

John Cannon

From: Bord
Sent: Wednesday 23 September 2020 15:34
To: Appeals2
Subject: FW: Ref. 308019
Attachments: 20200923-ABP-308019.pdf

From: Phoebe Duvall [REDACTED]
Sent: Wednesday, September 23, 2020 3:16 PM
To: Bord <bord@pleanala.ie>
Subject: Ref. 308019

To Whom It May Concern,

Please find attached a submission from An Taisce in relation to Ref. 308019.

Kind regards,

--

Phoebe Duvall

*Planning and Environmental Policy Officer
An Taisce - The National Trust for Ireland
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Phone: 01 454 1786
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Company Reg. No. 12469 | Charity Ref. No. CHY4741 | Charity Regulator No. 20006358
An Taisce is a membership-based charity
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An Taisce
The National Trust for Ireland

20200923-ABP-308019

An Bord Pleanála
64 Marlborough Street
Dublin 1

23rd September 2020

Ref: ABP-308019-20
App: Gort Windfarms Limited
For: Derrybrien Wind Farm
Site: Coppanagh, Slieveanore, Loughatorick North, Boleyneendorrish, Kilbeg, Toormacnevin, Funshadaun, Derrybrien North, Derrybrien South, Bohaboy, Derrybrien West, Derrybrien East, Derreennamucka, County Galway

To Whom It May Concern,

An Taisce would like to make the following observation.

As a result of the attached Supreme Court judgment of 1 July 2020, the substitute consent process has been struck down. We request that An Bord Pleanála address this.

Please acknowledge our submission and advise us of any decision made.

Yours sincerely,

Phoebe Duvall
Planning and Environmental Policy Officer
An Taisce – The National Trust for Ireland

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An Taisce – The National Trust for Ireland | *Protecting Ireland's heritage, safeguarding its future*

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Company Limited by Guarantee no. 12469 | Charity CHY4741 | Charity Regulator no. 20006358 | EU Transparency Register no. 473905437651-60

Directors: Philip Kearney (Chair), Trish O'Connell (Vice-Chair),
Stuart McCaul (Secretary), Nick Armstrong, Alison Hough, Hugh O'Reilly, Olivia Rogers, John Sweeney



THE SUPREME COURT

**Clarke C.J.
O'Donnell J.
McKechnie J.
Dunne J.
Baker J.**

**Supreme Court Record No: 9/19
High Court Record Number: 2014/342 JR**

Between /

AN TAISCE

Applicants/Appellants

AND

**AN BORD PLEANÁLA,
J. MCQUAID QUARRIES LIMITED,
IRELAND AND THE ATTORNEY GENERAL**

Respondents

-and-

**Supreme Court Record No: 42/19
High Court Record No: 2016/868 JR**

Between /

AN TAISCE

Applicant/Appellant

AND

AN BORD PLEANÁLA,

IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

SHARON BROWNE

Notice Party

-and-

Supreme Court Record No: 43/19

High Court Record No: 2016/542 JR

Between /

PETER SWEETMAN

Applicant/Appellant

AND

AN BORD PLEANÁLA,

IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

SHARON BROWNE

Notice Party

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 1st day of July, 2020

Introduction

1. The present appeals were joined and heard together before this Court due to the crossover in subject matter. All three deal with aspects of the “substitute consent” procedure contained in the Planning & Development Act 2000, as amended, and its compatibility with the EIA Directive 85/337, also as amended. For ease of reference, I will refer to the first appeal

(S.C. Record No. 9/19) as the “McQuaid case”, given that the quarry under discussion in that appeal, which is situated in Lemgare, Co. Monaghan, is owned by J. McQuaid Quarries Limited (“McQuaid Quarries”) and I will refer to the second and third appeals (S.C. Record No. 42/19 and 43/19) as the “Ballysax cases”, as both are virtually identical as to issue arising and involve the same quarry in Ballysax, The Curragh, Co. Kildare. In the first mentioned appeal, judgment was delivered in the High Court by Barrett J. on the 17th day of May, 2018, and in relation to the latter, which were heard together, a composite judgment was delivered by Eager J. on the 19th day of October, 2017. All three were co-joined when this Court granted leave to appeal in each case: accordingly, it is appropriate to issue a single judgment in respect of the matters arising.

Planning Control and Quarries:

2. Despite the impressive number of statutes which were repealed by the Second Schedule, there was very little in terms of control, regulation or enforcement of town and county planning prior to the enactment of the Local Government (Planning and Development) Act 1963 (“the 1963 Act”). The most recent until that time, namely The Town and Regional Planning Act 1934, as amended in 1939, was of very limited utility. Under the 1963 Act, there was a general obligation to obtain planning permission for the carrying out of any development which was not exempt or commenced before the appointed date: a similar obligation was imposed in respect of the retention of a structure which was or was deemed to be unauthorised as of that date. “Development” was defined as “the carrying out of any works on, in, or under land or the making of any material change in the use of any structures or other land” (s. 3(1)). A person was enjoined not to carry out such a development save in accordance with the permission granted: to do otherwise, constituted a criminal offence. (Section 24 of the 1963 Act).

3. Notwithstanding this mandatory requirement and the sanction for breach, the Oireachtas saw fit to include a provision whereby a person, who carried out a development either by the carrying out of works or the making of a material change in the use, without obtaining the required permission, could nonetheless apply for the retention of such development or for a continuation of such use, as the case may be. This was generally known as a “retention permission” (ss. 27 of the 1963 Act).

4. In that Act, provision was also made for the overall control of development and the means by which, *inter alia*, a planning authority could enforce that control. The appointed date for the purpose of this enactment was the 1st October, 1964, and so in general terms its measures had no application to events preceding that date. The Oireachtas was concerned that if it did so, constitutional considerations might impair substantial parts of the Act. (*Waterford County Council v. John A. Wood* [1998] IESC 32, [1999] 1 I.R. 556, *McGrath Limestone v. An Bord Pleanála* [2014] IEHC 382 (Unreported, High Court, Charleton J., 30th July, 2014)). In reality this meant that in respect of established works or uses existing at that time, there was no obligation to apply for a permission and the enforcement or control regime could not be activated in respect of such works or uses: this unless there was after that date further development or a material change in use, which included an intensification of that use. For the reasons next mentioned this regime, in particular that applying to the “use” provision, posed very considerable problems for planning authorities in respect of quarrying and quarries.

5. The 1963 Act was subsequently amended on at least nine occasions, sometimes substantively, in the decades which followed. As a result, by the year 2000 the body of legislation dealing with planning and development was disparate, unwieldy and extremely difficult to locate or follow. The Oireachtas decided in that year to coordinate in one piece of legislation the entire Planning Code: this became the Planning and Development Act 2000. All previous Acts, save for the very occasional section, were repealed by that measure. During

the time which followed, the 2000 Act has also been amended, with Planning & Development (Amendment) Act 2010 (“the 2010 Act”) being the only one of concern to us.

6. It has been the case for many years past that quarries, many of which predated 1964, posed considerable difficulties in the planning area. The nature of quarrying is such that, when operational, extraction is constantly taking place and invariably expansion and further development will be required over time, in order to continue operating at a functioning level. That level, depending on demand, will however vary on the vertical scale and may involve intermittent use. Therefore, regulating quarries has always represented a particular challenge for both the Oireachtas and local planning authorities given the ongoing nature of such projects. For those quarries which came into existence post the 1st October, 1964, the landscape for the regulation of such quarries became more rigorous than for those operating at and before that date: in respect of which the exposure by local residents to a nuisance action was their predominant concern. However, and notwithstanding this, the change in regime did have the potential to impact upon “pre-1964 quarries” but the same was attended with a considerable level of complication. On the domestic front whilst the concepts of “material change of use” and “intensification of use” arose, and when so established rendered the resulting activity unlawful, serious difficulties were encountered, regarding the identification of those quarries where such was taking place, regarding the scope and extent of such material change whether by intensification or otherwise but above all, in acquiring sufficient admissible evidence to have some overall regulatory control of such quarries. Whilst enforcement slowly became more effective, it never reached the level where compliance became regular or satisfactory. On the international front, difficulties of a different nature were to be encountered where, for example, such a quarry continued to develop and expand but became subject to legislative schemes, sourced in EU law and transposed into domestic law, such as the Directive under

discussion in this case. As a result and arising at both levels, there has been quite a large body of case-law dedicated to these questions.

7. A new approach was seen in the enactment of s. 261 of the 2000 Act, (commencement date: 28th April, 2004), which introduced a scheme whereby every quarry which had never been the subject of planning permission or which had been granted permission more than 5 years before that date were to be registered with the local planning authority by their owners or operators not later than one year after the section entered into force. The purpose of this process was to permit the supplied information to be analysed by the authority, with a view to determining whether, (i) in the interests of proper planning and sustainable development, further regulation through the imposition of conditions or of additional or modified conditions was necessary (s. 261(6)) or (ii) the owner or operator of the quarry would be required to submit an Environmental Impact Statement ("EIS") together with an application for planning permission, (s. 261(7)): this provision related to a pre-64 quarry, the extracted area of which was greater than 5 hectares or where it was situated in a prescribed site, and being one whose continuing operation was likely to have significant effects on the environment, Not later than 6 months after the registration of the quarry, the planning authority was also required to publish a notice of registration in a circulating newspaper, giving the information referred to in s. 261(4): a further notice must be served indicating its intentions under either subs (6) or subs (7), and stating that submissions or observations could be made on the operation of the quarry within a prescribed time. Following the expiry of that time-period the planning authority should then serve a notice of its proposals on the owners or developers as to either the conditions to be imposed or the necessity of making an application pursuant to subsection (7). Whilst this provision represented an attempt by the legislature to impose some controlling regime on quarries, it was fraught with its own difficulties and much case law followed.

8. In 2010 the Oireachtas enacted the Planning and Development (Amendment) Act: it contains multiple amendments to the 2000 Act, and had as its significant objective the State's desire to render our domestic legislation fully compliant with EU law. This can be seen from s. 3, which inserted a new s. 1A, which reads:-

“1A - Effect or further effect as the case may be is given by this Act to an act specified in the Table to this section, adapted by an institution of the European Union or, where appropriate, the part of such an act.”

There then followed a table which contains several Directives, including the Environmental Impact Assessment Directive and the Habitats Directive.

9. The former is of direct relevance to this case, as it was in the decision of the Court of Justice in Case C-215/06, *Commission v. Ireland*, where this State was found to be in breach of Articles 2, 4 and 5 – 10 thereof. In simple terms, the widespread availability of a retention permission in this jurisdiction, even in respect of projects which required but did not have such an assessment, was inconsistent with the Directive which mandated the existence of such, pre-commencement of works. Realising that a substantial number of operations fell into this category the Oireachtas sought to make rectification provisions which would comply with the Directive, as outlined by the Court of Justice. Before setting these out however, which are contained in Part XA and in s. 261A of the 2000 Act, as inserted by s. 57 and 75 respectively of the amending Act (“the 2000 Act”), it is necessary to make reference to the background of those provisions: this, as can be seen, is EEC/EU dominated, firstly *via* the original Directive next mentioned and its subsequent amendments and secondly, resulting from the judgment in Case C-215/06 by the Court of Justice.

The EIA Directive:

10. The founding Directive on which the relevant EU law is based (85/337/EEC), is titled ‘on the assessment of the effects of certain public and private projects on the environment’: it has seen amendments *inter alia* in 1997 and 2003, the latter designed to give effect to the Aarhus Convention. It was repealed and replaced by Directive 2011/92/EU, which describes itself as a codifying Directive, which in turn has been amended in 2014. Despite these changes, both the core objectives and the basic provisions of the enactment have remained much the same. Whichever measure is in force at any given time, it is being generally known as the Environmental Impact Assessment (EIA) Directive.

11. The overall objective of the EIA Directive is evident from several parts of the Recitals, some of which stress or state, (i) that the best environmental policy is to prevent pollution/nuisance at source; rather than trying to counteract their effects subsequent to that happening: to that end, the effects on the environment should be taken into account at the earliest possible stage: (ii) that a permission or consent by a competent authority in respect of a subject development should be granted only after an appropriate assessment of the likely significant environmental effects has been carried out: (iii) that projects of a certain type will have significant effects on the environment and thus as a rule should be subject to a systematic assessment: (iv) that other projects will have to be assessed either individually or by threshold in this regard: and (v) that effective public participation in the taking of relevant decisions should be encouraged and fostered and moreover, should be facilitated at the earliest possible time.

12. Taking the 2011 Directive as the current basis: Article 1(1) applies its provisions to those public and private projects which are likely to have significant effects on the environment; Article 1(2) defines “development consent” as meaning a decision by a competent authority “which entitles the developer to proceed with the project”. The term, development consent, is in fact a community concept, and as such its meaning falls to be

determined exclusively within what is now EU law (*R. (Diane Barker) v. London Borough of Bromley* (Case C-290/03 [2006] E.C.R. 1/03949). Article 2(1) requires “Member States to ...adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects”. The assessment factors which must be analysed are identified in Article 3. The projects captured by the Directive, are by reference to Article 4, listed in *Annex I* and *Annex II* of the Directive. The former are considered to be such a type that each must be systematically assessed, whereas those in *Annex II* may or may not require that assessment: such must be decided by Member States either on a case by case basis, or by threshold or criteria. All assessments must be conducted, *inter alia*, in accordance with Articles 5 to 10. Article 6(1) obliges Member States to take all necessary measures to ensure that authorities likely to be concerned by the projects are given an opportunity to express their opinion on the information supplied. Article 6(2) states that the public shall be informed of the several matters listed therein “*early in the environmental decision making procedure...and at the latest as soon as information can reasonably be provided*”.

Furthermore, the notice or other means of communication by which this is done must refer to the request for development consent, the fact that the project is subject to an EIA, the availability of information and how that might be accessed, and details of the arrangement for public participation. Paragraph 4 then continues “*The public concerned shall be given early and effective opportunity to participate in the environmental decision making procedures referred to in Article 2(2) and shall for that purpose be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken*”. Whilst all of the above are important, the most relevant point to note at this juncture is the mandatory nature of Article 2(1), read in conjunction with the definition of “development consent”, meaning that the

assessment should predate the giving of any such consent, and by definition that step should predate the commencement of any works or projects covered by the Directive. The compatibility of Irish law with this Directive's predecessor – 85/337/EEC – in respect of which see para. 9 above, gave rise to the following action instituted under Article 226/EC.

13. In 2006 infringement proceedings were taken against the State by the Commission in respect of the Directive, the relevant one being 85/337, as amended by Directive 97/11 (Directive 85/337). At the time of *the Commission v. Ireland* (Case C/215/06: judgment delivered on 3rd July, 2008), the relevant planning legislation then operative, was that contained in the 2000 Act, as amended by the Planning and Development Regulations 2001. This legislation was relied upon by Ireland as having adequately transposed the requirements of the Directive into domestic law. Like the 1963 Act, there was a general obligation to obtain planning permission pre-works. If, however, such a permission had not been obtained, the consequences were that the works were considered unauthorised and secondly, those responsible were guilty of a criminal offence (ss. 151 & 156 of the 2000 Act). Civil enforcement provisions were provided for, *inter alia*, under ss. 152-155, and 160 of the Act. However, the real focus of the case is centred on the provision for retention permission.

14. In this regard, section 32 is of relevance:

“32(1) Subject to the other provisions of this Act, permission shall be required under this part –

- (a) in respect of any development of land, not being exempt of development, and,
- (b) in the case of development which is unauthorised, for the retention of that unauthorised development.

- (2) A person shall not carry out any development in respect of which permission is required by subs (1) except under and in accordance with a permission granted under this part.”

Section 34 then sets out the general requirements for the making of an application for either type of permission. Subsection (12) is directly in point:-

- “(12) An application for development of land in accordance with the permission regulations may be made for the retention of unauthorised development and this section shall apply to such an application, subject to any unnecessary modification.”

15. Whilst noting the clear requirement of having to obtain planning permission before the works were undertaken, and the sanctions for not so doing, the court was concerned with those provisions, above recited, whereby a developer could retrospectively regularise the situation by applying for a “retention permission”. If granted, such had the same effect, as if in respect of the subject development, a permission was obtained pre-commencement. Applying the above measures, in the context of the Directive, any proposed project falling within the purview of either *Annex I* and *II*, required planning permission (“development consent”) to be obtained prior to the commencement of that project. Equally so however, even if that was not done, there was nothing in the 2000 Act which prevented a developer from seeking retrospective consent in respect of such project. This very provision is at the heart of the court’s decision.

16. The CJEU found that due to the universal availability of retention permission, such in effect offered a route by which developers could circumvent the requirements of the EIA Directive. In its decision, the court observed that this type of permission was a common feature of Irish planning law, was available without the necessity for the existence of exceptional circumstances, and that when granted its effects were equated with those of an ordinary

planning permission, which by definition preceded the carrying out of the intended works. For a development which was required to have an EIA carried out prior to the commencement of works and to have that navigate itself through the planning application process, the opportunity for a non-compliant developer to retrospectively seek permission after the project had been completed, was to allow the requirements of the Directive to be evaded. The court however, went on to say that national measures could be put in place to facilitate such regularisation, but subject to requirements that no such measures could afford an opportunity for developers to circumvent community rules or to dispense with applying them and further, that “it should remain the exception”. (para. 57 of the judgment). This critically important decision is one which I will come back to a little later (para. 73 below).

17. The response of the Irish State to this decision was the enactment of a number of new provisions by way of the 2010 Act, in the knowledge that there were numerous situations whereby if rectification could not be achieved, the works/activities would not only have to entirely cease, but restoration and remedial works would have to be carried out so as that, insofar as possible, the *status quo ante* would be re-established. Evidently, quarries were very much in the mind of the Oireachtas. These measures were as follows:-

(1) Section 4(4) of the 2000 Act was amended to provide that where an EIA was required, a development could not in its absence be classified as exempted (as inserted by s. 5(b) of the 2010 Act). In such a situation the substitute consent provisions would have to apply.

(2) Section 34(12) as inserted by s. 23(c) of the 2010 Act provided:

‘A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the

application would have required that one or more than one of the following was carried out –

(a) an environmental impact assessment,

(b) a determination as to whether an environmental impact assessment is required, or

(c) an appropriate assessment. '

Subject to that subsection and s. (12)(B), it was still possible, under s. 34(12)(C), to apply for a retention permission. And the third response was the creation of the “substitute consent” regime, provided for by the inclusion of a new Part XA (s. 177) and s. 261A, (para. 9 above): although part of the amending Act, I will for convenience, refer to these measures as being under the 2000 Act.

18. This regime is complicated and in fairness, at least to some extent, it may have to be given the myriad of circumstances and the timeframe which it has endeavoured to cover. The Act lays down a series of detailed provisions in this respect. At the outset, it should be borne in mind that a sequential process must be successfully navigated before regularisation can occur. That process has a preliminary step which must be invoked before the substantive application for substitute consent can be made. There is always therefore a two stage approach, but depending on the statutory provision in play, this varies: not just as to the underlying circumstances and what may trigger the process, but also in several other respects.

19. Section 177E of the 2000 Act, makes provision for an application to An Bord Pleanála (or “the Board”) for substitute consent: in accordance with subs (2)(a) such is made “pursuant to a notice given under s. 177B or s. 261A, or a decision to grant leave to apply for a substitute consent under s. 177D”. Any application which does not comply, *inter alia*, with these requirements, is by virtue of subs (3) invalid. Subsection (2) also specifies what must accompany such an application, which includes a remedial Environmental Impact Statement or

a remedial Natura Impact Statement, or both of those statements, as the case may be. Section 177F states what must be contained in the former, with s. 177G serving a similar purpose in respect of the latter. Under s. 177H, the public have a right to make submissions/observations in relation to this application (para. 92 below). The Board to whom such an application must be made, gives consideration to same and makes a decision thereof in accordance with s. 177K. Under subs (2) of this section, the matters which the Board must have regard to are set out. Finally, s. 177O provides that a grant of substitute consent shall have effect as if it were a permission granted under s. 34 of the 2000 Act. The provisions most relevant to the instant case can now be referred to.

20. As s. 177E points out, the substantive application for substitute consent can only be made when a notice is given under s. 177B or s. 261A, or leave to apply is given under s. 177D of the 2000 Act. In all, these provisions provide five separate “routes” or “pathways” through which an owner or developer may seek substitute consent. The first two are contained in s. 261A with the remaining three being housed in s. 177 of the 2000 Act. As above stated, all five involve a two stage process: the first, in three of these routes is carried out by the relevant planning authority, whereas in the remaining two, that is conducted by An Bord Pleanála: the Board is the only decision maker in the second stage.

21. Under s. 261A of the 2000 Act, both subs (1)(b) and the linked subs (2) and (3) are in play: the latter looks like this: where a planning authority is satisfied that a development was carried out after the 1st February, 1990, without a permission, but which, having regard to the Directive, an EIA was required but was not carried out, and where it is further satisfied, *inter alia*, that the quarry commenced operations before the 1st October, 1964, it can serve a notice on the owner or occupier requiring that person to apply to the Board for substitute consent under s. 177E of the Act. Although the underlying circumstances which gives rise to its invocation are different, the second route under s. 261A provides a similar mechanism for the

involvement of the planning authority and thereafter the Board. The third gateway is that provided for in s. 177B(1), which arises only where a planning authority directs that an application is required after it has been made aware that a judgment of either a domestic or European court has resulted in a previously granted permission being quashed for specific reasons in respect of a development which required (a) an environmental impact assessment, (b) a determination in relation to whether such an assessment is required, or (c) an appropriate consent: for convenience unless otherwise indicated, I will refer to all three as an “an Environmental Impact Assessment” (EIA). As with s. 261A, once such a direction issues, there is then a direct application to An Bord Pleanála for substitute consent: leave to apply is not required.

22. The fourth and fifth possible routes are provided for in s. 177C and when utilised, are considered by the Board under s. 177D. Subparagraph C(2) permits of two ways in which to apply: either under C(2)(a) which is determined by the Board under D(1)(a), or under C(2)(b) which is determined by the Board under D(1)(b). Under both of these routes the planning authority is not involved: but of significance is the fact that “leave to apply” for substitute consent must first be obtained before the substantive application itself can be made. Because of their importance to the overall case, it becomes necessary to quote the relevant parts thereof:-

“177C – (1) A person who has carried out a development referred to in subsection (2) or the owner or occupier of the land as appropriate, to whom no notice has been given under section 177B, may apply to the Board for leave to apply for substitute consent in respect of the development.

(2) A development in relation to which an applicant may make an application referred to in subsection (1) is a development which has been carried out where an Environmental Impact Assessment, a determination

as to whether an Environmental Impact Assessment is required or an appropriate assessment, was or is required and in respect of which –

- (a) the applicant considers that a permission granted for the development by a planning authority or the Board may be in breach of law, invalid or otherwise defective in a material respect, whether pursuant to a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union, or otherwise, by reason of –
 - (i) any matter contained in or omitted from the application for permission including omission of an Environmental Impact Statement, or a Natura Impact Statement or both of those statements, as the case may be, or inadequacy of an Environmental Impact Statement or a Natura Impact Statement or both of those statements as the case may be, or
 - (ii) any error of fact or law or a procedural error,

Or

- (b) the applicant is of opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

23. Section 177D reads:

“(1) The Board shall only grant leave to apply for substitute consent in respect of an application under section 177C, where it is satisfied that an Environmental

Impact Assessment, a determination as to whether an Environmental Impact Assessment is required or an appropriate consent, was or is required in respect of the development concerned and where it is further satisfied that:-

(a) that a permission granted for the development by a planning authority or the Board may be in breach of law, invalid or otherwise defective in a material respect, whether pursuant to a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union, or otherwise, by reason of –

(i) any matter contained in or omitted from the application for permission including omission of an Environmental Impact Statement, or a Natura Impact Statement or both of those statements, as the case may be, or inadequacy of an Environmental Impact Statement or a Natura Impact Statement or both of those statements as the case may be, or

(ii) any error of fact or law or a procedural error,

Or

(b) the applicant is of opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

- (a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- (b) whether the applicant had or could reasonably have had a belief that the development was not authorised;
- (c) whether the ability to carry out an assessment of the environment impacts on the development for the purpose of an Environmental Impact Assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;
- (d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;
- (e) the extent to which significant effects on the environment or adverse effects on the integrity of the European side can be remedied;
- (f) whether the applicant has complied with previous planning permission granted or has previously carried out an unauthorised development;

Such other matters as the Board considers relevant.”

24. As can be seen, s. 177C of the 2000 Act, provides an alternative basis upon which leave to apply can be moved. The first is where the circumstances outlined in C(2)(a) are satisfied and the second, is where the circumstances outlined in C(2)(b) are satisfied. These naturally

feed into what the Board can do on the follow on application (if any) under section 177D. The pathway utilised by McQuaid Quarries and which is the focus and subject of their appeal, is that provided for in s. C2(a): that availed of by Ms. Brown in the Ballysax case, was C(2)(b).

McQuaid's Case: Factual Background and High Court Judgment

25. The subject quarry, in Lemgare, Co. Monaghan, is owned and operated by J. McQuaid Quarries Limited ("McQuaid Quarries"), which is a respondent to these proceedings but which has taken no part in them. The quarry was duly registered under s. 261 of the Planning & Development Act 2000 (para. 7), and the owners were directed by Monaghan County Council pursuant to subs. (7), to make an application for planning permission and as part thereof to compile an environmental impact statement ("EIS"), something which they did on the 2nd March, 2004. Permission was thereafter granted by the planning authority.

26. An Taisce appealed this decision to the Board, contending that the application made was a retention application in respect of a development that required an environmental impact assessment ("EIA") and, accordingly, that permission could not be granted, having regard to the Directive (85/337/EEC) and the decision of the Court of Justice in Case C-215/06 *Commission v. Ireland*. However, this appeal was rejected on the 20th July, 2009. An Taisce then launched judicial review proceedings which challenged the lawfulness of that decision.

27. This judicial review action was successful, as Charleton J. granted an order of *certiorari* quashing the decision of the Board to grant planning permission, on the 25th November, 2010. This he did, *inter alia*, on the basis of there being errors on the face of the record in the decision of An Bord Pleanála, specifically in that it was required to consider, and

had not, whether the development which was the subject of the application was an unauthorised development (s. 261(7) of the 2000 Act).

28. After this judgment had been delivered, McQuaid Quarries applied to the Board for leave to seek substitute consent, pursuant to s.177C(2)(a) of the 2000 Act. This application was made in January, 2012 and the Board granted leave on the 28th May, 2012, pursuant to s. 177D(1)(a). Under s. 50(4)(a)(ii) of the 2000 Act, as amended, the validity of this decision could only be challenged in the eight week period commencing on the date of the decision, something which An Taisce did not do. McQuaid Quarries then made a substantive application for substitute consent which was granted by an Bord Pleanála on the 25th April, 2014. An Taisce then instituted the within proceedings which challenged that decision of the Board.

29. Barrett J. delivered his judgment in the matter on the 17th May, 2018 ([2018] IEHC 315). While he did consider the substantive issues raised by An Taisce, his main finding was that their challenge to the grant of substitute consent constituted an impermissible collateral attack on the leave decision, given almost two years earlier on the 28th May, 2012. His reasoning in this regard is further referred to when that issue is discussed later in the judgment.

30. The first submission of An Taisce on the merits of its case was to express concern that An Bord Pleanála had not included any reference to any of its EU law obligations or to the presence of exceptional circumstances in its decision. The second submission which is related, was that Irish legislation did not accurately transpose the EU requirement, to ensure that substitute consent is only available in exceptional circumstances. Finally, it had submitted that the remedial environmental impact statement (“rEIS”) which was provided in the substitute consent applications was not an adequate assessment of the environmental impact of the development.

31. In relation to the first and second submissions, the trial judge held that there was no obligation to specifically refer to relevant EU law, and that nothing in the CJEU decision suggested that each Member State could not identify, by way of legislation, particular circumstances in which it will be permissible to apply for development consent retrospectively. Furthermore, he found that the chosen remedy in Ireland's case, for the breach identified by the CJEU, in the form of Part XA of the 2000 Act was perfectly acceptable. Exceptionality was in his view, readily found in respect of a quarry which fitted the leave parameters of s. 177C(2)(a) and D(1)(a). In addition, when utilising this gateway, he felt that there was no necessity to identify individual exceptional circumstances which might arise if an alternative pathway was being utilised (s. 177C(2)(b) and D(1)(b)). He also disputed the contention that the possible circumvention of the EIA Directive was still an option, given that each substitute consent application was the subject of assessment and could be refused if it did not meet the environmental standards set out in European law.

32. The final point raised sought to challenge the lawfulness of the substitute consent process as a whole: however, this did not find favour with the trial judge. He could find nothing in the *Commission v. Ireland* decision to suggest that retrospective substitute consent was not allowed under Union law and was bolstered in this conclusion by the decisions of the Court of Justice in the Joined Cases C-196/16 and C-197/16 *Comune di Corridonia and Alessandrini*, two preliminary references from Italy in which it was held by the CJEU that an environmental impact assessment pursuant to the codified EIA Directive can be carried out after the project concerned has already been realised, in order to regularise the development.

33. In conclusion, Barrett J. found that the proceedings had been commenced hopelessly out of time and were an impermissible collateral attack on the decision of the 28th May, 2012. Notwithstanding this, he also expressed his conclusion on the substantive issues which was that

there was no merit in them, thus he refused all of the reliefs sought by An Taisce.

Subsequently, in a second judgment delivered on 19th November, 2018, ([2018] IEHC 640), the learned judge refused an application for leave to appeal to the Court of Appeal.

Ballysax Cases: Factual Background and High Court Judgment:

34. The quarry at issue in both the second and third appeals is owned and operated by the notice party, Ms. Sharon Browne and is situated in Ballysax, The Curragh, Co. Kildare. It was an entirely unauthorised development with no planning permission or any other form of consent ever having been obtained: as would follow, an EIA was never conducted. Kildare County Council, the relevant planning authority, did institute enforcement proceedings against the notice party in the local Circuit Court, however those proceedings have been adjourned following the application by Ms. Brown for leave to apply for substitute consent under s. 177C(2)(b) of the 2000 Act and the institution of the within proceedings by both the appellants, above named.

35. The application referred to was made on the 20th November, 2015, in respect of which, An Taisce and Mr. Sweetman sought to make submissions to An Bord Pleanála. However, both parties had their submissions returned to them on 14th October, 2016, with the Board contending that there was no legislative provision by which members of the public could make such submissions at that stage of the process. It was the view of the Board that without an express power enabling it to consider such submissions, it was in fact precluded from doing so.

36. Judicial review proceedings were separately instituted by each appellant, challenging this decision of the Board: both were heard and considered together with Eagar J. delivering his judgment on the 19th October, 2017 ([2017] IEHC 634). It was the contention of An Taisce and Mr. Sweetman, that public consultation at the level of principle must be undertaken:

alternatively they suggested that, even if there was no express or formal obligation to do so, there was still no legal basis for the Board's view that submissions could not be made and could not be considered.

37. The submissions made on behalf of the appellants were in large part repeated before this Court and as such will be detailed a little later. In short, they asserted a right in the public to participate and make submissions so as to ensure compliance with European law. They supported this by pointing out that if the information submitted by people whose rights stand to be affected or by people representing the local residents, was not at that point considered, there would be no further opportunity to do so at any later stage. In their view, the decision made at the leave stage was final, without an appeal facility, and therefore, public participation at this point was only fair.

In coming to his decision, Eagar J. noted the possibility in s. 177K(2) of the 2000 Act for the public to make submissions at the substantive stage, but his understanding of the substitute consent provisions was that those were intended to be a "close process" and therefore, by way of statutory interpretation he held that there was no right to participate at the leave stage. His judgment is further referred to when that issue is discussed later in the judgment.

Applications for Leave:

38. In the McQuaid case, the appellant filed an application for leave with this Court on the 9th January, 2019 and a determination was delivered shortly thereafter ([2019] IESCDET 231). The Court found that issues of general public importance had indeed been raised by An Taisce, firstly, regarding the potential questions of EU law raised by An Taisce, including whether the State's response to Case-215/06 was adequate in upholding the requirements of the EIA Directive. The second issue arising concerned the responsibility of An Bord Pleanála, in the context of EU law, in light of the judgment of the Court of Justice in Case-378/17 (*The*

Workplace Relations Commission case). Could it be obliged to dis-apply national law in order to be compliant with EU law? And thirdly it held, in the context of the jurisprudence surrounding the collateral attack doctrine which, though reasonably settled in law, could also benefit from some further exploration when the added dimension of European Union law was involved. The Court however, did note that there was no preclusion on the case being resolved through existing collateral attack jurisprudence, in a manner which was still compliant with EU law and noted further that there were some aspects of the arguments sought to be raised by An Taisce which had not directly been raised in the High Court.

39. The Ballysax cases were also the subject of two determinations granting leave ([2019] IESCDET 216, [2019] IESC 217). The issue upon which leave was granted in both was succinctly stated as being the scope, extent and meaning of the public right to participate in an application for substitute consent and whether this includes a right to be heard at the leave stage or whether that right is satisfied by participation at the substantive application for substitute consent. The Court noted a large number of applications for leave which had been filed seeking to raise this same issue. The Ballysax cases were joined with the McQuaid case for the case-management process and were subsequently heard together by this Court.

Submissions: McQuaid Cases

Submissions of the Appellant

40. An Taisce first makes submissions on the question of whether their judicial review proceedings amounted to a collateral attack on the decision of the 28th May, 2012, to grant leave to apply for substitute consent. The appellant submits that European law does not equate the expiry of time limits with the conferral of validity in the same way that Irish domestic law does. Due to the duty on Member States to nullify any unlawful consequence of a breach of

Union law (*Case 41/11 Environnement Wallonie* has been quoted in support of this), it is submitted that EU law is more likely to view a multi-stage process as presenting opportunities to remedy any flaws or breaches which may have occurred earlier in the procedure.

41. The appellant says that in the context of environmental law, the duty above referred to is very often seen in the obligation which the CJEU has found on numerous occasions to remedy a failure to carry out an EIA. Several decisions of the CJEU in which they considered multi-stage consent processes and subsequent consent processes are cited by the appellant, including, firstly *Case C-290/03 Barker* in which the Court held that if the national court concluded that the consent procedure at issue was one comprising of more than one stage, then there could be some circumstances in which the competent authority would be obliged to carry out a comprehensive environmental assessment in respect of a project even after the grant of outline planning permission, when reserved matters are subsequently approved. In *Case C-508/03 Commission v. UK*, the Court held that several articles of the EIA Directive had been incorrectly transposed into UK domestic law. It was contrary to Articles 2(1) and 4(2) of the Directive to provide for an environmental impact assessment to be carried out only at the initial stage of a multi-stage consent procedure and not at the later stages. The CJEU held that, in principle, the requirement of the EIA Directive may mean for an assessment to be carried out at each stage, if there is likely to be significant environmental impact.

42. An Taisce submits that issue is not whether the time limits themselves are compatible with EU law, but rather whether the effects attributed to the expiry of those time limits are compatible. In *Case C-664/15 Protect Natur*, while addressing time-limits for public participation in a project which did not require an EIA, the CJEU held that while of course Member States did have discretion to establish their own procedural rules for administrative processes, it must also be borne in mind that such rules and time-limits as imposed must not infringe in a disproportionate manner on the right to an effective remedy and to a fair hearing.

It was further stated that any rule imposing a time-limit must genuinely meet objectives of the public interest which are recognised by the EU.

43. The CJEU does not, in principle, preclude time-limits on challenging consent decisions issued in breach of the obligation to first assess the effects on the environment, this was held by the Court of Justice in Case C-348/15 *Stadt Wiener Neustadt*, however a national provision under which projects in respect of which consent can no longer be challenged due to the expiry of a time-limit for bringing proceedings are purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment, is not compatible with the EIA Directive (para. 43 of the Court of Justice's decision). This passage was quoted and re-emphasised by the Court in Case C-261/18 *Commission v. Ireland*. The State had attempted to make the argument in that case, that simply because the 8-week period had expired, the consents at issue could no longer be the subject of direct challenge: this argument was rejected, having regard to the principle cited from *Stadt Wiener Neustadt*. The appellant contends that throughout these decisions, the CJEU has placed significant emphasis on the obligation to remedy any defects arising at a subsequent consent stage.

44. An Taisce goes on to say that recent decisions of this Court in the context of multi-stage processes are not inconsistent with the approach of the CJEU, for example the decision in *Sweetman v. An Bord Pleanála*, *Houston v. An Bord Pleanála* [2018] IESC 1, [2018] 2 I.R. 250 and the *dicta* of Clarke C.J. at para. 42 of the judgment, wherein he stated that collateral attack jurisprudence became slightly more complex when applied to a multi-stage process which leads to a substantive administrative decision. The learned Chief Justice said that the proper approach would be to consider whether, in the context of the scheme as a whole, it can be said that it is clear that a particular issue is to be definitely determined at an earlier stage so that there is no possibility of that issue or question being re-opened at a later stage.

45. There are then submissions made as to the requirement, or lack thereof, for exceptional circumstances to be established in order to grant retrospective consent. The appellant draws our attention to the fact that it is the granting of such consent without exceptional circumstances which is contrary to EU law, not the granting of leave to apply for the consent. The exceptionality requirement does not arise in our domestic legislation at the leave stage under s. 177C(2)(a) or under the direction stage pursuant to s. 216A but it is very much in play for an application for leave made under the final of the three options, s. 177C(2)(b). An Taisce does not accept that simply because the exceptionality requirement does not expressly arise does not relieve the Board from considering it, given that it is an EU law obligation. Clarke C.J. has again been quoted, from *Callaghan v. An Bord Pleanála* [2018] IESC 39 at para 7.10, to support this submissions.

46. It is the essential submission of An Taisce on these interrelated issues of exceptional circumstances and the doctrine of collateral attack, that the regime in place must be interpreted as requiring the issue of exceptional circumstances to be addressed before substitute consent is granted, if it was not addressed at the leave stage. It follows that if exceptional circumstances are not addressed at either stage, then the doctrine of collateral attack cannot be invoked to preclude a challenge based on such an omission of obligations under EU law.

47. On the issue of exceptional circumstances being present in order for the regularisation of developments to take place, An Taisce has made several submissions about the manner in which the CJEU's decision in Case C-215/06 *Commission v Ireland* was interpreted by legislators and indeed how it has been applied to this factual scenario. An Taisce also respectfully submits that while the trial judge described its complaint as being that the quarry-owner should not have been allowed to apply for development consent retrospectively (para. 9 of the High Court judgment), it was in fact the submission of An Taisce that the developer should not have been granted substitute consent without the presence of exceptional

circumstances. The appellant does not accept that the circumstances of this case can be regarded as exceptional in the sense intended by the CJEU.

48. The appellant cites again from the Case C-215/06 *Commission v Ireland* in which the CJEU said that while European law could not preclude national measures which would, in certain cases, regularise developments and operations which are unlawful pursuant to Community law, it also stressed that such measures could not offer the persons concerned an opportunity to circumvent or dispense with Community rules and should remain the exception. This was re-iterated in Case C-261/18 *Derrybrien (No. 2)*, a case which came 11 years later. In that decision the CJEU examined the obligations on a Member State when a project has been authorised in breach of the obligation to carry out an EIA, in particular where the consent was not challenged within the period prescribed by national law and has, therefore, become final in the national legal order. The Court of Justice said that the EIA Directive precludes a legislative measure which would allow a project without requiring a later assessment and without the existence of exceptional circumstances.

49. It is the appellant's contention that, quoting from *The National Trust for Ireland v McTigue Quarries Ltd* [2018] IESC 54 ("*McTigue*") for support, that the Planning and Development (Amendment) Act 2010 was introduced to address the CJEU's decision in *Commission v Ireland* and it did set out pathways of regularisation of unauthorised developments which required an EIA but was always subject to the exceptional circumstances requirement as set out by the CJEU. An Taisce submits that the caveats in relation to exceptional circumstances have not in fact been observed in this case and indeed have not been observed in the legislation in two of the three pathways to regularisation. Simons observed, in an article published in the Annual Review of Irish Law 2008 discussing the *Commission v Ireland* decision, that a theme in the judgment was that circumstances in which substitute consent could be sought should not be so widely drawn that it would in fact encourage

developers not to make an application in advance of commencing the development. He suggested that exceptional circumstances might have to be confined to cases where a developer is not culpable.

50. It is said that the definition of “exceptional circumstances” provided in section 177D(2)(g) is a proper reflection of the jurisprudence of the CJEU. It is also accepted by the appellant that where a planning permission is quashed, this is a factor which could legitimately be taken into consideration, as “such other matters as the Board considers relevant” (s. 177D(2)(g)), however such consideration must also have regard to all the circumstances, including the extent of work done before any planning permission, why the planning permission was quashed and whether any work was done after the permission had been quashed but before any new permission was obtained. As it stands, if the only consideration of exceptional circumstances is whether or not the previous permission is “in breach of law, invalid or otherwise defective in a material respect, pursuant to a final judgment of a court of competent jurisdiction in the State...by reason of any error of fact or law or a procedural error” and An Taisce says that this is not compliant with the concept of exceptional circumstances as envisioned by the CJEU.

51. Case C-196/16 *Commune di Corridonia* is referred to as possible example of the circumstances envisioned by the EU for the grant of substitute consent. The quarry in Lemgare operated without planning permission or EIA for a period before the owners were directed to apply for planning permission, under s. 261, without any retrospective assessment. That permission was then quashed, due to An Bord Pleanála’s incorrect equation of the registration of the quarry under s. 261 as establishing its pre-1964 status and the quarry continued to operate without permission for over a year. The permission which was quashed was not one which had been sought before the commencement or expansion of the development beyond

pre-1964 boundaries. Accordingly the appellant submits that the factual circumstances are very far removed from *Corridonia*.

52. An Taisce submits that there is a duty on the Board to interpret and apply national law in accordance with EU law and, if necessary, to disapply national law. By failing to require exceptional circumstances as intended by the CJEU, An Bord Pleanála were required to remedy the unlawful consequences of the breach of EU law which occurred by the failure to carry out an EIA. The appellant submits that the law on this point ought to be reconsidered and reinterpreted in light of the decision in Case C-378/17 *Workplace Relations Commission* in which a discriminatory age-provision relating to An Garda Síochána was held contrary to EU law and the CJEU held that bodies tasked with the application of both EU and domestic law ought not wait for the setting aside of a provision which is contrary to EU law in order to dis-apply it.

53. The trial judge did not address the substance of the point raised by An Taisce, that the remedial environmental impact statement contained no proposals for site restoration. The trial judge held that given that An Taisce had made no further comment beyond the “exceptional circumstances argument”, pursuant to *Lancefort v. An Bord Pleanála* [1999] 2 I.R. 270, it could not raise any arguments regarding the contents of the statement given that it had not raised the point earlier than the judicial review proceedings. An Taisce have submitted that *Lancefort* is not in fact authority for this proposition and further, the more recent decision of *Grace & Sweetman* [2017] IESC 10 must also be considered. It is also submitted that this approach is inconsistent with the approach of the CJEU in Case C-238/14 *Djurgarden*.

54. In conclusion, An Taisce say that the appeal should be allowed, the decision to grant substitute consent should be quashed and that if necessary, the question of remittal can be addressed at that point.

Submissions of the Respondents

55. An Bord Pleanála begins by setting out the five gateways through which substitute consent can be obtained in the State, the first two contained in s. 261A and the rest in s. 177B(1), 177D, 177D(2) respectively. The respondent makes the point that the two gateways under s. 177D only open after an application for leave to apply for substitute consent has been made, pursuant to the developments and circumstances outlined in ss. 177C(1) & (2). In relation to s. 177D, it is submitted that the section is drafted in clear language which is impossible to construe in a manner other than what is contended for by An Bord Pleanála: the section is unambiguously drafted in the alternative. Leave to apply for substitute consent may be granted either where a planning permission is invalid for the specified reasons or where there are exceptional circumstances which render the making of such an application appropriate. It is submitted that the Board does not possess general power to consider the exceptional circumstances which may be required, the matters which are relevant are clearly set out under s. 177D(2) and they did not arise in this case. Once leave to apply for substitute consent has been granted and the application is made pursuant to s. 177E, the Board will then decide whether to grant or refuse the permission under s. 177K(1), having regard to the matters listed in s. 177K(2).

56. In light of the above interpretation, the respondent submits that the legislature has very carefully delineated the concept of “exceptional circumstances” through several methods. There may be an entitlement to apply for substitute consent arising from one of the specific scenarios in s. 261A, s. 177B, s. 177C(1)(a), such scenarios are limited and defined and in themselves comprise the existence of exceptional circumstances. There is an additional and individualised pathway provided through s. 177C(1)(b) and s. 177D. An Bord Pleanála submits

that the legislative scheme makes it clear that the only way to satisfy this pathway is through the existence of specific exceptional circumstances but also that these only arise for consideration at the leave stage and are not re-considered again. In relation to this specific case, the respondent says it was not required, when considering a leave application pursuant to s. 177C(2)(a), which is premised on a planning permission being legally invalid for particular reasons, to examine whether there were exceptional circumstances at play.

57. An Bord Pleanála then makes submissions on the issue from an EU law perspective, starting with Case C-215/06 *Commission v. Ireland*. Great emphasis is placed on the context in which the CJEU's comments about Ireland's approach to retention planning permission were made: it is said that the comments were aimed at the system which was in place at that time, a system which did allow the giving of retention permission in circumstances which were not exceptional. The Board submits that in the *Stadt Wiener* decision, again the focus of the Court of Justice was on the system in place, their criticism was of a system which would allow retention permission to be granted without restriction. It is submitted that nothing in either judgment suggests that Member States are precluded from marking out pathways for seeking substitute consent, such as Ireland did, only a large amount of emphasis is placed on how such types of permission must remain the exception.

58. Additional submissions were filed by the respondent in relation to the appellant's reliance on *An Taisce v McTigue Quarries Ltd & ors* [2018] IESC 54, which the respondent respectfully submits has nothing of substance to add to this particular case. The issue in *McTigue*, as the respondent sees it, was about whether a grant of substitute consent in respect of remedial works covered the on-going operation of a quarry, whereas the issue in this appeal goes to the heart of whether the grant of substitute consent was valid or not. The respondent firmly believes that the issue is not as the appellant frames it, as being whether, in all cases, an individual assessment of whether exceptional circumstances are in play is necessary, but rather

whether the legislature was entitled to determine what those circumstances might be and set them out as defined categories in the scheme. Nothing in the decision of the Court in *McTigue* changes the manner in which this Court should approach that question.

59. The respondent also makes a number of submissions about the joined Cases C-197/17 *Commune di Loro Piceno* and C-196/17 *Commune di Corridonia*, where the CJEU considered whether an EIA could take place after construction. The analysis of the Advocate General Kokott is quoted, to support the submission that an overly-formalistic approach to the requirement that an EIA be carried out before consent should not be adopted. Pragmatic solutions such as those suggested by the Advocate General can be utilised. The Board accepts that an EIA process taking place without prior consent cannot have the legal effect of treating that development as having untainted consent. In both the cases above mentioned, the subsequent post-execution did not circumvent the requirements of the EIA Directive: the process involved a full analysis of the environmental effects of the project at issue and would involve the possibility of requiring a termination of the project if that was appropriate.

60. On the collateral attack point, the respondent says that there is little to be added because the time point only crystallises insofar as it is possible to say the appellant should have moved within 8 weeks of the 28th May, 2012 because it was certain that the Board could not consider what the appellant says it should have considered. The appellant was entitled to ask the Board to consider what it says should be considered and to challenge the substitute consent decision as that was the point at which the appellant knew its points had not been accepted by the Board. The Board says that really, this point does not arise before this Court. The High Court expressed a concluded view on the scheme and held that the appellant had moved too late but in any event the trial judge was of the opinion that the appellant was wrong.

61. The respondent contends, on the issue of An Taisce's complaints in respect of the rEIS, that the issue is not about standing in the same sense as was addressed *Grace & Sweetman v. An Bord Pleanála* [2017] IESC 10: the respondent accepts that the appellant does have the requisite standing. The issue however, as the Board sees it is that An Taisce were a party to the process and chose to make particular submissions to the decision-maker, which did not include the argument they then sought to raise in respect of the rEIS before the High Court, which argument was made in such a vague manner that the respondent did not possess enough detail to know what the complaint actually was. An Bord Pleanála submits that the appellant had the information needed available *ab initio*, to make an argument about the adequacy of the rEIS.

62. The Board also rejects the appellant's argument that rule which prevents it from raising the argument in judicial review proceedings when it was not made to the decision-maker makes its rights under European Union law more difficult to enforce. The respondent fails to see that the appellant has made any viable argument under the guise of the principles of effectiveness, equivalence and national procedural autonomy. It is further submitted that the appellant's reading of Case C-238/14 *Djurgarden* is misguided as it concerned whether EU law tolerated a total exclusion of access to a review procedure on the basis that prior rights to participate had been given. The respondent says that no such exclusion exists here and that the courts are entitled to have regard to the need for effective judicial review mechanisms: if the appellant is correct then EU law would be permitted a person to make generic submissions in order to gain standing and then picking out whichever grounds of challenge it wishes with the added benefit of the decision-maker's, in this case the Inspector's report, without having to specify them in any detail in pleadings.

63. In terms of a remedy, the respondent says that, if the appellant is correct as a matter of EU law, it is submitted that it would not be correct for the Board to have to fashion some kind of domestic procedure to create a remedy. The law as it stands on this lacks any legal form or

certainty therefore this would not be satisfactory. However, this of course will only arise if the Court holds against the respondent on the substantive issues.

64. The State respondents have filed written submissions also, some of which overlap with those of An Bord Pleanála and therefore do not need to be repeated. They too believe the overall legislative scheme and wording of the subject provisions make it clear that once J. McQuaid Quarries had been permitted to apply for substitute consent pursuant to s. 177C(2)(a), there was no need for any additional criteria to be satisfied, in particular there was no requirement to demonstrate the existence of exceptional circumstances. They firmly believe that the trial judge's assessment of the challenge mounted by An Taisce was correct and in this respect they have cited well-established authorities on the topic of the collateral attack doctrine such as *Goonery v. Meath County Council* (Unreported, High Court, Kelly J. 15th July, 1999), *Harrington v. Environmental Protection Agency* [2014] IEHC 307 and in particular *Nawaz v. Minister for Justice, Equality and Law Reform* [2013] I.R. 142 which case the State respondents have submitted is directly analogous to the present proceedings. It is their contention that An Taisce's challenge to s. 177C(2)(a) and s. 177D(1)(a) is a means of questioning the validity of the Board's decision of the 28th May, 2012.

65. The State respondents contend that the legal basis upon which the appellant has predicated its argument that the High Court's finding of a collateral attack is contrary to EU law, is unclear. The authorities submitted by the appellant from the Court of Justice relate to multi-stage consent processes and illustrate that treating a development as lawfully authorised, for the purposes of the EIA Directive, simply because the time limit for challenging consent for the development has passed, is impermissible. However, the State respondents contend that none of the factual and legal scenarios submitted can be relied upon: the process under discussion is not a multi-stage consent process as the application for leave to apply for substitute consent is not itself a consent but is rather a preliminary step in an administrative

procedure which determines whether an application for development can or must be submitted and furthermore, the provisions at hand do not have the effect of deeming a project lawfully authorised notwithstanding the absence of an EIA simply because the time-limits for challenge have expired.

66. It is not accepted that the decision of this Court in *Sweetman v. An Bord Pleanála* [2018] IESC 1, [2018] 2 I.R. 250 can be relied upon by the appellant. In that case, the Court could not determine whether the appellant's challenge was a collateral attack because the correctness or otherwise of his underlying contention had not yet been resolved. The State respondents acknowledge that the Court may take the same view of the instant case however they point to several material differences: firstly Houston came before the Court in the form of a trial of a preliminary issue, with limited scope for a consideration of the underlying dispute and secondly, in this case, both decisions have been made by the same authority and An Taisce has not identified any basis for not making that argument in the first instance. Finally, the appellant has not argued that it is impermissible in principle to identify categories of cases but rather has said that s. 177C(2)(a) does not satisfy the criteria of being exceptional in the sense contended for by the CJEU. Thus, the State respondents say the challenge is very clearly directed at the statutory provisions for the decision taken in May, 2012 and not those in play in April, 2014.

67. The State respondents then make submissions on the concerns raised by the appellant as to the adequacy of the State's response to CJEU's decision in case C-215/06. They say that the CJEU has affirmed in numerous subsequent decisions that national rules which allow for the regularisation of developments but only in the exception, are permissible (Case 348/15 *Stadt Wiener* and Case C-196/16 *Commune di Corridonia*). It is submitted that the appellant's position, that insofar as s. 177C(2)(a) permits an application for substitute consent it does so in circumstances which are not exceptional, is misconceived and based on an incorrect reading of

Case C-215/06. There is nothing in the case-law to support the suggestion that in order for domestic law to be EU compliant that an individual inquiry into the circumstances of each development is required before an application for substitute consent is permitted. It is said that in fact, the decision given by the CJEU in Case C-261/18 *Derrybrien (No. 2)* illustrated no obvious objection by the CJEU to the current provisions of the State which provide access to the possibility of substitute consent.

68. The Court is urged to see that there is nothing in EU law which precludes Member States, in the interests of legal certainty, from identifying specific categories of cases where regularisation is permissible as an exception to the necessary general rule and that this is what is done through s. 177C(2)(a) and a. 177D(1)(a) which both identify the very limited criteria which apply. It is respectfully submitted that both sections do not provide an opportunity to circumvent the rules of the EIA Directive and in fact they ensure compliance notwithstanding any permission which may previously have been granted.

69. In conclusion, the State respondents agree with the findings of the trial judge and say that the relevant law is clear with settled authorities to reflect same. No reference to the Court of Justice pursuant to Article 267 TFEU is in their opinion necessary.

Submissions: Ballysax Cases

70. Given the single issue involved in these cases, it is more convenient to discuss the joint submissions made during the course of Issue No. 2, where they are considered as part of the discussion on that issue.

Discussion/Conclusion:

71. There are in total five issues arising which I propose to consider in the following order: firstly, whether the relevant provisions of 2000 Act, dealing with substitute consent, are a sufficient implementation of the Directive having regard to the various decisions of the Court of Justice, commencing with *the Commission v. Ireland*: in particular, whether the gateway to an application for substitute consent under s. 177C(2)(a) is a sufficient compliance with the exceptionality test as laid down repeatedly by the Court of Justice: particularly as it is claimed that once leave has been given, that test forms no part of the decision on the substantive application under s. 177K of the Act. Second, the scope, extent and meaning of the public right to participate under the Directive: in particular the extent of that right on a leave application made under either s. 177C(2)(a) or C(2)(b), or whether or not such a right is satisfied by the provisions of s. 177H, which afford to all members of the public a full right to make submissions or observations at the substantive application stage. Third, whether the challenge by An Taisce to the substitute consent decision in the *McQuaid* case can be correctly considered as a collateral attack on the leave decision given on the 28th day of May, 2012. Fourth, the right or obligation, if any, of An Bord Pleanála, to disapply national law having regard to the decision of the European Court of Justice in the *Workplace Relations Commission* case, and finally, the question of standing.

Issue No. 1: Effective Transposition of Exceptionality (McQuaid's Case):

72. The EIA Directive, in a variety of its manifestations, has been considered on a number of occasions by the Court of Justice. The following insofar as is relevant, can be deduced from some of its case law (Case C-287/98 *Linster* [2000] ECR I/06917 and Case C-486/04 *Commission v. Italy* [2006] ECR I/11025):-

- (i) Member States must implement that Directive in such a manner as fully corresponds to the objective set out in the Recitals and in Article 2(1) (85/337/EEC: 2011/92/EU) which as is evident from the unambiguous language used, is that the appropriate assessment must be conducted before a development consent is given in respect of a project to which the Directive applies.
- (ii) Accordingly, it must follow that the application for and the obtaining of development consent, based on the appropriate assessment, must predate the commencement or execution of any works. Otherwise the requirements of the Directive are being ignored.
- (iii) This interpretation and understanding of the Directive applies to all projects, whether they fall within *Annex I* or *Annex II* of the Directive.

These principles were reaffirmed in *Commission v. Ireland* (paras. 49, 51 and 52): against this background, the CJEU considered the infringement proceedings, the subject matter of that case.

73. At the heart of the court's decision, at least on this aspect of that case, was whether or not Irish law as it then stood fully or effectively implemented Council Directive 85/337/EEC. The decision of the court holds good for Directive 2011/92/EU. Its approach in this regard was to conduct an analysis of Directive 85/337/EEC and then, having looked at the Planning Act 2000, to compare whether its relevant provisions were effective to achieve the fundamental objectives of the Directive. It said no: it is sufficient for our purpose to align that decision to s. 32(1)(b) and s. 34(12) of the 2000 Act, the retention permission provision, and in particular its generality (para. 14 above). The court having so found, went immediately on to consider whether at the level of principle rectification could subsequently take place, that is whether a project, captured by the Directive, which had been constructed and commissioned, without the required EIA could be rendered compliant by retrospective means. It said this could be done,

but the availability and use of whatever national measures were put in place to achieve this end, were heavily circumscribed. The conditions included:-

- (i) that such measures could not afford the opportunity of circumventing the community rules or of dispensing with them: or put another way, that such measures should not encourage or act as an incentive to developers to bypass the Directive, and
- (ii) that resort to such measures should remain the exception.

It is this last mentioned requirement which is central to the *McQuaid* case.

74. Arguably as later cases show, one should add in, that the assessment carried out for regularisation must take into account the environmental impact from day one of the development (*Castelbellino* Case C-117/17 (para. 30)) and that the State must nullify the unlawful consequences caused by a failure to implement or properly implement or utilise the Directive (*Corridonia*: Case C-196/16 and C-197/16). Whilst the matters last mentioned also arise in a different context, nonetheless they demonstrate the restrictive nature of how and when such a process may be availed of.

75. To contextualise the court's approach on some of the core points of its decision, the following paragraphs of the judgment can be referred to:-

“54. As the Irish legislation stands, it is undisputed that Environmental Impact Assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitute under Irish law a contravention of the planning rules.

55. However, it is also undisputed that the Irish legislation establishes a retention permission and equates its effects to those of the ordinary planning permission which

precedes the carrying out of the works and development. The former can be granted even though the project to which it relates and for which an Environmental Impact Assessment is required pursuant to Articles 2 and 4 of the Directive 85/337 as amended has been executed.

56. In addition, the grant of such a retention permission use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances had the result under Irish law that the obligations imposed by Directive 85/337 as amended, are considered to have in fact been satisfied.

57. While community law cannot preclude the applicable national rules from allowing, in certain circumstances, the regularisation of operations or measures which are unlawful in light of community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the community rules or to dispense with applying them and that it should remain the exception.

58. A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forego ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest stage in all the technical planning and decision making process, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59. Lastly, Ireland cannot usefully rely on *Wells*. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation and good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure, to carry out an Environmental Impact Assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60. This cannot be taken to mean that a remedial Environmental Impact Assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an Environmental Impact Assessment preceding issue of the development concerned, as required by and governed by this Directive.”

It concludes as follows:

“61. It follows from the foregoing that by giving retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects of which an Environmental Impact Assessment is required must be identified and then before the grant of development consent and therefore necessarily before they are carried out, must be subject to an application for development consent after such an assessment, Ireland has failed to comply with the requirements of that Directive.”

76. As is evident, the requirement of exceptionality can be seen from several parts of the court’s judgment. At para. 56 it said “*the grant of such a retention permission, use of which*

Ireland recognises to be common in planning matters lacking any exceptional circumstances...: at para. 57 “*the regularisation of operations or measures... [in such a manner]... should remain the exception*”: at para. 61 “*By giving to a retention permission, which can be issued even where no exceptional circumstances are proved...*”. In fact, as part of the submissions made by Ireland, it was asserted on its behalf “*...that retention permission is a reasonable fall-back mechanism to be resorted to in exceptional circumstances...*” (para. 46). Accordingly, it is clear from that decision alone that whilst community law does not preclude national measures from putting in place a mechanism for the retrospective rectification of a breach of the Directive, nevertheless such could not in any way replicate the generality of s. 32(1)(b) and s. 34(12) of the 2000 Act, as originally enacted (para. 14 *supra*), but rather had always to remain the exception to the necessity of obtaining pre-development consent.

77. In subsequent cases the court, on several occasions repeated much of what was stated in *Commission v. Ireland*: Concentrating on the requirement of exceptionality, the Court in *Stadt Wiener Neustadt* (Case C-348/15) (17th November, 2016), repeated on at least three occasions that such national measures “*should remain the exception* (para. 36), that if such measures could apply “*even where no exceptional circumstances are proved*”, the same is a violation of Directive 85/337 (para. 37), and again the same phraseology is found at para. 38. In *Krizan* (Case C-416/10), see para. 87: in *Corridonia and Loro Piceno* (Case C-196/16, C-197/16 (paras. 38 and 40). These are but a flavour of the decisions of the court which emphasise the necessity for exceptionality to exist before any retrospective application can be successful. Accordingly, whatever national measures are adopted to reflect the Directive, the same must essentially focus on requiring/ensuring that where a project is captured by Article 4(1) and *Annex I*, or where following an analysis the project outlined in Article 4(2) and *Annex II* require an EIA, the same is carried out prior to and submitted with an application for development

consent. Where that has not occurred, the possibility of subsequent rectification must always be the exception.

78. On the domestic front, the continuing application of “exceptionality” was both recognised and endorsed by this Court in *Sweetman v. An Bord Pleanála & Ors* [2018] 2 I.R. 250. The “gateway” used in that case was s. 261A(2)(a) and (3) of the 2000 Act, which involved the local authority in serving a notice directing the owner or operator of the quarry in question to apply to the Board for substitute consent. Mr. Sweetman argued that an individual assessment of exceptionality had to take place either by the planning authority (para. 21 above) when satisfying itself of the matters set out in these provisions or by the Board, following application, when deciding whether or not to grant substitute consent. It was acknowledged that there was no express provision obliging the planning authority to so consider that at stage 1, with An Bord Pleanála arguing that likewise there was no obligation on it to consider exceptionality when making its decision under section 177K. For present purposes the point is that wherever the obligation may rest, the exercise had to be carried out. Clarke C.J. in giving the court’s judgment, having made reference to *Commission v. Ireland* (para. 57; cited at para. 94 above), went on to say at para. 44 of the reported judgment:-

“Thus, the validity of any scheme for retrospective consent such as the substitute consent process at issue in this appeal, must, if it is to be compatible with European law, be such as it does not operate as a facilitation or encouragement to circumvention of European Union rules and can only operate in exceptional circumstances.”

He continued:-

“First, there is a dispute about the extent of the requirement for “exceptional circumstances” which undoubtedly exists as a matter of European law.” (para. 45)

He further said:-

“But if individual exceptionality must be considered as a matter of European law, then at what stage of the process that to occur” (para. 46)

Accordingly, there can be no doubt but that the existence of exceptionality remains an essential requirement of EU law and must therefore be respected in any national measure providing for retrospective regularisation in circumstances such as those arising in the *McQuaid Quarries* case.

79. To recall for a moment: the issue presently under discussion arises from a submission by An Taisce that neither s. 177C(2)(a) or s. 177D(1)(a) sufficiently reflect the level of “exceptionality” inherent in the decision of the Court of Justice.

80. As above stated, the application made by McQuaid Quarries was under s. 177C(2)(a) and not under s. 177C(2)(b): and likewise, leave to apply was given under s. 177D(1)(a) with of course s. 177D(1)(b) not being relevant (para. 22 above). It is difficult to see how any issue could arise if the application had been made under C(2)(b) as not only does that provision require the existence of “exceptional circumstances”, but what that means for the Board in its determination is set out in D(2). But as stated, that is not the route through which leave was applied for and granted. What arises then is where the “exceptionality” requirement as demanded by the Court of Justice is to be found in C(2)(a) and D(1)(a).

81. It is not suggested by anyone in this case that the pathway, provided for in s. 177C(2)(b), is incremental to that provided for in s. 177C(2)(a). No submission has been made that the “exceptional circumstance” route so identified in subpara (b), feeds into or can as a matter of interpretation, be added to subpara (a). This must be correct, the clear text of the legislation so indicates: the disjunctive words equally so demand. This is also clear from *Sweetman*. Whilst it is not necessary to identify any particular principle of statutory interpretation giving rise to this conclusion, but if it was, reference can be made to what

Hardiman J. said in *Montemuino v. Minister for Communications, Marine and Natural Resources* [2013] IESC 40 (Unreported, Supreme Court, 17th October, 2013): the relevant passage is as follows:-

“Where two things are separated in speech or writing by the word ‘or’ they are distinguished from each other or set in antithesis by or; they are set up as alternatives to the other word or words so separated. It follows that the words so separated are not identical, but are different in nature or meaning [as the legislation enacted by the Oireachtas provided that] the words ‘or any’ should follow the word ‘all’. On the ordinary natural meaning of the words, the effect of this addition is to create an alternative to the forfeiture of ‘all’ of the gear and catch.”

I am therefore satisfied that the route or pathway identified in C(2)(a) is distinct from that as outlined in the following paragraph, namely C(2)(b). Consequently, the latter cannot be called in aid so as to establish the exceptionality requirement, which however must exist when C(2)(a) is utilised.

82. So, where is it to be found? If at all, it must be within C(2)(a) itself. Barrett J., in the *McQuaid Quarries* case, felt it did:-

“Moreover, exceptionality, when sought, is in any event readily to be found: the exceptional circumstances that presents in respect of the quarry at Lemgare is that it has been able to squeeze itself through the gateway offered by s. 177C(2)(a) and D(1)(a). That is no easy achievement and not all quarries will find themselves so placed.”

83. Despite what once may have been their case, An Taisce does not deny but that *McQuaid Quarries* were entitled to apply for development consent retrospectively, but in that regard says that it should not have been granted as the pathway in s. 177C(2)(a) does not embrace the “exceptional circumstances” as envisaged by the Court of Justice. In addition, they

acknowledge at para. 69 of their submission, “*Further, An Taisce does not rule out as a matter of principle that it might be possible to identify a category of cases which come within the concept of exceptional circumstances*”. Both the Board and the Attorney General submit that this is exactly how the Oireachtas chose to establish exceptionality in s. 177C(2)(a), and thus in the *McQuaid*’s case.

84. Indeed, though not central to the issues before the court, Clarke C.J. at para. 45 of the *Sweetman* anticipated this very argument, saying:-

“First there is a dispute about the extent of the requirement for “exceptional circumstances”, which undoubtedly exists as a matter of European law. On Mr. Sweetman’s case it is necessary that there be an analysis in each case as to whether sufficient exceptionality exists to justify retrospective consent. An alternative argument might be that it is open to Oireachtas to specify certain categories of cases which meet the exceptionality requirement specified in European law although, of course, it would be necessary for the court to assess whether the category of case identified in any relevant legislation truly meets the exceptionality test. I express no view on the true answer to that question which it is one of the issues which lies at the heart of the substantive proceedings”. (Emphasis added)

That statement captures precisely what is at stake on this issue. Firstly, can compliance with the EIA Directive be achieved in this way and secondly, even if it can, has the Oireachtas in the manner in which it has legislated, fully respected the requirement of the Court of Justice to ensure that retrospective rectification remains an exception to the fundamental requirement of the Directive, which is that one must apply for and obtain a development consent pre-commencement of works.

85. There is nothing in the Directive or in any of the judgments emanating from the Court of Justice which would preclude satisfying the exceptionality test by way of legislation, either by way of category, threshold or criteria. It is not and never has been a requirement that every situation where subsequent rectification is sought, had to be examined at an individual level so as to establish this condition. That being so, there is nothing in principle which would prevent the Oireachtas from enacting a measure such as that contained in s. 177C(2)(a) or D(1)(a). It is the case of the Board and in particular the Attorney General, that s. 261A, s. 177B and in particular s. 177C(2)(a) have by their wording appropriately delineated the concept of exceptional circumstances. The pathways so offered are said to be specific, defined and limited and adequately represent the exceptional circumstance requirement. Consequently, where otherwise appropriate, retention permission, should be available in principle even in respect of a project, which required but did not have the necessary EIA carried out prior to the commencement of the development. An Taisce take the opposite view.

86. The EIA Directive, did not in any of its various versions, attempt to deal with the consequences which should follow, where its provisions were not respected by national measures. The court did not in any discursive way so indicate in *Commission v. Ireland*, or in any of the later cases: therefore, it has not spelled out what it had in mind by the use of the subject expression. Clearly however, at the level of principle, the entire tenor of the court's jurisprudence is that foremost must be the requirement to obtain pre-development consent, and that retrospective regularisation must very much remain a significant understudy to that requirement.

87. The word or phrase could have a number of different meanings: it could connote something remarkable, extraordinary or special, or that the underlying events must be rare or unusual. However, context is important. When the Court of Justice refers to retrospective regularisation as having to remain the exception, its justification is that otherwise developers

may be incentivised to ignore or disregard the requirements of a prior consent/EIA: in other words, national measures cannot act as an inducement to avoid EIA compliance (para. 74 above). Therefore, such regularisation must remain the exception, rather than rule.

Consequently, the relevant provisions of domestic law cannot permit, allow or facilitate a situation whereby the obtaining of, as in this jurisdiction, a retention permission becomes common, normal or general. Given this approach, how therefore does s. 177C(2)(a) meet the exceptionality requirement?

88. It is instructive now to look at what an applicant must assert and what the Board must be satisfied of on any application for leave under C(2)(b) and D(1)(b) of section 177. When considering whether exceptional circumstances exist, under this pathway, the matters identified in subpara (2) must be taken into account:-

-
- (i) would the grant of retention permission circumvent the objectives of the Directive,
 - (ii) could the developer have had a bona fide belief that the development was not unauthorised,
 - (iii) would the existing circumstances permit the conducting of an effective assessment of the environmental impact of the development from its commencement,
 - (iv) can any significant effects on the environment, occurring to date, be remedied, and
 - (v) what in the past has been the developer's attitude to planning compliance.

In addition, the Board may take into account any other matter it considers relevant.

89. It is striking now to compare the matters which I have listed with the essential elements of an application under s. 177C(2)(a). The core constituents of that section are as follows:

- (i) the completed development, in respect of which an EIA “was or is” required has been the subject matter of a permission,
- (ii) that permission may be invalid or otherwise defective in a “material respect”,
- (iii) as so determined by the Court of Justice or domestic court “or otherwise”,
- (iv) by reason of the “omission” to carry out an EIS or its “inadequacy” or,
- (v) by reason of “any error of fact or law or a procedural error” (emphasis added)

90. It is not readily apparent how these points, considered either individually or collectively, could be fairly described as being exceptional. The development in question required an EIA: the permission obtained is in a material respect in breach of law, invalid or “otherwise defective”, as so found by a judgment of the Court of Justice or a court in this jurisdiction by reason of the absence of a required EIA, or the inadequacy of same or as a result of “any error of fact or law or a procedural error”. These factors, in the context under discussion, can only be considered quite general and quite broad: such are fairly average and relatively ordinary and are matters likely to be readily found on inquiry. It is therefore, exceedingly difficult to assign “exceptionality” to such matters. The fact that only a limited number of projects might be able to benefit from this provision, is not the point. The point is the broadness or generality of what has to be established so as to be successful under this pathway (s. 177C(2)(a)).

91. Accordingly, in my view, as so drafted, these provisions fail to comply with the various judgments from the Court of Justice above mentioned and accordingly, have as a direct

consequence failed to properly transpose aspects of the Directive which underpin such judgments.

Issue Two: Public Participation (Ballysax):

92. The second issue on this appeal arises out of the Ballysax proceedings and has been described above (para. 74 *supra*). In short, it is whether members of the public have any right to participate in the application for leave to apply for substitute consent, or whether instead such right is confined to the substantive application for substitute consent itself. Before addressing this ground of appeal, it may be helpful at this stage to set out some further relevant statutory provisions pertaining to this issue.

Legislative Framework

93. Section 177C provides in relevant part as follows:

Application for leave to apply for substitute consent where notice not served by planning authority.

177C.—(1)... [see para. 22 above]

(2)... [see para. 22 above]

(3) An applicant for leave to apply for substitute consent under subsection (1) shall furnish the following to the Board:

(a) any documents that he or she considers are relevant to support his or her application;

...

(b) any additional information or documentation that may be requested by the Board, within the period specified in such a request.

...

(4) Where an applicant for leave to apply for substitute consent under subsection (1) fails to furnish additional information or documentation within the period specified in a request under subsection (3)(b), or such additional period as the Board may allow, the application shall be deemed to have been withdrawn by the applicant.

(5) The Board may seek information and documents as it sees fit from the planning authority for the administrative area in which the development the subject of the application under this section is situated, including information and documents in relation to a permission referred to in subsection (2)(a) and in relation to any other development that may have been carried out by the applicant and the planning authority shall furnish the information not later than 6 weeks after the information is sought by the Board.

New subsections 177C(3)(aa) and 177C(3A) have been inserted into the section pursuant to the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018), reg. 22(a) since these proceedings were commenced, but are not relevant to the issue under consideration.

94. Section 177D provides, in relevant part, as follows:

“Decision of Board on whether to grant leave to apply for substitute consent.

177D.—(1) ...

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

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

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

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

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

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

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

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

(3) In deciding whether it is prepared to grant leave to apply for substitute consent under this section the Board shall have regard to any information furnished by the applicant under section 177C(3) ... and any information furnished by the planning authority under section 177C(5).

(4) The Board shall decide whether to grant leave to apply for substitute consent or to refuse to grant such leave.

(5) (a) Subject to paragraph (b), the decision of the Board under subsection (4) shall be made —

(i) 12 weeks after receipt of an application under section 177C(1),

(ii) 12 weeks after receipt of additional information from the applicant under section 177C(3)(b), or

(iii) 12 weeks after receipt of information from the planning authority under section 177C(5),

whichever is the later.

...

(6) The Board shall give notice in writing to the applicant of its decision on the application for leave to apply for substitute consent and of the reasons therefor.

(7) Where the Board decides to grant leave to apply for substitute consent, the notice under subsection (6) shall also contain a direction—

(a) to apply for substitute consent not later than 12 weeks after the giving of the notice, and

(b) to furnish with the application a remedial environmental impact assessment report or a remedial Natura impact statement, or both that report and that statement as the Board considers appropriate.

(8) The Board shall give a copy of the notice of its decision under subsection (6) and direction under subsection (7) to the planning authority for the administrative area in which the development the subject of the application for leave to apply for substitute consent is situated and details of the decision and direction shall be entered by the authority in the register.”

Once again, certain amendments effected by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018) have been omitted above as they do not have any relevance to the issues arising on this appeal.

95. Also of note, primarily for comparative purposes, is section 177H, which provides as follows:

“Submissions or observations by person other than the applicant for substitute consent or planning authority.

177H.— (1) Any person other than the applicant for substitute consent or a planning authority may make submissions or observations in writing to the Board in relation to an application for substitute consent.

(2) Submissions or observations that are made under this section shall not be considered by the Board if the person who submits them has not complied with any relevant requirements prescribed by regulations under section 177N.

(3) Subsection (2) shall not apply in relation to submissions or observations made by a Member State or another state which is a party to the Transboundary Convention, arising from consultation in accordance with the Environmental Impact Assessment Directive or the Transboundary Convention, as the case may be, in relation to the effects on the environment of the development to which an application for substitute consent relates.”

96. Finally, it may also be helpful to set out the following relevant subsections of section 177K:

“Decision of Board.

177K.— (1) Where an application is made to the Board for substitute consent in accordance with relevant provisions of the Act and any regulations made thereunder the Board shall ensure it has, or has access as necessary to, sufficient expertise to examine the remedial environmental impact assessment report to ensure its completeness and quality and may decide to grant the substitute consent, subject to or without conditions, or to refuse it.

(2) When making its decision in relation to an application for substitute consent, the Board shall consider the proper planning and sustainable development of the area, regard being had to the following matters:

- (a) the provisions of the development plan or any local area plan for the area;
- (b) the provisions of any special amenity area order relating to the area;
- (c) the remedial environmental impact assessment report, or remedial Natura impact statement, or both that report and that statement, as the case may be, and, where section 177E(2A)(b) applies, the environmental impact assessment report or Natura impact statement or both that report and that statement, as the case may be, submitted with the application;

(d) the significant effects on the environment, or on a European site, which have occurred or which are occurring or could reasonably be expected to occur because the development concerned was or is proposed to be carried out;

(e) the report and the opinion of the planning authority under section 177I;

(f) any submissions or observations made in accordance with regulations made under section 177N;

(g) any report or recommendation prepared in relation to the application by or on behalf of the Board, including the report of the person conducting any oral hearing on behalf of the Board;

(h) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c), that fact;

(i) conditions that may be imposed in relation to a grant of permission under section 34(4);

(j) the matters referred to in section 143;

(k) the views of a Member State where the Member State is notified in accordance with regulations under this Act;

(l) any relevant provisions of this Act and regulations made thereunder.

...

(5) The Board shall also send a copy of its decision under subsection (1) to the planning authority in whose area the development the subject of the application for substitute consent is situated and to any person who made submissions or observations in relation to the application.”

The Judgment of the High Court

97. As outlined above, An Taisce, and separately Mr. Sweetman, sought to make submissions to the Board in respect of the notice party’s application for leave to apply for substitute consent in respect of the Ballysax quarry. These submissions were returned to them by the Board on the basis that the legislation, on the Board’s interpretation, does not contain any facility for the Board to receive or consider submissions from the public at the application for leave stage. The appellants were granted leave to institute these judicial review proceedings seeking, *inter alia*, an order of *certiorari* quashing the Board’s decision to reject their submissions and a declaration that the appellants had an entitlement to make submissions to the Board at the leave stage.

98. In short, the applicants contended, in the first instance, that the legislation, properly construed, does make provision for the consideration of submissions from members of the public and/or environmental NGOs at the leave stage. They submitted that there is no legal requirement for an enabling provision so as to permit the Board to have regard to information that comes before it: the Board is fully entitled to consider all relevant information irrespective of how such has been presented. A second strand of the argument was that it is contrary to fair

procedures and natural and constitutional justice to exclude the public from making submissions or observations at that point in the process. The appellants say that it is necessary for concerned members of the public to be allowed make submissions so that a properly informed decision can be made, as it would be impossible for the Board to reach a fair or proper determination armed only with the submissions of the applicant for leave and/or the possible submissions of the planning authority. Finally, the appellants argued that, having regard to the provisions of European law, public participation is required at the earliest stage in the process, and when all options are open to the competent authority. They contended that if a competent authority cannot consider submissions on exceptionality and circumvention at the subsequent stage, a decision on these issues is no longer open to the competent authority.

99. The respondents maintained that that there is no legislative provision at all for submissions by the public at the leave stage. In their view, on a straightforward interpretation of the relevant statutory provisions, the application for leave is intended to be a “closed” process, with input limited to the applicant for leave and the relevant planning authority. This, the Board submitted, was in stark contrast to the provisions in respect of public participation in the substantive application for substitute consent, which grants a clear and unambiguous right to third parties to make submissions. It was further argued that no right to make submissions at the leave stage could be inferred or implied into the legislation, as this would be directly contrary to the legislative choice of having a “closed” leave stage. Finally, all respondents maintained that no right to make submissions at that preliminary stage could be derived from European Union law, and denied that there had been any failure to properly transpose the EIA Directive into national law.

100. By his judgment delivered on the 19th October, 2017 ([2017] IEHC 634), Eager J refused the reliefs sought. His reasoning was as follows:

“The Court’s Decision

54. The focus of the judgment in *Commission v. Ireland* related to retention that is the ability to retrospectively obtain development consent in circumstances where the development had taken place without the relevant assessments. The availability of substitute consent is restricted and an application for substitute consent can only be made in very limited circumstances and the provisions of s. 177D clearly established what might be described as the closed nature of the Board’s consideration of an application for leave.

55. The application for leave is limited to input (in accordance with the legislation) to that of the developer and the planning authority. However, once leave is granted the actual application for substitute consent then involves the full panoply of participation. The legislative intention of the Oireachtas is clear.

56. Counsel for the applicant argues that this Court should direct that there is a right for members of the public to make submissions in relation to an application for leave for substitute consent. However, it is clear that the legislation in this planning situation is clear. It is also noted that once leave is granted the applicants can make such submissions as they think fit having regard to the various divisions under section 177K(2). The court is satisfied that no right to make submissions at the application for leave stage should be implied on behalf of the applicants.

57. The applicants further argue that the lack of participatory rights at the application for leave stage are in breach of European law. The court is of the view that there are ample participatory rights after the application for leave is granted and when the notice party must then apply for substitute consent and it is clear from the jurisprudence that there is a limit to public participation and the court notes the Advocate General's decision in Case C-416/10 *Krizan* at 134:-

'134. In that regard, it must be noted that the updating assessment should determine whether repeat public participation is necessary. The interests in effective and timely administrative proceedings must be balanced against the rights of the public. Public participation would make the procedure more cumbersome, especially since the course of the procedure it would possibly be necessary to examine, on more than one occasion, whether the Environmental Impact Assessment is sufficiently up to date following changes in the circumstances which have occurred in the meantime.' [Emphasis added by Eager J]

58. Having regard to all the circumstances of the case, the court is satisfied to refuse the reliefs sought in the notice of motion by both applicants."

Appeal

101. By a subsequent judgment delivered on the 14th January, 2019 ([2019] IEHC 40), Eager J refused the appellants leave to appeal to this court, finding that they had failed to raise a point of law which satisfied the threshold for leave to appeal to the Court of Appeal pursuant to section 50A(7) of the 2000 Act, as amended.

102. However, by its Determination delivered on the 10th October, 2019 ([2019] IESCDET 217), this Court granted leave to the applicants to appeal to this Court from the said judgment of Eager J. The Court was satisfied that the constitutional threshold for leave to appeal was satisfied and observed that it would be in the public interest to obtain clarity on the scope, extent and meaning of the public right to participate and whether this includes a right to be heard at the leave stage, or whether the public right of participation is satisfied by participation at the substantive application for substitute consent.

Submissions

103. The Court is grateful to counsel for the helpful written and oral submissions made by the parties. Their respective positions are much as they were in the court below, as above described. Rather than setting out a summary of the submissions at this stage, they are addressed below in the context of my treatment of the issue under consideration.

Decision

The First Argument – Statutory Interpretation

104. The appellants accept, as they must, that section 177C makes no express provision for public consultation. In their view, however, no such enabling provision is required. They submit that, having regard to the provisions of section 177D and the matters to which the Board must have regard when making the leave decision, submissions from the public and/or other concerned parties can (and indeed should) be received by the Board and considered. Central to this submission is section 177D(2)(g). Section 177D (paras. 22 and 95 above) sets out the matters that must be considered by the Board, and, this includes at section 177D(2)(g) “*such other matters as the Board considers relevant*”. The appellants submit that this section affords

the Board a discretion to consider any matters that it considers relevant and this must, in their view, include matters brought to its attention by members of the public. Accordingly, on this interpretation the relevant provisions do permit the Board to consider all relevant matters, including those brought to its attention by members of the public. This is, in effect, an argument that public participation is permitted at the leave stage even on a primary, literal approach to the interpretation of the provisions, without the need to have regard to any supra-legislative norms, be they at domestic or EU level. Accordingly, I will first deal with this argument as founded entirely on the first principles of domestic statutory interpretation. Subject to the outcome of that exercise, it may be necessary to consider the other arguments raised by the appellants.

105. Perhaps if subsection 177D(2)(g) was viewed in total isolation from the other subsections of that provision and from the substantive other provisions (sections 177A-177Q) which make up the substitute consent regime contained in Part XA of the 2000 Act, one could be persuaded that the residual category of *such other matters as the Board considers relevant* might encompass consideration of submissions received from the public and interested environmental bodies. However, it is well accepted that even the literal approach to statutory construction requires the relevant provisions to be read in their proper context, that context including the other sections of the legislation and indeed the scheme of the legislation as a whole. So viewed, I agree with the respondents that there is no method of construction of the relevant provisions that can enable the conclusion that the public has a general right to make submissions at the leave stage.

106. To take, first, section 177C, which governs the making of an application for leave to apply for substitute consent, subsection 177C(3) provides that certain information and

documentation shall be furnished by the applicant for leave to the Board, while subsection 177C(5) permits (but does not require) the Board to seek such information and documents, as it sees fit from the relevant planning authority. No provision is made for the submission of information or documentation by any entity other than the applicant or the planning authority. Turning next to section 177D, concerning the decision of the Board on whether to grant leave to apply for substitute consent, subsection (3) thereof provides that in deciding whether it is prepared to grant leave the Board shall have regard to any information furnished by the applicant under section 177C(3) and any information furnished by the planning authority under section 177C(5). Again, no mention is made of information received from any other source. Furthermore, I observe while that the Board is required to give notice in writing to the applicant of its decision and the reasons therefor, and a copy of such notice is to be provided to the relevant planning authority (sections 177D(6) and (8), respectively), no mention is made of a requirement to inform any other party of the decision reached on the application for leave.

107. If an examination of sections 177C and 177D gets us no further than what the appellants readily accept – that is, that no express provision is made for the consideration of submissions at the leave stage – it is instructive to contrast these sections with what is provided for in respect of the substantive application for substitute consent. The relevant provisions are set out in full above (para. 97). Notably, pursuant to section 177H(1), third parties are expressly authorised to make submissions at this stage of the process (*“Any person other than the applicant for substitute consent or a planning authority may make submissions or observations in writing to the Board in relation to an application for substitute consent”*), provided that those submissions or observations comply with any relevant requirements prescribed by regulations under section 177N (section 177H(2)). When making its decision on the application for substitute consent pursuant to section 177K, the Board is statutorily obliged to have regard

to any such submissions or observations properly so made (section 177K(2)(f)). Thus, in marked contrast to the procedure at the leave stage, the 2000 Act authorises the public to make submissions on the substantive application and obliges the Board to have regard to those submissions in making its decision on that application. Furthermore, in contrast to the situation at the leave stage, the Board shall send a copy of its decision on the application for substitute consent to any person who made submissions or observations in relation to that application (section 177K(5)). Additionally, it should be noted that Part 19 of the Planning and Development Regulations 2001 (as amended) provides what the respondents describe as “a suite of notice applications for the Substitute Consent application”; no similar provisions exist in respect of the application for leave stage.

108. Disregarding subsequent amendments thereto which are not relevant to the issue before the court, sections 177A-177Q, which comprise the substitute consent regime contained in Part XA of the 2000 Act, were drafted, inserted and commenced at the same time. I am entirely satisfied that the various sections must be read together such that they cumulatively contain the procedure in respect of substitute consent. Concentrating on the gateways available pursuant to s. 177C, such evidently takes the form of a two-stage process, with applicants being required first to obtain leave prior to the substantive application for substitute consent being made. Clear and unambiguous provision is made for interested parties to participate in the substantive decision: however, there is no such provision in respect of the leave stage. While the appellants characterise this as the legislation being “silent” on public submissions at that preliminary stage, I do not consider that it can be so viewed. For my part, I cannot consider this as anything other than a deliberate choice by the legislature, given the clear terms in which such participation is provided, within the same Part of the Act, in respect of the application proper. The evident legislative intention as expressed in the Act is to the effect that the leave stage is

intended to be carried out without a general right of public input. As such, I agree with the respondents that what is intended at the application for leave stage is what has been referred to in these proceedings as a “closed” process.

109. It is true that the legislature did not expressly preclude the making of submissions at the leave stage, as it might quite easily have done. However, this does not detract from what is, in my view, a clear legislation intention that input at the leave stage would be limited to the applicant and, where sought, the authority, with public participation in the process occurring only at the subsequent, substantive stage. Therefore, it is not simply the case that “no provision” has been made for public submission at the former stage, rather it is that by the enacted measure, such is not allowed. Accordingly, I believe that when the substitute consent regime is read as a whole, the absence of public participation at the leave stage was clearly and deliberately intended by the legislature.

110. I do agree with the appellants that it would be wrong in law to maintain that a competent authority or administrative body must always be expressly empowered to receive submissions from the public if it is to consider them. This judgment should not be read to suggest that all such bodies, regardless of the legislative scheme underpinning them, must necessarily be expressly empowered to receive public submissions. All will depend on the legislation and the body in question. Here, the process comprises two stages, one of which expressly authorises and contemplates public participation and the other of which does not. Matters could well be different in respect of what I may call a “one-stage” process which was silent on the issue. Without in any way intending to rule on what would be the correct construction in those circumstances, clearly one could see that the interpretive context in that scenario would be substantially different to that now presenting. As it is, however, I cannot

overlook what appears, in the context of this legislation, to be the clear intention of the legislature in excluding the public from participating at the leave stage.

111. A further submission advanced by the appellants, which it is convenient to address at this stage, is that the Board cannot be expected to make a proper decision on the entitlement to apply for substitute consent based only on the information supplied by the applicant and possibly also by the relevant planning authority. They point out that the party seeking leave will often (if not invariably) have already acted unlawfully in carrying out unauthorised development, and therefore submit that the veracity and/or completeness of the information provided by any such applicant cannot lightly be assumed, given the interest which the provider of the information has in the application. It is submitted that without participation by the public, who are the best repository of environmental information, it is difficult, if not impossible, to reach a fully informed decision. The appellants point to each of the considerations mandated under section 177D(2) of the 2000 Act, and submit that the Board cannot properly and fully consider these matters if its consideration is limited to a submission by the applicant. It is further said that on the High Court's reading of the legislation, the Board cannot receive a submission from the relevant planning authority unless it actively seeks information from such authority. As such a request is discretionary, there may be instances where the information provided by the applicant is the only information before the Board. Equally, it is submitted that on the High Court's approach the Board could not seek or receive any submissions from any of the usual statutory authorities or prescribed bodies (such as the Environmental Protection Agency), and that is unthinkable that the bodies with the greatest knowledge and/or expertise could be precluded from consultation at the leave stage in this way. The respondents, on the other hand, submit that the legal basis for implying a right to make submissions cannot be

found in apprehensions about the possible quality of the decision to be made: either the statute permits the public to make submissions or it does not.

112. There may well be something to these arguments of the appellants, at a factual level. One can readily appreciate that limiting the information at the disposal of a decision-maker may have consequences on the quality of their decision-making, in some cases at least. Having said that, there are often sound practical reasons for restricting the available information, and the scheme adopted in relation to substitute consent seems to reflect a clear and deliberate legislative choice. Even if, however, one were to assume that every complaint made in the preceding paragraph is sustainable and that the exclusion of the public at the leave stage is in some way detrimental to the decision-making process, it is hard to see how, as a matter of statutory interpretation, this could actually advance the appellants' case in relation to whether or not the legislation as drafted does in fact entitle the public to make submissions at that stage. For the reasons set out above, I have concluded that it does not: while this possibly and on some occasions may have adverse consequence for the quality of the Board's decision-making, I do not consider that this court can in some way attempt to cure that by departing from the clear legislative intent to have a "closed" leave application. Simply because the provisions could have been drafted differently, or in a way that would arguably lead to better decisions, cannot compel the court to read the provisions *as actually drafted* in the manner advocated by the applicants.

113. A related argument made by the appellants is that in the interests of good environmental decision-making the authority should not, at any stage of the process, disregard relevant information that comes into its possession, whatever its source or provenance. They state that the submissions which were returned to them contained information clearly relevant to the

Board's consideration and should not have been returned to them, however, they arrived before it. Thus, it is argued that even if the legislation does not authorise the public to make submissions as such, the Board, having received the information, should have considered it.

With respect, I do not think that this could be correct. As stated by the respondents, one would have to question how an effective system could operate if, as a matter of law, a decision-making body was required to consider any information which was put before it, irrespective of whether or not the information presented, was in accordance with the prescribed rules.

Moreover, to require the Board to consider unregulated submissions would fly in the face of the legislative intention of limiting public participation at the leave stage. It would be a straightforward exercise in frustrating the intention of having a "closed" section of the process if the Board was nonetheless required to have regard to any submissions it might receive from whatever source.

114. I would therefore conclude that, adopting an approach on the basis of the primary method of statutory interpretation, members of the public are not given a right, under Part XA of the 2000 Act, to make submissions at the application for leave stage, of the substitute consent process. It is an evident legislative choice that the leave stage is intended to be a "restricted" process, with public participation being limited to the substantive application if subsequently made. While the consequences of this are discussed below, I cannot see any way of "reading in", to s. 177C or s. 177D a right to participate in the leave stage, given the clear legislative intent to the contrary.

115. Additionally, I should note at this point that the appellants have also argued that domestic fair procedures require a public right of participation. Their submission is that natural and constitutional justice require that those affected or interested by a determination must be

entitled to be heard and they refer, in this regard, to the principle of *audi alteram partem*. They further point to the practical and costs difficulties associated with the fact that, while there is an accepted right to judicially review any determination on the grant of leave, such a challenge is inherently compromised by the absence of participation in the leave process. They say that such proceedings are completely unsuitable unless the information and facts upon which they would base their challenge had been at least before the Board, and at least considered by it.

Accordingly, in their view it would be clearly preferable for the public to have an opportunity to put the matters of concern before the Board at the leave stage. However, whether it would be preferable or not, I cannot see that this creates an avenue to finding a right of public participation within the corners of the Act, given the clear contrary legislative expression. I am not satisfied that, as a matter of purely domestic administrative or constitutional law, there must necessarily exist a right to make submissions at the application for leave stage.

The Second Argument – Public Participation Rights under EU Law

116. Things may look different, however, under EU law. The appellants maintain that even if a right to make submissions at the leave stage does not arise via the ordinary method of interpreting legislation, the same is in any event required as a matter of EU law and accordingly, their submissions ought to have been considered. They claim that, having regard to the provisions of the Directive, public participation is required at the earliest stage in the process, and when all options are open to the decision maker. The heart of their argument is that if a competent authority cannot consider submissions on exceptionality and circumvention at the next stage, a decision on these issues is no longer open to that authority.

117. With this in mind, it may be helpful to further set out the principle legislative provisions being cited in support of this argument: although some of these, in abbreviated form, have

been referred to at paras 11 and 12 above. In this regard, the following recitals to the EIA Directive should be noted:

“(16) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

(17) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public.

...

(19) Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

(20) Article 6 of the Aarhus Convention provides for public participation in decisions on the specific activities listed in *Annex I* thereto and on activities not so listed which may have a significant effect on the environment.

(21) Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of that Convention.”

118. Pursuant to Article 1(2)(c) of the EIA Directive, “*‘development consent’ means the decision of the competent authority or authorities which entitles the developer to proceed with the project*”. Article 2 of the Directive provides, in relevant part, as follows:

“Article 2

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

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. ...”

119. Regard should also be had to Articles 6(2) and 6(4) of the EIA Directive, which state as follows:

“2. The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

- (a) the request for development consent;
- (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;
- (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
- (d) the nature of possible decisions or, where there is one, the draft decision;
- (e) an indication of the availability of the information gathered pursuant to Article 5;
- (f) an indication of the times and places at which, and the means by which, the relevant information will be made available;
- (g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. ...

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.” (Emphasis added)

120. Recital 29 to Directive 2014/52/EU (amending Directive 2011/92/EU) provides, *inter alia*, as follows:

“Moreover, taking into account unsolicited comments that might have been received from other sources, such as members of the public or public authorities, even though no formal consultation is required at the screening stage, constitutes good administrative practice.”

121. Relying in large part on the above provisions, the appellants submit that, as a matter of EU law, the public is entitled to participate in the determination to be made on the existence of exceptional circumstances and/or the circumvention of the Directive. As this determination is made once and for all at the leave stage, they argue that they therefore must have a right to make submissions on these matters at that point. Their argument is that the decision on the existence or otherwise of exceptional circumstances is a part of the decision-making processes envisaged by Article 2(2) of the Directive. As such, the public has a right to participate under Article 6(4), and such participation must be facilitated before a final decision on the existence

of exceptional circumstances is made, so that all options (including the option to find that exceptional circumstances do not exist) remain open to the competent authority. They therefore submit that public consultation must be undertaken at the leave stage or else, at the very least, that even if no formal public consultation is required, there certainly is no legal basis for arguing that public submissions cannot be received and/or must be excluded from consideration.

122. The appellants cite certain European jurisprudence which is said to support these contentions, referring in particular to Case C-72-12 *Altrip* (at paras. 43-46), Case C-137-14 *Commission v. Germany* (para. 55), and the Opinions of Advocate General Kokott in Case C-416/10 *Krizan* and Case C-196/16 *Corridonia*. In the latter Opinion, the Advocate General stated that:

“36. On the question of how to rectify the omission of an environmental impact assessment, there has been considerable debate amongst the parties on how a judgment handed down against Ireland [C-215/06] should be interpreted. It was held in that case that the regularisation of operations or measures which are unlawful in the light of EU law is only permissible if it does not offer the persons concerned the opportunity to circumvent EU rules or to dispense with applying them and remains the exception.

37. However, the parties have failed to notice that in a later case the Court, relying on that judgment, clarified the conditions under which the omission of public participation under the rules on integrated pollution prevention and control may be rectified. Namely, at the date the procedure for public participation is carried out all options and solutions must remain possible and rectification at that stage must still allow the pub-

lic concerned effectively to influence the outcome of the decision-making process.

Those considerations must also apply in relation to an environmental impact assessment.” [Emphasis added; internal citations omitted]

123. In Case C-416/10 *Križan*, the CJEU stated as follows at para. 90:

“90 Consequently, the principle of effectiveness does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make available to the public concerned the urban planning decision at issue in the main proceedings during the administrative procedure at first instance, provided that all options and solutions remain possible and that rectification at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process, this being a matter for the national court to determine.” [Emphasis added]

Ultimately, the appellants submit that even if it is unclear at what stage, in a normal EIA process, public participation must be facilitated, in a remedial situation, where a determination as to compliance with EU law is required, public participation must be permitted before such determination is made.

124. The Board, in its impressive submissions, maintains that no right to participate at the leave stage arises under EU law. While it accepts that the EIA Directive gives important rights of public involvement, it submits that these only arise after an application for development consent has been made. Having regard to the wording of Articles 1(2)(c), 2(2) and 6(2), it says that no right is conferred on members of the public nor on any NGO to make submissions in

any pre-application procedure. The Board therefore submits that there is absolutely nothing in the EIA Directive (as implementing the Aarhus Convention) which grants any right of involvement, or input prior to the substantive application. In this case, of course, the leave stage is not about a grant of development consent: it is about whether an application for such a grant can be made in the first instance. The Board further submits that nothing in Article 6(4) gives rights at an earlier stage than those given by Article 6(2). It is claimed that the whole target of Article 6(4) is “the environmental decision-making procedures referred to in Article 2(2).” Thus, while it refers to public participation “when all options are open”, this has no bearing on the present case because the “options” referred to are only those that arise as a result of the development consent application itself, not an application for leave to apply. The Board further distinguishes the case law cited by the appellants, submitting that none of it supports the contention that participation rights exist at the leave stage, which is the preceding stage beyond the contemplation of the Directive.

125. Despite the respondents’ forceful arguments, I am satisfied, on the basis of the provisions and authorities referred to above, that European law requires that the public be entitled to participate at the application for leave stage of the substitute consent process. The granting of leave is, quite evidently, a pre-requisite to successfully navigating the section 177C/177D gateway to substitute consent. It is not a mere technical or box-ticking exercise; rather it is a highly significant aspect of the overall process, in that the outcome of the leave application will determine whether the application for substitute consent (which is itself an exceptional avenue, given the requirements of EU law) can be made at all. Importantly, while some matters which arise for consideration at the leave stage overlap with those which fall to be considered on the substantive application, there are other matters, notably the issues of exceptional circumstances and/or the circumvention of EU law, which are finally determined at

the stage of the leave application. The legislative scheme does not permit these matters to be revisited subsequently. The public is therefore denied any opportunity to make submissions on these matters.

126. It must be remembered that the underlying purpose of public participation in environmental matters is to facilitate good, fully informed decision making, it being acknowledged that the public as a whole is one of the greatest repositories of environmental information. The EIA Directive recognises that without participation by the public, it is difficult to reach the kind of decision as envisaged. It is, as I see it, contrary to the purpose of public participation in improving environmental decision-making to exclude the public from making submissions at the leave stage. Good decision-making can take place where the decision-maker has the relevant information before it. As the appellants have demonstrated in their submissions in this case, the matters which fall to be considered at the leave stage are matters in respect of which the public may have highly relevant information. It seems to me that, in preventing the public from making submissions on the application for leave, Part XA of the 2000 Act fails to provide for public participation at a stage when all options and solutions remain possible: quite clearly, the option of refusing to grant leave is off the table by the time the public have any opportunity to make submissions which may be of relevance to that decision.

127. As noted above, matters would be considerably different if there was total overlap in the factors which may be considered as between both stages, or if the decision reached at the leave stage was subject to being revisited at the substantive stage. That, however, is not the case. Notably, the appellants were prevented from making any submissions on whether “exceptional circumstances” existed within the meaning of section 177D(1)(b), such that it would be

appropriate to permit an application for substitute consent. Matters set out in section 177D(2) as having a bearing on the existence of exceptional circumstances include whether regularisation of the development concerned would circumvent the purpose and objectives of the EIA Directive or the Habitats Directive; whether the applicant had or could reasonably have had a belief that the development was not unauthorised; and whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development (sections 177D(2)(a), (b) and (f), respectively). By returning their submissions, the Board prevented the appellants from having any input on these matters. It would appear, for example, that the section 160 proceedings (of the 2000 Act) in respect of the Ballysax quarry were unknown to the Board; certainly they are not referred to in the decision refusing leave. They were however averted to by An Taisce. While obviously the existence of the such proceedings was not a determinative factor on this occasion, one can appreciate that in other situations such information could be highly relevant to the decision maker.

128. It could be contended that there is nothing to preclude the appellants from making submissions on these matters at the substantive application stage. Considering the statutory scheme as a whole, the provisions of section 177D operate as a sort of a gatekeeper provision to determine whether the applicant should be allowed to apply for substitute consent at all. Section 177K deals with the substance of whether substitute consent should be granted, with subs (2) mandating certain matters for consideration which do not include those matters next mentioned. While that may seem rather obvious and perhaps inherent in the nature of a leave application, in my view there is a wider relevance to the directional focus of each provision. Unquestionably the impact of the development on the environment is, understandably, significant at both the leave and substantive stages. However, it appears that the character and history of the applicant for permission is much more in play at the leave stage than at the later

substantive stage. It is at the initial screening stage that the Board is expressly asked to have regard to matters such as previous failure to comply with planning permissions and whether the applicant could reasonably have believed that the development in question was not unauthorised. These, and the other factors referred to in section 177D(2), are matters in respect of which the public may have highly relevant information.

129. This is not to say that the legislative scheme requires that the door would be altogether shut to the public submitting information on such matters and that they could not therefore be considered at the substantive stage. However, it does seem to me that the need to establish “exceptional circumstances” provides a rather different threshold than what the applicant must establish at the substantive stage, one in respect of which the public are denied the opportunity to make submissions. One can readily imagine circumstances wherein certain information/submissions provided by the public or An Taisce might well be determinative in respect of whether “exceptional circumstances” exist, having regard to the prescribed matters in respect of that determination, but might be altogether less weighty in respect of the substantive application itself.

130. If the decision at the leave stage did not foreclose on any possible outcome, then the mere fact that the public could not make submissions at that very earliest stage of the process may be of no consequence, provided that all options remained open. Certain matters are, however, decided once and for all at that stage of the process and cannot subsequently be revisited at the substantive stage. In the instant case, once leave had been granted the issue of exceptional circumstances was finally decided. It is clear that the actual conclusion as regards this requirement, a pre-requisite to being granted leave to pursue the substitute consent application, cannot itself be revisited. Likewise, although it does not arise directly in respect of

the Ballysax case, it would appear that the matters set out in sections 177C(2)(a) and 177D(1)(a) (*i.e.* that the permission is in breach of invalid, invalid or otherwise defective by reason of a court decision, any error of law or fact or procedural error, the omission of an EIA report etc.) similarly could not be revisited after the leave stage. One can therefore envisage the very real possibility that a member of the public who had relevant submissions to make in respect of such matters, which may be central to a grant of leave, would be precluded from doing so in a meaningful way by virtue of being confined to making such submissions at the substantive stage. It is clear that once leave has been granted, the decision to grant leave cannot be revisited: that decision is ring-fenced and the option not to grant leave is off the table.

131. Given that the granting of leave cannot be revisited at a later stage, it appears to me that by the time public participation is provided for under the 2000 Act all options, including refusing the leave, or determining the scope of the leave or of the remedial statements to be provided, are no longer open to the Board. This, in my view, is inconsistent with the requirement that the public be given early and effective opportunities to participation at a time when all options are open. It seems to me, therefore, that in failing to provide for public participation on a crucial issue, namely exceptionality, at a time when all options remain open, the State has failed to properly transpose the EIA Directive in this respect.

132. In other circumstances – if, perhaps, the legislation, properly construed, was truly silent on the question of public participation at the leave stage – it might have proved possible to remedy this omission through the Court “reading in” the right in question into the legislation. The Court could, in other words, imply the right to make submissions at that stage into the legislation in by presuming that the intention had been to provide for it. No such approach is

open here. For all of the reasons set out above, the legislation cannot be regarded as simply silent on the point: in fact the clear legislative intent in the section was to exclude public participation at the leave stage. Accordingly, in the face of so clear a contrary legislative intent, there could be no question of “reading in” a right to make submissions, notwithstanding the requirements of the EIA Directive. The same would, to use the phrase used in EU law, be to adopt an interpretation which is *contra legem*: it would be to adopt an interpretation which goes against the express wording of the legislation. The court cannot read in a right which directly contradicts the clear legislative intent behind the provisions in question.

133. Before I leave this point, could I say that I interpret the Directive and the case law as meaning that once all options are open, that public participation in, for example, the exceptionality requirement, can take place at either stage 1 or stage 2 of the process provided for under the 2000 Act. Whilst of course acknowledging that how the Oireachtas may address this issue is a matter for them, nonetheless it might be useful to say that the most appropriate time at which that participation on that event should occur, is if in fact leave is granted. In other words, those applications which might fail for this or other reasons could be dealt with at the first stage, but where successful, the issue of exceptionality and the public views thereon could take place together with all other issues upon which the public might have right to participate at the substantive stage.

Issue Three: Collateral Attack (McQuaid)

134. J. McQuaid Quarries Limited made its application for leave to apply for substitute consent in January 2012; the Board made its decision to grant leave to apply on the 28th May, 2012. As stated by Barrett J, “*So far as An Taisce had any complaint as to the validity of that*

decision, it had, pursuant to ss.50 and 50A of the Act of 2000, as amended, eight weeks to bring such challenge. It did not bring any such challenge" (para. 9). This, in his view, raised "*an insurmountable difficulty*" for An Taisce in that its complaint, in essence, was that J McQuaid Quarries Limited should not have been allowed to apply for development consent retrospectively, but the decision which allowed the first-named notice party to apply for development consent was the decision of the 28th May, 2012, to grant leave to apply for substitute consent. The learned judge continued as follows:

"10. An Taisce seeks to get around the timing difficulty which presents by challenging the decision of An Bord Pleanála of 25th April, 2014 to grant the substitute consent. But of course that later decision could never have been granted were it not for the decision of 28th May 2012. What presents, in truth, is an out-of-time attack and an impermissible collateral attack, on the decision of 28th May, 2012, under the guise of an attack on the decision of 25th April, 2014. It is not a million miles from relying on a referee's decision on a penalty-kick to challenge the decision to hold a football match in the first place. Such a collateral attack runs contrary to a line of jurisprudence that includes *Goonery v. Meath County Council* [1999] IEHC 15 and *Lennon v. Cork City Council* [2006] IEHC 438, with the judgments in those cases emphasising that the courts will look to the substance of the relief sought in proceedings, rather than its mere form, so that a failure to seek e.g., an order of *certiorari* in respect of an order which comes first in time not being fatal to a conclusion by a court that, as here, it is that decision and not one later in time which is truly under attack."

Barrett J observed that the clear purpose and effect of statutory time-limits such as the eight-week time limit for judicial review in planning matters of this nature is to empower persons

affected by such decisions to rely on them after a brief period, safe in the knowledge that the decisions are then beyond court challenge.

135. He referred to the decision of Clarke C.J., for this Court, in *Sweetman v. An Bord Pleanála* [2018] IESC 1; [2018] 2 I.R. 250 (“*Sweetman*”), where the learned Chief Justice commented on the position where, as in this case, there is a two-stage process (see below). Applying that decision to the presenting facts, Barrett J held that once J McQuaid Quarries Limited had navigated the section 177D(1)(a) gateway, it would not have to satisfy any additional criteria, in particular exceptional circumstances under section 177D(2) of the Act of 2000. Accordingly, if An Taisce wished to argue that the quarry operator was not entitled to pursue his substitute consent application on the section 177D(1)(a) basis, it fell to it to do so within eight weeks of the decision of the 28th May, 2012: this it did not do so. In the learned judge’s view, to allow An Taisce to challenge a decision where it was over 90 weeks beyond the permitted eight-week period in coming to court, in circumstances where there were no exceptional circumstances outside its control which prevented its bringing its application in a timely fashion, would be fundamentally and improperly to undermine the certainty which that eight-week period legitimately seeks to achieve (para. 13). The learned judge concluded that “*It follows from all that the court has stated above that the court considers the within proceedings, which ostensibly challenge a decision of 25th April, 2014 but in truth seek to assail a decision of 28th May 2012, have been commenced hopelessly out of time and represent an impermissible collateral attack on the earlier decision*” (para. 24), although, as described above, the learned judge also addressed the application on the merits, finding for the respondents on that basis also.

Appeal

136. As above noted, Barrett J refused leave to appeal from the said judgment. However, by determination delivered on the 15th October, 2019 ([2019] IESCDET 231), this Court granted leave to the appellants to appeal to this Court, stating, *inter alia*, as follows:

“9. While the principles relating to that aspect of Irish procedural law which precludes a collateral attack (and, in particular, an out of time collateral attack) are now reasonably well settled, it does not necessarily follow that the application of those broad principles in a particular class or category of case may not require further elucidation. Given the overriding obligation identified by the CJEU in *Commission v. Ireland*, which only permitted what has now come to be substituted consent in exceptional cases, there clearly is a significant European Union law overlay in the area of substituted consent. This Court is not satisfied that it can safely be said at this stage that those overriding requirements of European Union law might not require a particular approach to the exercise of the collateral attack jurisprudence in at least some cases. In those circumstances, the Court is satisfied that issues of general public importance arise in these proceedings which include, potentially, the question of European Union law identified in the notices of application for leave to appeal but also the question of the proper approach to the collateral attack jurisprudence in a case such as this. ...

10. That being said, the Court would wish to make clear that it remains fully open to parties opposing An Taisce to argue that this case can simply be dealt with, in a manner compatible with European Union law, under the collateral attack doctrine ...”

Discussion/Decision

137. The principle of procedural autonomy applies in the relationship between EU law and the laws of Member States. It has always been accepted that, subject to the principles of effectiveness and equivalence, Member States are in charge of the procedures by and within which cases travel through and are dealt with in the court system. The imposition of time limits and their application are quintessentially procedural matters. The concept of a collateral attack is closely associated with such time limits. Therefore, at the level of principle, it must first be asked whether the finding by the trial judge that the institution of proceedings after the substantive substitute consent decision was given constituted an impermissible attack on the leave decision, dated some two years earlier. If, in accordance with domestic law, that finding was correct, it must then be asked whether such a time limit, as imposed by sections 50 and 50A of the 2000 Act, breaches either the principle of effectiveness or equivalence.

138. There is also a further issue insofar as these questions arise in the context of a two-stage decision process. If there was but a single decision, then at least under domestic law the issue would be clear-cut and could be decided in that way. That is not the situation, however. The complication so arising was addressed by Clarke C.J. in *Sweetman*, in a passage set out in detail below. In essence, this Court decided in that case that one must look at the overall scheme and determine whether what is decided at each stage is intended to be truly separate and distinct from the other, even if the requirements of both must be established before the overall process concludes. Ultimately this becomes a question of court interpretation having regard to the structure of the scheme and the express words used are those capable of being employed.

139. The basis for the collateral attack doctrine was explained clearly by Clarke C.J. in his judgment in *Sweetman*, where he stated as follows:

[38] The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally-mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.

[39] The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like.

140. In my recent judgment in *P.N.S. and anor v The Minister for Justice & Equality* [2020] IESC 11, I discussed the principles which may be extrapolated from the jurisprudence in this area, having cited the relevant case law. Although that decision was in the immigration context, I believe the following points are nonetheless instructive as regards the principles which apply more generally:

- “(i) It is common case that subject to the following, a “collateral attack”, properly so classified, should be regarded as the equivalent of a direct attack on the subject measure for, inter alia, procedural purposes.
- (ii) In deciding upon the question, the Court looks at the gist and essence of the proceedings and in particular at the substance of the reliefs claimed. The phra-

seology used in the pleadings is not determinative: neither is a submission that there is no “per se” challenge to the captured measure: substance prevails over form.

- (iii) It is an oversimplification to pitch the test only as being whether the purpose or motivation, object or effect of the proceedings is to mount a challenge to the measure in question. Purpose and motive alone may be sufficient: but on many occasions will not be: object together with effect will almost always be sufficient.
 - (iv) If an applicant can assert a right, either legally or constitutionally based, which is independently sourced, from that which underpins the validity of a deportation order, whether within the asylum process or otherwise, such a right should be given effect to even if there is consequential effect for the enforcement of the order: either conditioned in terms of time, steps or measures: such may arise in a variety of circumstances.”
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141. As alluded to above, the matter is somewhat complicated, however, where, as here, there is a multi-stage process leading to the ultimate resolution of the administrative issue in question. The proper approach to such situations was explained by Clarke C.J. in *Sweetman*, where he stated as follows:

“[40] However, the application of that general principle can become complex in circumstances where there is a two or more stage process leading to the substantive administrative decision concerned. In such a case is it permissible to leave a decision made at an earlier stage in the process go unchallenged and then raise a point which could have been made in respect of that initial decision at a later stage in the process?

In such a case it seems to me that it is necessary to analyse the process concerned for the purposes of determining whether it is the overall intent of the scheme in question that the relevant issue or question be definitively and finally decided at the first stage with no capacity to revisit the issue at any subsequent stage in the process.

[41] In some circumstances, for example, an initial decision may simply be to the effect that there is an arguable case or a case to answer or the like so that all of the issues remain open for full debate as the process continues. In other cases, it may be clear that the initial decision is designed to definitively determine some relevant matter such as whether jurisdiction exists or qualifying factors are present. In such a case the scheme does not envisage those issues as being capable of being revisited once established at the initial stage.

[42] While the distinction which I have just identified may be relatively easy to express in general terms, the analysis which may be required to decide on the proper characterisation of any particular scheme may not always be quite so easy. This may particularly be so where the scheme is not express in its terms as to whether particular issues are capable of being raised at various stages in the process or alternatively are to be taken to be definitively determined at a particular point. But in an overall sense I am satisfied that the proper approach for the court to take is to consider whether, taking the scheme as a whole and having regard to its express terms and any additional matters which can properly be implied, it can be said that it is clear that a particular question or issue is to be definitively determined at an earlier stage so that there is no possibility to have that issue or question re-opened at a later stage. In such a case it is appropriate to require anyone who wishes to challenge that initial decision to do so

within any relevant statutory time limit or time provided for in rules of court. Any failure to do so within such time limit, including any extended time limit which the court may, in accordance with its jurisdiction, permit, will render the initial decision incapable of challenge and will further preclude any challenge to any subsequent decision made in the process which is based on a contention that the initial decision was not lawfully made.

[43] Against that backdrop it is necessary to consider the specific scheme which exists for the grant of substitute consent using the quarries gateway which is at issue in these proceedings. However, before so doing it is necessary to recall the jurisprudence of the CJEU which makes clear that what is described as a system of regularisation in the environmental context is permissible but only where the system “does not offer the persons concerned the opportunity to circumvent the Community rules ... and that it should remain the exception” (see *Commission v. Ireland* (Case C-215/06) [2008] E.C.R. I-4911, at para. 57). Furthermore, the CJEU has held that the previous Irish system of retention permission which, as the court noted, could “be issued even where no exceptional circumstances are proved” was inconsistent with European law (see *Commission v. Ireland* (Case C-215/06) [2008] E.C.R. I-4911, at para. 61).

[44] Thus, the validity of any scheme for retrospective consent, such as the substitute consent process at issue on this appeal, must, if it is to be compatible with European law, be such as it does not operate as a facilitation or encouragement to circumvention of European Union rules and can only operate in exceptional circumstances.

...

[49] In a clear case where the scheme under consideration requires a final decision on some aspect of the process to be made at an earlier stage such that the determination then made cannot be revisited later in the process, it may well be appropriate for a court to decline to hear a substantive challenge to a later decision in the same process on the grounds that it amounts to a collateral attack, outside time, on the earlier decision. But where, as here, an analysis of the scheme itself is one of the key issues to be decided in the substantive proceedings such that it is by no means clear as to whether there is an obligation to consider individual exceptionality and, importantly, if so at what stage that consideration can or must be made, it would not, in my view, be appropriate for a court to prevent the substantive issue going ahead. On at least one view the scheme, interpreted in accordance with European law, requires an assessment of individual exceptionality at the Board stage. If that view prevails then Mr. Sweetman's challenge could not be described as an impermissible collateral attack. But to decide that question requires hearing the substantive case. It cannot be described on a preliminary application such as this."

142. What emerges is that where there is a two or multi-stage process, it is necessary for the court to analyse the process concerned for the purposes of determining whether it is the overall intent of the scheme that the relevant issue be definitively decided at the first stage with no capacity to revisit the issue at any subsequent stage of the process. Where such is the nature of the scheme, it is appropriate to require anyone who wishes to challenge that decision to do so within any relevant statutory time limit. Failure in this regard will render the decision incapable of a later challenge, so that it will not be open to a party to contend that any subsequent

decision in the process is invalid on the basis of the prior one not having been lawfully made. As stated by the Chief Justice at para. 50 of his judgment, the collateral attack jurisprudence should only be deployed to prevent a substantive case being heard in circumstances where it is clear, on a proper analysis of the relevant scheme, that an earlier decision taken at some point in the process in question is intended to be final and definitive concerning the issue in question

143. As submitted by the State respondents, the Board's decision on the leave application was notified to the local planning authority pursuant to section 177D(8) of the 2000 Act, and entered under the statutory register. In addition, this leave decision was included in the Board's weekly list under Article 72(1)(f) of the Planning and Development Regulations 2001 (as amended). Accordingly, as of May 2012 the public (including An Taisce) was on notice of the fact of the Board's decision to grant McQuaid Quarries leave to apply for substitute consent. An Taisce has not suggested that it failed to challenge this decision because of a lack of notice, or for other good and sufficient reasons. On the contrary, at all relevant times, that appellant could have moved to have that decision quashed, but it did not do so. It was open to An Taisce to challenge this decision but no such challenge was initiated. Following what was stated in *Sweetman*, Barrett J. held that the appellant's challenge to the decision of the 25th April, 2014 was in reality a collateral attack on the earlier decision of the 28th May, 2012, and therefore impermissible.

144. On the application of the principles above described, it is difficult to see any error in this analysis, at least insofar as the purely national law on collateral attack is concerned. The scheme of the substitute consent procedure appears to conform to the sort of two-stage process described by Clarke C.J. in which final decisions are made at the initial stage which cannot

subsequently be looked at anew. As set out on Issue Two, I have no doubt but that the structure of s. 177C, as applying to both C(2)(a) and C(2)(b), was that once a decision was made on the leave application, then that decision was ring-fenced and could not be further reviewed at the substantive application stage. As explained, whilst the matters in consideration for both had some overlap, there is no doubt but that they also differed in substance. Furthermore, the parties involved and the information required for each application was different. After the leave decision has been made, the option to subsequently reverse that decision is no longer a possibility. I therefore entertain no doubt but that both Stages 1 and 2 are separate and self-contained. It therefore cannot be re-visited at a later stage. To mirror the language of *Sweetman*, the question of whether to grant leave to apply is definitively determined at the leave stage such that there is no possibility to have that issue re-opened at the later stage. By a straightforward application of what was said in *Sweetman*, it follows that as a matter of domestic law the leave decision could only be challenged within the time as specified in section 50 of the Act.

145. But that is not the end of the matter, even domestically. The argument of An Taisce is that they have no complaint with the leave decision, but rather they challenge the substantive decision. I cannot accept this submission. It does not bear up to scrutiny. Let us suppose they are successful in this case, and the substitute consent decision should not be granted: where does that position the leave decision? It is still on the record, it is still valid, it has not been quashed and, in its terms, it directs the addressee to apply for substitute consent. It would create massive uncertainty and confusion if in fact both were not treated as being inextricably linked. In my mind they are so. Accordingly, having regard to the nature of the proceedings brought by the appellants and the decision of this Court in *Sweetman*, I accordingly agree with the learned trial judge that the true focus of the judicial review was the decision of the 28th May,

2012, and that the proceedings therefore amounted to a collateral attack brought dramatically out of time.

146. The CJEU has said on a number of occasions, particularly in the context of the EIA Directive, that where a breach occurs, the State is obliged, first, to nullify the unlawful effects and secondly, to remedy the resulting harm. In addition, it has been categorical in saying that the expiry of time limits, domestically, to challenge the project's compliance with the EIA cannot prevail if the effect of same would be to render the project lawfully authorised as regards the obligation to assess its effects on the environment, and that such would be inconsistent with the EIA Directive. What, then, is to be made of this in the context of the collateral attack jurisprudence?

147. The above discussion has been conducted on the basis that the collateral attack jurisprudence applies without distinction as to the type of decision involved. Certainly what is stated holds good for administrative decisions as such. But different considerations may be appropriate when issues of constitutional or EU law arise. On the latter point, which is that directly in issue the appellants submit that European law does not equate the expiry of time limits with the conferral of validity in the way that Irish domestic law does. Rather, they submit that in light of the general duty on Member States as previously outlined, to nullify the unlawful consequences of a breach of Union law, European law is more likely to regard a multi-stage process as an opportunity to remedy any flaws that may previously have existed.

148. However, it is important to recognise that European law does not preclude the imposition of national procedural rules obliging a party to bring proceedings in the

environmental context within a certain time limit. As stated by the CJEU in Case C-664/15

Protect Natur:

“87 In that context, it must, however, be noted that, when they set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directive 2000/60, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection ...

88 In principle, Article 9(3) of the Aarhus Convention does not preclude a rule imposing a time limit, such as the one set out in Paragraph 42 of the AVG, obliging the effective exercise, from the administrative procedure stage, of the right of a party to the procedure to submit objections regarding compliance with the relevant rules of environmental law, since such a rule may allow areas for dispute to be identified as quickly as possible and, where possible, resolved during the administrative procedure so that judicial proceedings are no longer necessary.

89 Thus, such a rule imposing a time limit may contribute to the objective of Article 9(3) of the Aarhus Convention, set out in the 18th recital of that convention, of providing effective judicial mechanisms and appears also to be in line with Article 9(4) of that convention, which requires that the procedures referred to, inter alia, in Article 9(3) of the convention provide ‘adequate and effective’ remedies that are ‘equitable’.

90 In such circumstances, the rule imposing a time limit may — notwithstanding the fact that it constitutes, as a precondition for bringing judicial proceedings, a limitation on the right to an effective remedy before a court within the meaning of Article 47 of the Charter — be justified, in accordance with Article 52(1) of the Charter, to the extent that it is provided for by law, it respects the essence of that law, it is necessary, subject to the principle of proportionality, and it genuinely meets objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others ...”

149. Whilst it may be said that European law may not be concerned with the existence of time limits regulating national procedural rules, it is clear that it will consider the effects attributed to the expiry of those time limits to ascertain whether they are compatible with the relevant environmental norms. Thus, as stated by the CJEU in Case C-348/15 *Stadt Wiener Neustadt*:

“40 Nevertheless, that fact alone cannot alter the above conclusion. It is indeed settled case-law of the Court that, in the absence of EU rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

41 The Court also considers that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, which protects both the individual and the administrative authority concerned. In particular, it finds that such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law ...

42 Consequently, EU law, which does not lay down any rules on the time limits for bringing proceedings against the consents issued in breach of the obligation first to assess the effects on the environment, set out in Article 2(1) of Directive 85/377, does not preclude, in principle and subject to compliance with the principle of equivalence, the Member State concerned from setting a time limit of three years for bringing proceedings, such as that provided for in Paragraph 3(6) of the UVP-G 2000, to which Paragraph 46(20)(4) of the UVP-G 2000 refers.

43 However, a national provision under which projects in respect of which the consent can no longer be subject to challenge before the courts, because of the expiry of the time limit for bringing proceedings laid down in national legislation, are purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment, which it is for the referring court to ascertain, is not compatible with that directive”

To similar effect, the Court stated in Case C-261/18 *Commission v Ireland* that:

“94 In any event, Ireland simply states that, after the expiry of the period of 2 months, or 8 weeks set by the PDAA, respectively, the consents at issue could no

longer be the subject of a direct application to a court and cannot be called in question by the national authorities.

95 By its argument, Ireland fails to have regard, however, to the case-law of the Court referred to in paragraph 80 above, according to which projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, cannot be purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment.”

150. The Court, in granting leave on this point, anticipated that the influence of European law on the area of substitute consent may require a particular approach to the exercise of the collateral attack jurisprudence in at least some cases. While this remains the position and the Court is grateful to counsel for the submissions made, the Court is satisfied, in light of the answers given to Questions One and Two, above, that it is no longer necessary for the purposes of these proceedings to resolve this question concerning collateral attacks. It is possible however to comment at a general level on this point, if only to recognise that the doctrine of collateral attack is of course judge made and driven, and thus is capable of some adaptation or relaxation if a particular situation demands it. For example, a challenge in the context of an administrative law decision where the statute has implemented a certain timeframe could well be distinguished from a constitutional challenge to legislation, or indeed from a challenge to some aspect of European law or its transposition into domestic law, as has arisen here, if the tenets of justice deem it so appropriate. This however, is for another day.

Issue Four (both the McQuaid case and the Ballysax cases): Does An Bord Pleanála have jurisdiction to disapply national law where in its view it is inconsistent with EU law?

151. It has generally been accepted in this jurisdiction that an administrative body or tribunal did not have jurisdiction to set aside statute law, either primarily enacted or in secondary form, even if it was of the view that the same was inconsistent with EU law. In relation to the Commissioner for Environmental Information, the High Court so held in *An Taoiseach v. The Commissioner of Environmental Information & Ors* [2013] 2 I.R. 510.

152. This matter was again looked at this time by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Workplace Relations Commission* [2017 IESC 43, in a judgment delivered by Clarke J. (as he then was) on 15th June, 2017. The factual issue centred on whether or not the maximum age at which a member of An Garda Síochána had to retire was discriminatory on age grounds. That maximum age was provided for by secondary legislation, namely the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2014 (S.I. 749/2004). The issue first appeared before the Equality Tribunal, but its functions were absorbed into the Workplace Relations Commission by the 2015 Act of the same name. The Minister's argument was that the tribunal had no power to set aside or disapply substantive law, and therefore had no jurisdiction to inquire into the complaint of unlawful discrimination. In substance, he suggested that such an exercise was confined to the High Court.

153. Having conducted a review of both the constitutional and legal position under domestic law, the learned judge said:-

“It follows that, as a matter of fundamental Irish constitutional law, the proper interpretation of the jurisdiction of the Tribunal, on the one hand, and the High Court, on the other, is that the Tribunal does not have jurisdiction to deal with cases involving

the disapplication of national legislation but the High Court, having that jurisdiction, also has an entitlement to implement, in the course of considering a case brought in which it is contended that there is a breach of union employment equality rights which might require the disapplication of a measure of national legislation, a full power to provide for any remedy which will be available under the Employment Equality Acts. Whilst this latter position would not normally pertain in the context of a purely domestic legal situation, it is necessitated by the requirement to ensure that Union law rights are vindicated and represents the appropriate national solution to the problem caused by the Tribunal not have a jurisdiction to disapply legislation.” (para. 5.15)

154. Clarke J. then went on to consider the position under EU law and having discussed the principles of effectiveness and equivalence, was not satisfied that recourse to the High Court, when such a claim was asserted, would necessarily infringe either of those principles.

However, he went on to ask whether Union law required the Tribunal to have such a jurisdiction? As the answer to that question could not be said to be *acte éclair*, the court decided to make a reference under Article 267 of TFEU to the Court of Justice. That occurred with the opinion of that court, sitting as the Grand Chamber, being delivered on 4th December, 2018.

155. The court in its substantive decision firstly repeated well established principles as they apply to national courts. Given the primacy of EU law, such courts are under a duty to give a full effect to EU provisions, and such on occasion may necessarily involve the refusal to apply any conflicting provision of national law, without waiting for that provision to be set aside by whatever national means might otherwise be appropriate. The old case of *Simmenthal Case* 106/77, was referred to.

156. In outlining these principles, the Court of Justice was referring to any legislative, administrative or judicial practice which might impair the effectiveness of EU law. To ensure that such did not occur, the national court had to have the power to do “everything necessary” when called upon to disregard any such measure which might inhibit the directly applicable EU rules from having full force and effect. (*Factortame & Ors*, C-213/89, (para. 20) and *Vinner Vetten*, C-409/06, para. 56). The court then continued at paras. 38 and 39:-

“As the court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the States – including administrative authorities – called upon, within the exercise of their respective powers, to apply EU law...it follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules.”

It would therefore seem to be the case in accordance with this judgment that a body such as An Bord Pleanála would be required to disapply national measures of whatever type, if inconsistent with EU principles.

157. If applied literally, this judgment is capable of having widespread ramifications for the jurisdiction of national non-court bodies, or administrative entities, which are called upon to apply national legislation which was enacted to transpose EU measures. The problems which may arise could vary enormously. I will endeavour to give just one or two plausible examples. Whilst there may seem to be no difficulty in disapplying a measure of national law and as a result leaving in place a regime by which the issue at hand can be immediately dealt with, it would be an entirely different prospect if to implement EU law one had to go further and positively create a regime so as to give full force and effect to such measure. Or a situation could very easily arise wherein a multiplicity of conflicting rulings by differently composed bodies would be made, all of which would then inevitably end up before the High Court for

resolution either by way of judicial review or by way of a case stated. Some years ago, before any such decision had issued from the CJEU, an esteemed academic, Dr. Elaine Fahey made the observation that the inconsistent and sometimes incorrect application of EU law principles by administrative decision makers had resulted in a stream of strange case law coming before the Irish courts (EU Law in Ireland, Clarus Press, 2010)

158. Whilst fully respecting the judgment of the Court of Justice and recognising the necessity for domestic law to always remain subject to the principles of effectiveness and equivalence, it will however be necessary over time to see how its decision works in practice in the various and myriad situations which on a daily basis the multitude of entities, tribunals, decision makers and the like, loosely described as administrative bodies, have to face. It would be highly undesirable and I think counterintuitive if the overarching effect of such a decision was to result in the operation of any underlying legislative scheme becoming disjointed and disorderly, in an attempt to remain compliant with the law of the Union. One would hope that a coherent system for the disapplication of national law would emerge in any given situation. The decision maker in any such circumstance, should seek out the most efficient way of dealing with, not only the issue immediately at hand but also with the consequences of any singular decision which might normally mean seeking to have the matter determined as speedily as possible in a court which could deliver a decision binding on all bodies. However in light of my view on Issues 1 and 2, I would prefer to leave this matter stand until it becomes necessary to navigate the court's judgment into a concrete set of circumstances which it is necessary to resolve for the purposes of the case.

Issue Five: *Locus Standi*

159. Notwithstanding the written submissions, it was not seriously suggested in oral argument that either of the cases at hand, or any substantive part thereof, could be determined on this basis. Accordingly, it is not necessary to further discuss this issue.

Conclusion

160. It follows from the above:

- i. That on Issue 1, for the reasons therein stated, I would hold that section 177C(2)(a) and its corresponding provision, section 177D(1)(a) are inconsistent with the EIA Directive as interpreted by the Court of Justice, in that they fail to provide for an exceptionality test as demanded by that court;
- ii. On Issue 2, I would likewise hold that given the structure of s. 177, the failure to make provision for public participation at the leave application stage for substitute consent is inconsistent with the public participation rights conferred by and outlined in the EIA Directive;
- iii. By reason of my view on the above issues, it is not necessary to conclusively express an opinion on Issues 3 and 4;
- iv. Finally, as Issue 5, concerning standing, was not seriously pursued, it is not necessary to express any view thereon.

Accordingly, on Issues 1 and 2, I will grant appropriate declarations to reflect the conclusions so reached.

2/10/20
