualifying interests associated with this designated European site.
>
> (c) Confirm the planning authority's decision under s. 261(3)(a)

Reasons and Considerations

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

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

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

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

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

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

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

62. The Applicant in submissions to the court has submitted that no application was made to An Bord Pleanála by the Applicant or Jennifer Fowler to review the decision of Meath County Council to refer the matter for substitute consent. It is clear from the affidavit of Mr.

Kieran Cummins, Planning Consultant, and his evidence on examination before the Court and the correspondence from the Applicant's solicitors to Meath County Council and An Bord Pleanála that the Applicant and Mrs. Jennifer Fowler were particularly concerned that the substitute consent procedure would regularise the unauthorised development on the lands and were certainly very wary of the substitute consent procedure and wanted the planning authority, Meath County Council, to take enforcement action against the Respondent.

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

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

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

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

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

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

> "I refer to your submission of a restoration plan for the above quarry. On reviewing this file, I note that this Council accepted the restoration plan submitted by you pursuant to condition 28 of TA20055 on 3rd February, 2014.
>
> In issuing this approval in respect of condition 28, the Council did not have regard to the fact there is currently

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

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

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

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

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

Legal Principles

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

> "(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High

Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) the question of delay and acquiescence;

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

(d) the public interest, to include:-

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

(ii) as members of the public, those

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

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

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

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

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

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

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

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

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

Dublin County Council v. Sellwood Quarries Ltd. [1981] I.L.R.M. 23 ; White v. McInerney

> Construction Ltd. [1995] 1 I.L.R.M. 374 ; Mahon v. Butler [1997] 3 I.R. 369 ; Blainroe Estate Management Company Ltd. v. I.G.R. Blainroe Ltd. (Unreported, High Court, Geoghegan J., 18th March, 1994) and Irish Wildbird Conservancy v. Clonakilty Golf and Country Club Ltd. (Unreported, High Court, Costello P., 23rd July, 1996) followed.
>
> 7. That, while the respondent's reasonable conduct and co-operation with the planning authority might be of considerable relevance to the court's consideration of what order, if any, it should make, it could not impact on the court's finding as to whether there had been a breach of the planning permission conditions."

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

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

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

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

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

79. While the Planning Authority can and regularly makes use of the

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

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

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

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

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

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

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

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

> 25. "As appears Article 6(3) envisages a two-stage process which is implemented in greater detail by ss. 177U and 177V of the PDA:
>
> > (i) a screening for appropriate assessment in accordance with s. 177U;

> (ii) if, on a screening, the Board determines that an appropriate assessment is required then it must carry our an appropriate assessment in accordance with s. 177V.

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

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

unauthorised development.

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

Delay and Acquiescence.

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

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

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

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

husband.

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

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

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

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

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

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

97. The court accepts there was substantial delay between Mrs. Jennifer Fowler acquiring knowledge about the breach of planning conditions and the issue of proceedings. The court is satisfied from

the evidence of Mr. Kieran Cummins, Planning Consultant, engaged by Jennifer Fowler that there was difficulty in procuring information from Meath County Council about the relevant planning permissions and that planning file 96/633 was not available.

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

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

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

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

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

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

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

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

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

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

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

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

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

Alleged breach of undertaking of the Respondent and amount of extraction

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

(i) An existing site layout of September 2011 prepared on 20th September, 2011, drawing No. 13 – RN-03.

(ii) Existing site layout of November 2012, prepared on 23rd November, 2012, drawing No. 13 – RN-02.

(iii) Existing site layout of May 2013, prepared on 10th June, 2013, drawing No. 13 – RN-01, and a cross section A-A to D-D prepared on 10th June, 2013, drawing No. 13 – RN-04.

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

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

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

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

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

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

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

117. The issue of volume was also referred to in the Meath County

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

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

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

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

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

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

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

123. Mr. Weir has surveyed four water bodies on the lands. Lake 1 on the south eastern portion of the lands has an area of 3.039 hectares

or 7.511 acres. Lake 2 to the north has an area of 3.562 hectares, or 8.800 acres. Lake 3 to the southwest has an area of 0.690 hectares or 1.704 acres. Lake 4 has an area of 0.753 hectares or 1.860 acres

The restoration and remediation proposals of the Applicant and Respondent

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

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

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

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

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

129. Mr. Burns was examined on his affidavits of 2nd December,

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

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

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

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

133. Mr. Mullin had concern that the proposals put forward by Mr. Burns exceeded the restoration as provided for in the original Environmental Impact Statement prepared by John Barnett and

Associates Ltd and accepted by Meath County Council when granting planning permission and he was of the opinion that the existing material on site could be utilised. However, he accepted that there was a need for organic improver but did not accept that it would be appropriate to import actual topsoil onto the lands or subsoil.

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

(i) That the baseline for the restoration would be the Environmental Impact Statement report of John Barnett and Associates Ltd.

(ii) A general grading out of the current unstable steep side slopes to sustainable and stable slopes. There was common agreement that the minimum gradient should be 1.25 moving up to 1.6 in places.

(iii) Removal of all remaining structures including fuel tanks and general quarry debris.

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

(v) Creating levelling, cultivating of existing soils.

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

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

(viii) Reestablishment of field hedge rows.

(ix) Fencing off site.

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

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

137. Both recommended there should be some form of updated Environmental Impact Assessment to take account of the substantial changes of unauthorised development not envisaged in the original Environmental Impact Statement.. Mr. Burns, however, was of the opinion that if the restoration plan of Brady Shipman Martin was followed in full by the court there would be no requirement for an EIA. In considering the expert reports and the expert opinion of both witnesses, the court finds there were substantial deficiencies in certain aspects of their evidence. Mr. Mullin underestimated the severity of the non-compliance with planning permission. He had not examined in detail the Environmental Impact Statement originally prepared for the planning permission nor did he examine the original

planning permission. His report and evidence was deficient in respect of the treatment of the topsoil and subsoil by the Respondent. There was evidence from Mr. Mullin that soil analysis had been prepared by the Respondent but this was not furnished to the court. The evidence adduced by Mr. Burns in relation to the topsoil and overburden was much more comprehensive in detail and of assistance to the court with the exception of his proposal to have topsoil imported and his position as to where this could be sourced and how much of the existing soils on the lands could be utilised.

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

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

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

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

142. The court is faced with an issue of moral hazard. There are two very deep lakes on the lands which were dug by the Respondent illegally with no regard to the planning permission. In the court's opinion, there are substantial logistical problems about infilling them. The expert evidence adduced by the Applicant in relation to this

particular problem does not give the court comfort that this could be achieved in accordance with section 160. The wording of the Act states restoration should be "as far as is practicable".

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

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

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

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

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

The Planning Authority

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

This Court does not have jurisdiction to prevent the Planning Authority from taking these steps.

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

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

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

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

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

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

155. When the relief to be granted pursuant to s. 160 of the Planning Acts 2000, is finalised while not an ideal solution to the problem faced by the Applicant, and the Respondent it will provide comfort to the parties if the scheme of restoration and remediation ordered by the court is complied with. The restoration and remediation to be carried out does not require planning permission and although the status is not as ideal as a development which has had the benefit of planning

permission or a Section 261A consent in the circumstances of this case, it would to the best possible extent resolve the status of the property.

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EXCERPTS from VARIOUS COURT JUDGEMENTS – Keegan

Pierson & Ors -v- Keegan Quarries Ltd, High Court Record Number: 2008 20 MCA

1. It is helpful to examine sections of the judgment dated 12th August 2009. *Ms. Justice Irvine* held that: -

> *40 If the quarry constituted unauthorised development at the start of the s. 261 process, its registration subject to conditions does not, in my view, alter its status. Neither does that decision have any legal effect on the right of a party with the appropriate locus standi, such as the applicants in the present case, to challenge that development as being unauthorised under s. 160 of the 2000 Act*
>
> *45. Nowhere in this learned text, is there any support for the proposition that the legislature intended that s. 261 was to be used as some substitute method whereby planning permission or authorisation could be obtained for the use of a quarry that constituted unauthorised development at the date of the application for registration.*
> *In fact, the contrary view is expressed by the author at para. 8 – 136 where he states:-*
>
> > *"The effect of registration is simply to ensure that the planning authority and members of the public, have sufficient information to allow the question of what renewed controls, if any, should be imposed to be addressed."*
>
> *47. The applicants submit, and I agree with them, that the respondent's quarry, if it was unauthorised development because it had not been operated as such prior to 1st October, 1964, is not immune from the need to apply for planning permission merely because it has been registered as a quarry subject to conditions by the planning authority in the course of the s. 261 procedure.*
>
> *48. At para. 8 – 169, Simons continues:-*
>
> > *"Section 261 merely supplements the normal range of enforcement mechanisms, and, accordingly there is nothing in s. 261 which prevents enforcement action being taken against an unauthorised quarry under Part VIII of the PDA 2000. This is so even if the quarry has been purportedly registered under Section 261."*
>
> *53. There is nothing in the guidelines to suggest that if a quarry is unauthorised at the date of its registration that the planning authority can proceed to permit the quarry to operate subject to conditions in lieu of taking enforcement action and/or requiring the owner to apply for planning permission. The guidance just quoted lends strong support to the applicant's contention that this section cannot be used by a quarry owner to obtain planning permissions, so to speak by the backdoor. It is clear that if it comes to the notice of a planning authority in the course of the s.261 process that any quarry is unauthorised then its obligation is to use the full rigors of the planning code to restrain such use. Accordingly, it must follow that the applicants in the present proceedings retain their right to seek relief under s. 160 of the Act in equivalent circumstances where they maintain that the use by the respondent of its lands amounts to unauthorised development.*
>
> [Emphases added]

2. In a subsequent order of the court dated the **21st December 2010** the respondents '*KEEGAN QUARRIES LIMITED*' were ordered to restore the lands. Part 2 of the said order provided that: -

> *'Pursuant to s.160(1)(b) of the Planning and Development Act 2000 that the Respondent restore the lands the subject matter of these proceedings to the condition they were in as of February 2007, or as close as is practicable thereto, the said works to be carried out so as to obliterate all evidence of the present quarry and leave the lands landscaped in the manner outlined in Option 1 of the letter of Malone and Martin Solicitors dated the 19th November 2010 save as may otherwise be required by the Planning Authority; the Respondent to make*

whatever applications in that behalf may be necessary within 16 weeks of the date of this Order.'

[Emphases added]

3. It is helpful to examine sections of the judgment dated 7th October 2010. *Ms. Justice Irvine* in Jonathan Pierson, John A. Woods, Glenn White, Desmond Woods, Kevin Greene And Joan Coyle v. Keegan Quarries Limited [2008 20 MCA]: -

> 101 '....*Mr. Keegan's evidence that the quarry looked fresh to him is unconvincing against the backdrop of the applicant's evidence of the gates being closed and their failure to note any activity on the site....'*
>
> **(i) *Bona fides***
> *126. '...in support of its submission that if a respondent has acted bona fide in the belief that their development was authorised, this is a factor to be taken into account by a court in deciding whether or not to grant the relief sought.'*
>
> *'130. Insofar as I am asked to exercise my discretion on the basis that Mr. Keegan bona fide, if incorrectly, formed the view that the history of the quarry was settled when it was registered, I reject that submission. Mr. Keegan has been in the quarrying business for almost 30 years. He, or companies under his control, own several quarries. From his evidence, it is clear that in his mind, at the time of the purchase, was whether the quarry was an authorised development from a planning perspective. Thus if he did enter into this multi million euro purchase based upon his own judgment as to the legal status of the quarry without taking professional advice he acted foolishly and with reckless disregard for the respondent's position as was discussed by Geoghegan J. in his decision in Cavan County Council v. Eircell Limited (Unreported, 10th March, 1999).*
>
> *131. I find it difficult to believe that Mr. Keegan did not take legal or planning advice on the legal status of the quarry prior to completing its purchase. Because of the nature and extent of his quarrying business, Mr. Keegan must have regular dealings with planning experts and lawyers. Issues such as planning applications, compliance issues and negotiations with local authorities must be part and parcel of everyday life for those involved in quarrying. Indeed, in the present case, as soon as the respondent purchased these lands, Mr. Keegan engaged the services of Mr. William Sheil, Planning Consultant, to prepare an appeal against the conditions imposed at the time of the registration of the quarry.*
>
> *132. I find it difficult to accept Mr. Keegan's evidence that he bona fide but incorrectly himself formed the view that the history of the quarry was settled when it was registered and proceeded to act on that basis alone. In this regard, the requisitions on title raised by his solicitors canvassed the use of the lands both prior to and post the 1st October, 1964. Further, special condition no. 9 of the contract for sale provided that "the lands are sold with the benefit of the Meath County Council letter dated 15th December, 2006". It seems to me highly likely that whoever was dealing with the purchase of these lands on behalf of the respondent would have explained to Mr. Keegan the significance of the requisitions raised and the replies received.*
>
> *133. If the respondent received expert advice regarding the planning status of the quarry prior to the completion of the contract to the effect that its status was assured, I believe that I would have been informed of this fact given the respondent's reliance upon the decision of O'Sullivan J. in Altara Developments Ltd v. Ventola Ltd [2005] IEHC 312 (Unreported, High Court, O'Sullivan J., 6th October, 2005). In that case, the court refused to grant relief under s. 160 in circumstances where the respondent had received professional advice prior to proceeding with the development complained of that it was in compliance with its planning. In these circumstances, I think it is fair to assume either that the respondent sought no direct expert*

advice on the planning status of the quarry, or that, if it did, it received advice to the effect that complete reassurance could not be given. In the first scenario, the respondent was the author of its own misfortune. If the latter situation pertained, then the respondent accepted a risk which any entity is entitled to take. In neither scenario would the relevant circumstances justify the court exercising its discretion in the respondent's favour.

134. However, given that the respondent's submission is based upon the factual assertion that Mr. Keegan, as a layman, entered into a contract to purchase these lands for the respondent, based upon his own belief that the legal position was assured rather than based upon any professional legal or planning advice, the respondent is the author of its own misfortune.

135. Even if it be the case that Mr. Keegan's initial evidence was correct, and that I accepted that he forged ahead with the purchase on the basis of what Mr. McGuinness told him regarding the pre-1964 use of the lands, I reject the submission made on his behalf that he "had to rely on the representations made to him by the vendor". There is simply no reason why inquiries could not have been made in the locality regarding the historic use of these lands. There was clear evidence given in this case that the respondent would have been in a position to access all of the files in the planning department in relation to the relevant lands which would have demonstrated to him the rather flimsy evidence available to the local authority at the time it registered Mr. McGuinness's quarry. This is not a case where the respondent made the relevant inquiries and either got no answers or incorrect answers thereto.

157. The applicants maintain that the conduct of the respondent should be taken into account and they maintain that the evidence has established that, when Mr. Keegan visited Mr. Pierson's home in early 2007, he engaged in what may be described as somewhat strong-armed tactics. Mr. Pierson maintained that Mr. Keegan told him that it was his intention to quarry "all the way down the hill" on the respondent's lands, far beyond the northern boundary permitted under the planning permission, and that he further told him that it was his intention to continue quarrying for thirty years, rather than for the ten-year period provided for in the planning permission.

158. I accept Mr. Pierson's account of the argument which he alleges took place with Mr. Keegan, and I believe that his account is consistent with the submission made on the respondent's behalf by Mr. John Shiels in seeking to appeal the conditions attached at the time of the registration of the quarry. However, I get the impression that, whilst this may have been an unpleasant conversation from Mr. Pierson's perspective, Mr. Keegan's approach did not have the effect of curtailing Mr. Pierson's actions. Accordingly, I have entirely discounted this event for the purpose of dealing with my discretion.

159. The applicants have submitted that Mr. Keegan sought to mislead the court in his evidence regarding his understanding as to the boundary fixed by the local authority at the time the quarry was registered. Likewise, it has been submitted by the applicants that the respondent has quarried beyond the limit of the permitted boundary.

160. I am satisfied on the evidence that the applicants have established that Mr. Keegan well knew the northern perimeter of the boundary, which is to be gauged by drawing a line across the word "Hilltown" through the top of the letter "l" where it appears on the map attached to the application to register the quarry. In reaching this conclusion, I am satisfied that Mr. Keegan was advised, as a result of an inspection which took place at the quarry on the 13th August, 2007, that he had reached the limit of permitted boundary. I accept Mr. Griffin's evidence that, on the 25th September, 2007, at a meeting at his office, he explained to Mr. Keegan and to his colleague, Mr. Perkins, from whom the court heard no evidence, that he was not permitted to quarry beyond the letter "l" on the map and that to demonstrate this fact to Mr. Keegan, he drew a line across the top of the word "Hilltown" on the same map to demonstrate the northern boundary permitted under condition No. 2 of the registration conditions.

161. I am also satisfied that the map scheduled to the warning letter sent to Mr. Keegan on the same date shows a line drawn across a number of the letters in the word "Hilltown", confirming what was explained to Mr. Keegan at his meeting with Mr. Griffin on the 25th September.

162. I found Mr. Keegan's evidence as to his understanding of the northern perimeter of his quarry to be self-serving. I reject his evidence to the effect that he believed that the northern boundary was to be found by drawing a line through the letter "l" in the word "Hilltown", but keeping that line parallel with the southern boundary of the site. There is simply no logic to this interpretation. Further, no expert was produced to the court to support this interpretation. Neither did Mr. Keegan produce evidence from Mr. Perkins to support his alleged bona fide understanding as to the northern perimeter of the property following his meeting with Mr. Griffin, nor did Mr. Keegan take any expert planning advice from Mr. Burke or anybody else as to how condition No. 2 was to be interpreted.'

[Emphases added]

4. Excerpt from the judgement of *Ms. Justice Finlay Geoghegan* delivered on the 9th day of December, 2011, IEHC 453 in Keegan Quarries Limited V Michael McGuinness And Marie McGuinness [2011 861 P]

40. 'Mr Keegan was the principal witness for Keegan Quarries. My assessment of Mr. Keegan as a witness is that he is not a totally reliable witness of fact. He appeared to have a poor recollection of precisely what occurred in the course of the negotiations leading to the contract and completion of the sale in 2007...'

[Emphases added]

5. **Excerpts from High Court Judgment of Justice Michael White**: In that case of *Fowler v Keegan Quarries Ltd* [2016 IEHC 602, 2012 463 MCA], Judge White made numerous findings. Of note are the following re the applicant: -

> *43. The breaches of the planning permission were not minor but were of the most fundamental nature.*
> *(i) The Respondent breached the water table to a substantial degree.*
> *(ii) It did not carry out any monitoring of the water table and furnish the results of this monitoring to Meath County Council.*
> *(iii) It brought material other than cement including sand and gravel onto the subject lands for use in a concrete batching plant which was in breach of the planning permission.*
> *(iv) It was obliged to carry out progressive restoration and make sure that the topsoil and overburden were stored separately for the purposes of restoration. This was ignored.*
> *(v) It continued to extract material subsequent to the expiration of planning permission.*
> *(vi) It quarried beyond the lands the subject of the planning permission.*
> *(vii) In addition to this many less serious breaches occurred which are set out in Mr Jennings report.*
>
> *44. The fact that progressive restoration did not take place and the water table was breached has made restoration and remediation difficult and complex.*
>
> *70. Opinions have been advanced to the court as to the approach An Bord Pleanála may have taken to the unauthorised development on the lands and the proposed remediation and restoration. They were the most serious and fundamental breaches of planning permission, where substantial undertakings were given to the Planning Authority when planning permission was sought in 2002 that the water table would not be breached and that progressive restoration would occur on the lands. An Bord Pleanála would have to have given serious consideration to this.*
>
> *86. There is no obligation on this Court to refer the matter to An Bord Pleanála for the purposes of further extension of time to submit an application for substitute consent. The Respondent did not apply for substitute consent within the time allowed. It was its responsibility to do so and not the Applicant's. While the court accepts that the Applicant wanted to have the Planning Authority, Meath County Council, enforce the original conditions of the planning permission and was opposed to the substitute consent procedure that did not absolve the Respondent as it had carried out the unauthorised development contrary to the planning permission. It was not a mere trivial or technical breach but a substantial one where the Respondent given its experience had to have known that it was deliberately and consciously breaching conditions of planning permission. The court does not intend to refer the matter back to An Bord Pleanála for the purposes of an application to extend time to make an application for substitute consent. That process is at an end.*
>
> *91. These are private law proceedings but there is a strong public interest in ensuring that those responsible for carrying out development in accordance with planning conditions laid down by the appropriate Planning Authority, do so in a manner which is compliant with those conditions, particularly where there are potential injurious consequences for the environment. This is such a case. It is the court's opinion that breaching the water table with possible consequences of polluted matter leeching off the lands into water courses and either affecting other private land owners or the public water supply or the natural environment is a matter of serious consequence.*
>
> *107. The court accepts that Mr. Keegan was trying to deal with the situation that had arisen, but he was not frank in appraising Mrs. Fowler of the extent of the breaches of the permission.*

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

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

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

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

122. There is no dispute that the depth of the extraction below the water table was very substantial, given the assurances by the Respondent to the Planning Authority that it would quarry to a depth of 1.5m above the water table.

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

[Emphases added]

Of note are the following re the planning authority: -

149 'The court is conscious that the Planning Authority is not a party to these proceedings but there is undisputed evidence that it did not follow up on the conditions it laid down... if it had taken its enforcement responsibility seriously, the breach of the water table would not have arisen.'

150 '...Any inspection of the quarry over the period of its operation would have shown that the Respondent was not carrying out its responsibilities to progressively restore the lands as directed.'

151 '...This Court is conscious that the Planning Authority may not have been provided the resources by central government to bolster its role of enforcement, but it has been surprised that such serious breaches of planning permission had gone unnoticed for a substantial period of time in particular when a water table was breached in proximity to an aquifer. This Court hopes that in future a blind eye will not be turned to this degradation of the environment.'

[Emphases added]

6. In a further related judgement of the same matter of *Fowler v Keegan Quarries Ltd* [2016 IEHC 602, 2012 463 MCA], delivered on the 30th September 2021 Mr. Justice Michael White made the following findings.

> Paragraph 43
> *'...The court holds the respondent responsible for the fundamental breaches of the Planning Permission that led to this action.'*
>
> Paragraph 43
> *'...The Court had no trust in Meath County Council to monitor its own Planning Permission....'*
>
> Paragraph 45
> *"The court accepts its is an issue of moral hazard to leave large water bodies..."*