THE HIGH COURT

[2021] IEHC 342

[2020 No. 137 MCA]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELEOPMENT ACT 2000
BETWEEN

DONEGAL COUNTY COUNCIL

APPLICANT

– AND –

P BONAR PLANT HIRE LTD T/A BONAR'S QUARRY

RESPONDENT

[2019 No. 366 MCA]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELEOPMENT ACT 2000
BETWEEN

PETER SWEETMAN

APPLICANT

– AND –

P BONAR PLANT HIRE LTD T/A BONAR'S QUARRY

RESPONDENT

– AND –

KEVIN MCLAUGHLIN

FIRST NOTICE PARTY

– AND –

JOSEPH MCLAUGHLIN

SECOND NOTICE PARTY

SUMMARY

This judgment concerns two applications for relief under s.160 of the Planning and Development Act 2000 brought against a respondent that has been operating a quarry in County Donegal in flagrant disregard of Irish and European law. The Council's application has succeeded outright. Before making its final orders in the application of Mr Sweetman, the court has invited further argument from him as to whether there is any aspect of the orders that he has come seeking that is not 'closed out' by the comprehensive orders that the court will be making in favour of the Council. This summary forms part of the court's judgment.

JUDGMENT of Mr Justice Max Barrett delivered on the 18th May 2021.

I. Background

1. The court deals with Application #1 first.

2. Apart from a brief appearance by Mr Bonar at the beginning of the hearing of these proceedings, they were undefended. Given that neither he nor anyone for the respondent was present, the court decided that it would be desirable to give a written judgment, if only so the respondent has a written text to indicate what is being ordered and why – though the 'why' must be patently apparent: one cannot operate a quarry in blatant breach of Irish and European law. Of course one can (I do) have some sympathy for the

Bonar family. They have owned and operated their quarry for years, it has provided them with an income, and now all that will change. But in their heart of hearts they must know, and I suspect they do know, that a quarry simply must be operated in accordance with the law, whether it is their quarry at Calhame or some other quarry. No-one is above accountability to the law, just as none of us are beneath its protection.

3. This is an application for injunctive relief brought pursuant to s.160 of the Planning and Development Act 2000, as amended, ('PADA'). Donegal County Council, the applicant, is the planning authority for the administrative county of Donegal. The application relates to a quarry site at Calhame (orse Fallard), in Letterkenny. The respondent is currently carrying out development at that site in the form of quarrying activity. This constitutes unauthorised development in breach of the PADA and is also being carried out in breach of European Union law, in particular the EIA and Habitats Directives. The court has considered and read all of the pleadings and arguments of both sides to these proceedings.

4. The quarry site is partly registered within Folios DL19287 and DL200009 (registered owners: Peter and Kevin McLoughlin), Folio DL39623F (registered owner: Sadie McLaughlin) and Folio DL19288 (registered owners: Ellen McCallion, Joseph Bradley and Julia McLernon). As part of planning application 18/50016 made by the respondent to the Council on or about 11th January 2018 a solicitor's certificate was submitted to the respondent stating that the three McLaughlins had "good and sufficient legal interest and entitlement" to the site.

5. By notice of motion of 3rd June 2020, the Council seeks the following reliefs:

   (1) An order restraining the respondent, its directors, officers, servants, agents and/or licensees from carrying out or continuing to carry out any (or any further unauthorised) development in the quarry site at Calhame (orse Fallard), Letterkenny, Co. Donegal, consisting of (a) operating a quarry on the site, (b) carrying out any quarrying or related/ancillary activities on the site to include drilling, breaking, blasting, excavating, crushing and/or screening of rock and stone, and (c) washing and/or otherwise processing excavated rock/stone materials on the site and/or transporting excavated rock/stone materials off the site;

   (2) an order directing the respondent, its directors, officers, servants, agents and/or licensees to cease all unauthorised development on the site as described at (1);

   (3) an order directing the respondent to comply with the landscape and restoration plan submitted to the applicant on 17th October 2014 pursuant to Condition No 5 of planning permission reference 06/51276 (An Bord Pleanála Reference No. PL05C.223700) granted by An Bord Pleanála in respect of the site on 9th June 2008; and specifically (a) in accordance with para.6 of the said landscape and restoration plan, (i) to carry out final geotechnical assessment of quarry faces and bench structures and submit them to the Council for agreement, (ii) to carry out an ecological appraisal of the site for priority habitat and species potential and submit

them to the Council for agreement, and (iii) subject to (i) and (ii), to develop and submit a final restoration plan to the Council for agreement; (b) to submit to the applicant a programme for implementation of the final landscape restoration plan agreed with the Council under (a)(iii); (c) thereafter, to implement the said plan within a period agreed with the Council;

(4) a declaration that the quarrying and related/ancillary activities and/or works on the site constitute unauthorised development being carried out without planning permission contrary to Irish law and/or the EIA Directive and/or the Habitats Directive;

(5) such incidental or consequential orders which the court deems just, appropriate or expedient;

(6) such further or other relief as the court deems just, appropriate or expedient; and

(7) an order for the Council's costs, fees, outlays and expenses.

6. It is accepted by the Council that there was quarrying on the site prior to the coming into operation of the Local Government (Planning and Development) Act 1963 on 1st October 1964 and that quarrying continued on the site after that date.

7. The first planning application for the site was made on 8th January 2003 by the then operators of the quarry, Mountain Top Quarry Ltd (Planning Ref. 03/7004). The application contained a retention element in respect of development already carried out and an application for planning permission for prospective development. (The making of this application indicates that there was a concern on the part of the operators that unauthorised development had occurred, such that retention permission was required, and that any future extension of the quarry would constitute further development which would require planning permission under planning law). Thereafter, the Council gave notification of a decision to grant planning permission subject to 17 conditions. A third-party appeal against that decision was then lodged with An Bord Pleanála. By decision of 28th June 2004, the Board refused the planning application (Ref. PL05C.205498). The especial attention of the court has been drawn to a note in this decision that "*In arriving at its decision to Board considered that any future application for retention and extension of this quarry should be accompanied by an environmental impact statement".*

8. Following the commencement in force of s.261/PADA on 28th April 2004, quarry operators were obliged within one year to provide specified information to the Council regarding their quarries. Mountain Top provided that information by application made on 8th April 2005. While the s.261 registration process was still underway, on 6th October 2006 Mountain Top made a further planning application (Ref.06/51276) in respect of certain development on the site. An EIA was submitted with the application. While this planning application was under consideration , on 2nd March 2007 the Council served notice on Mountain Top, in accordance with s.261(5)/PADA that it was proposing to impose a number of conditions on the operation of the quarry at the site.

9. On 4th May 2007, the Council decided to grant planning permission to Mountain Top on foot of application ref. 06/51276 subject to 23 conditions. A third party appeal was subsequently lodged with the Board against this decision on 29th May 2007.

10. On 26th October 2007, the Council notified Mountain Top that the Council had finalised the s.261 registration procedure. This letter referenced the fact that the Council, as a part of the registration procedure, considered taking steps under s.261, including the imposition of conditions. However, the Council had ultimately decided not to take such steps. The letter of 26th October emphasised that *"the registration procedure is simply the registration of information submitted and does not confer a planning consent/permission for the continued operation of the quarry. That can only be achieved by successfully applying for planning permission in accordance with the normal planning process".*

11. By decision dated 10th June 2008, the Board decided to grant planning permission PL05C.223700 to Mountain Top, subject to 25 conditions. The conditions attached by the Board to the planning permission included the following:

    Condition No.2

    > *"This permission is for a period of five years from the date of this order, unless a separate permission for a further duration has been granted within the period. Reason: in the interest of orderly development and to monitor the impact of quarry operations on the environment."*

    Condition No.5

    > *"Within 6 months of the date of this Order, a comprehensive landscape and restoration plan shall be submitted to the planning authority for agreement including a programme for implementation and the agreed plan should be fully implemented to the satisfaction of the planning authority within 12 months of the expiry of planning permission. Reason: in the interest of orderly development and to protect the amenities of the area."*

12. Following the commencement of s.261A/PADA on 15th November 2011, the Council was obliged to examine every quarry in its administrative area to establish whether an EIA, screening for EIA or AA was required but had not been carried out. In respect of the quarry the subject of these proceedings the Council concluded that a determination under s.261A was not applicable.

13. On 12th December 2012, the Council received from Mountain Top an application under s.42 of the PADA for an extension of the duration of the planning permission issued by the Board on 9th June 2008 (ref: PL05C.223700/Planning Authority ref. 06/51276).

14. In or about 2014, the respondent took over quarrying operations on the site from Mountain Top. Subsequent to the commencement of operations at the site by the respondent, the Council received complaints that the quarry was being operated in breach

of planning permission PL05C.223700/Planning Authority ref. 06/51276. As a result, the Council opened an enforcement file (ref. UD14125) and took enforcement action. On foot of same the respondent took action to comply with a number of planning conditions to which the enforcement action related. By November 2016, the Council considered the respondent to be in compliance with all outstanding conditions, save those considered unenforceable.

15. As part of its response to the enforcement action, on 17th October 2014 the respondent's agent submitted a landscape and restoration plan required by Condition No. 5 of planning permission PL05C.223700/Planning Authority ref. no. 06/51276 to the Council.

16. On 11th January 2018, the respondent lodged with the Council a planning application seeking, *inter alia*, the continuation of quarrying activities on the site for a further period of ten years. This planning application was duly processed by the Council, under ref. no. 18/50016 and, on 12th July 2018, the Council decided to grant planning permission for the said development, subject to 19 conditions. On 3rd August 2018, two third-party appeals were subsequently lodged with the Board in respect of the Council's decision of 12th July. On 2nd April 2019, the Board decided to refuse the respondent's application for planning permission for two stated 'Reasons and Considerations':

"1. On the basis of the information provided with the application and the appeal, including the Natura Impact Statement, and having regard to the potential for the discharge of contaminated water to the local surface water drainage network that has a hydrological pathway to the Leannan River SAC, the Board is not satisfied that the proposed development either individually, or in combination with other plans or projects, would not adversely affect the integrity of Leannan River SAX (Site Code 002176), in view of the site's conservation objectives. In such circumstances, the Board is precluded from granting permission for the proposed development.

2. On the basis of the information contained in the planning application, the EIAR and the submissions on file, the Board is not satisfied that a full and adequate assessment of the potential impacts of the proposed development on the environment has been carried out and that the submitted EIAR meets the requirements of Article 94 of the Planning and Development Regulations 2001 (as amended). In particular, the potential adverse impacts of the proposed development in relation to ground and surface water, have not been adequately addressed in the EIAR and further data relating to noise and dust emissions stated to have been collected have not been provided. In the absence of such a full and adequate assessment, it is not considered that it has been demonstrated that the proposed development would not have significant negative impacts on the environment, would not seriously injure the amenities of the property in the vicinity and would not be contrary to the proper planning and sustainable development of the area."

17. The Board's direction also contained a note to the effect that in addition to the two stated reasons for refusing permission, the Board also had concerns about the safe operation of the vehicular entrance to the quarry site, as well as a lack of clarity about how the final proposed quarry profile was achievable from the current situation, but did not pursue those issues as standalone grounds for refusal in the light of its conclusions on EIA and AA as reflected in the stated reasons for refusing the planning permission.

18. The direction also recorded that the Board had decided to refuse permission *"generally in accordance with the Inspector's recommendation".* The inspector had had significant concerns about water and hydrology issues, in particular the effects of the quarrying activity on surface water quality and groundwater. The inspector had a particular concern about the effect of sedimentation in water discharges on the freshwater pearl mussel, a qualifying interest of the Leannan River SAC, located about 3.5km from the site and linked to it by a hydrological pathway. The inspector had carried out an AA on the effects of the proposed development and was not satisfied that the proposed development would not adversely affect the integrity of the SAC in view of the site's conservation objectives. Accordingly, he concluded that the Board was precluded by law from granting the planning permission.

19. The respondent did not seek to challenge this decision of the Board of 2nd April 2019 by way of judicial review. Nor has the respondent made any further application for planning permission in respect of the site.

20. Planning permission for quarrying on the site expired on 9th June 2018. Thereafter, quarrying activity on the lands was not authorised and the respondent was obliged to restore the lands in accordance with the landscape and restoration plan submitted in accordance with Condition No. 5 of permission PL05C.223700/Planning Authority red. No. 06/51276, such restoration to have been completed by 8th June 2019 in accordance with the said condition.

21. Two site inspections carried out by Mr McFeely of the Council, on 22nd June 2018 and 19th October 2018 established that quarrying works had ceased and that there was no quarrying on the site over that period. However, the Council received a complaint on 26th April 2019 that unauthorised development was occurring at the site. As a consequence, Mr McFeely carried out a further site inspection on 31st May 2019. He found that the respondent was carrying out quarrying activity on the date of the inspection. It is clear from the report that Mr Bonar refused to give an undertaking to cease extraction of stone and the processing of materials on-site, purporting to rely on the pre-1964 user to justify the ongoing quarrying activity.

22. Following on the last-mentioned inspection, Mr McFeely recommended that the Council issue an enforcement notice under s.154/PADA. An enforcement notice was duly issued and served on the respondent on 26th June 2019. The notice required the cessation of quarrying on the lands and of the use of the lands for all quarrying-related activities, such cessation to occur within six weeks, i.e. by 8th August 2019.

23. Mr McFeely carried out a further site inspection on 30th August 2019, when he found that quarrying and quarrying-related activities had not ceased. He then recommended that the Council issue summary criminal proceedings against the respondent pursuant to s.154(8)/ PADA for the offence of non-compliance with an enforcement notice. As a consequence, the Council issued a District Court summons on or about 13th February 2020.

24. A further inspection was carried out by Mr McDermott, another Council officer, on 25th March 2020. The context for same was that the Council was aware, from continuing complaints received from members of the public that the respondent was carrying out ongoing quarrying activities at the site in blatant breach of planning law, without planning permission and notwithstanding the enforcement action that had been taken by the applicant.

25. The Council decided that during Mr McDermott's inspection of 25th March 2020, he should deliver a letter dated 25th March 2020 to the respondent from the county solicitor seeking an immediate cessation of quarrying activities on the site and stating that, in default of such cessation, the Council might issue planning injunction proceedings. Mr McDermott handed this letter to Mr Bonar, a director of the respondent, during his visit. In the course of their conversation, Mr Bonar indicated a complete disregard for the requirements of the law, stating that *"he couldn't stop working as he had workers to keep employed, contracts to fulfil and advised that he would stop quarrying when he got planning permission for the new quarry in Raphoe",* as if compliance with the law is somehow an elective or negotiable process; needless to say, it is neither.

26. In the course of the inspection, Mr McDermott noted: (i) that quarrying was ongoing with materials being extracted by rock-breaking along the south-eastern quarry face; (ii) that the processing of quarrying materials was ongoing with two separate crushers/screeners in operation at two separate locations on-site. A variety of vehicles were in operation and stockpiles of materials were being loaded onto two lorries which then left the site.

27. In a report of 26th March 2020, Mr McDermott recommended that the within proceedings be commenced. In the period from end-March to end-May 2020 there were ongoing complaints to the Council about the quarry by members of the public. So Mr McDermott carried out a further inspection on 11th May 2020 and found that the quarry was still in full operation. Mr McDermott met Mr Bonar and told him, amongst other matters, that the Council continued to receive complaints from the public about the unauthorised operation of the quarry and that he (Mr McDermott) was on-site to request him to stop quarrying. Mr Bonar replied that matters had not changed since the inspection of 25th March, that he could not stop working as he had workers to keep employed and contracts to fulfil, and that he would stop when he got planning permission for a new quarry operation in Raphoe. It is a reply that shows a shameless disregard for the law on Mr Bonar's part.

28. Mr McDermott then proceeded with his formal inspection of the site and found, for example, that (i) quarrying was still ongoing with materials being extracted by rock-breaking along the south-eastern quarry face; (ii) the processing of quarried materials was not ongoing on this occasion; however, the smaller of the two separate

crushers/screeners was warming up with only water running through; (iii) a variety of vehicles were operating and a large number of stockpiles of material were evident. In conversation with Mr McDermott, Mr Bonar indicated that he had started operations at about 07:30 and he expected that 20-25 vehicles would be leaving the site that day.

29. By this time the Council's solicitors had written (on 8th May 2020) to the respondent's solicitors, calling upon the respondent to give an undertaking by 1pm on Tuesday 12th May 2020 to the effect that quarrying operations would stop immediately, in default of which the applicant could bring s.160 proceedings without further notice to the respondent. On 12th May 2020, the respondent's solicitors wrote, declining to give such an undertaking.

30. On 14th May 2020, the Council was advised by Michael Friel Architects and Surveyors that the respondent would be submitting a full 'exit plan/strategy' that would contain plans for cessation of quarrying and removal of machinery, *etc.* from the quarry site. Yet when the plan/strategy turned up on the 22nd May 2020, it turned out not to be acceptable to the Council. In truth, it was obvious that it would never be accepted: it contemplated the continued operation of what is an unauthorised quarry until mid-September 2020 in clear breach of the PADA, the EIA Directive, and the Habitats Directive, with consequent risks in terms of adverse impact on the environment, on a protected European site (the Leannan River SAC) and on the residential amenity of nearby residents, all of which/whom the respondent seems satisfied to treat with utter disregard. Throughout, the document seeks to excuse the respondent's continued quarrying operations on the basis of various propositions that have no legal basis. It makes reference to a geotechnical assessment which is not provided; and it rather misses a gaping problem, which is that all quarrying should have ceased on the expiration of planning permission (Plan. Reg. No. 06/51276) on 9th June 2018.

31. The Council, the court understands, had hoped that the invocation of the planning enforcement mechanisms available to it under s.154 of the PADA would be adequate to address and bring to an end the unauthorised quarrying on the site. However, it became necessary to bring the within application once it became clear, and it is clear, that the respondent, with breath-taking audacity, intends to ignore the enforcement notice and to carry out unauthorised development in breach of Irish and European law. Suffice it to note that none of us get to pick on an *à la carte* basis the laws that apply to us.

32. In an affidavit of 15th June 2020, sworn as part of these proceedings, Mr Bonar avers, amongst other matters, as follows:

> *"2. I say that the Respondent trades as 'Bonar's Quarry' from lands situate…in the County of Donegal and operates a quarry and concrete plant from the said lands. I say and believe that the quarry has been in continuous use since the 1930s when it was originally operated by the Boyce family until the 1950s when Donegal County Council ran the quarry to produce road material in the Letterkenny Greater Area. Thereafter, I say and believe that there were a number of individuals who operated*

the quarry until in on or around 1971 when a Mr Matthew Thompson operated the quarry under the name 'Karl Quarries' until 1986.

3. *I say that it is accepted by Martin McDermott [in]…his affidavit…that there was quarrying on the site prior to the coming into operation of the Local Government (Planning and Development) Act 1963 on the 1st October 1964 and that quarrying continued on the site afte that date.*

4. *I say that in 1986 Mr Thomas Bonar and Mr Eamon Bonar took over the quarry and operated same under the name of Mountain Top Quarry Limited until 2014 when your deponent took over the quarry under the name of the respondent herein, P Bonar Plant Hire Ltd. I say therefore that the quarry has been in continuous use since the 1930s or thereabouts and that the operation of the quarry commenced prior to the 1st October 1964.*

5. *I say that in 2005 an application pursuant to section 261 of the Planning and Development Act 2000 was made for registration of the quarry as a pre-October 1st 1964 quarry….*

6. *I say and believe that the quarry was recognised as a pre-1964 quarry and Donegal County Council issued a letter on 2nd March 2007 pursuant to s.261(5) of the Planning and Development Act 2000 stating that it proposed to impose 15 conditions on the operation of the quarry….*

7. *I say and believe that on 3rd October 2006, Mountain Top Quarry Limited applied to Donegal Council under Planning Application Reference 06/51276 for retention permission for the removal of topsoil over [the] areas of [a] proposed extension, planning permission for [that] extension to [the] existing stone quarry to include drilling, blasting, excavating, crushing and screening of rock and planning permission for the construction of workshop for [the] purpose of repairs and storage of machinery ancillary to [the] existing quarrying business on site and all associated site works….*

8. *I say that permission was granted by Donegal County Council on 4th May 2007 in respect [of] the application subject to 23 conditions….*

9. *I say that the decision was the subject of an appeal to An Bord Pleanála Reference Number PL05C.223700. However, I say [that] An Bord Pleanála upheld the decision of Donegal County Council to grant permission on 9th June 2008 subject to 25 conditions….*

11. *I say and believe that an application for extension of duration of planning reference 06/51276 [PL05C.223700] was made on 12th December 2012 for an extension of duration for a period of 10 years from 10th June 2008 to 9th June 2019 and the said application was granted….*

12. *I say that the respondent took over the quarry in 2014 and continued to quarry the "Existing Quarry" and extended area measuring 1.521 hectares….*

13. *I say that on 11th January 2018, the respondent applied to Donegal County Council under Planning Application Reference 18/50016 for the continuation of quarrying activities for a period of 10 years on a site 7.3 hectares by lowering the floor of the existing quarry to 132m AOD and for revised opening hours. I say that on the 12th July 2018, that Donegal County Council granted permission subject to 19 conditions….*

14. *I say that the decision of Donegal County Council was appealed to An Bord Pleanála who ultimately refused permission on 2nd April 2019. I say that the Respondent therefore ceased all quarrying and related activities in the extended area and has not quarried same or carried out quarrying-related activities in that area since the expiry of planning permission on 9th June 2018.*

15. *However, I say that the respondent has continued to quarry the existing quarry which had been in operation prior to 1st October, 1964 and which I say and believe has been continuously quarried since development began.*

16. *I say and believe that the continued quarrying of the existing quarry is a continuation of the works that were reasonably contemplated when the works commenced prior to the 1st October 1964.*

17. *I say and believe that the operation of the quarry has not intensified to such an extent as to amount to material change in use that would require planning permission.*

18. *I say that the Existing Quarry has not yet been fully worked out and I say and believe that this area was anticipated or contemplated in the pre-1st October 1964 period as being an area to be worked to completion. The respondent employs approximately 30 people at the Quarry whose employment is dependent upon the Respondent completing the anticipated works. In the circumstances, I say and believe that damages would not be an adequate remedy should this…Court grant interlocutory relief and the Respondent thereafter be successful…".*

33. Mr Bonar essentially advances a single ground of defence to these proceedings, viz. that even though there is no extant grant of planning permission for same, the respondent can lawfully continue quarrying in that part of the quarry referred to by Mr Bonar as the "*Existing Quarry*", on the basis that the "*Existing Quarry*" was in operation prior to 1st October 1964 and has been continuously quarried since development began, with the result that the continued quarrying of the "*Existing Quarry*" is but a continuation of the works that were reasonably contemplated when the works commenced prior to 1st October 1964.

34. There are a number of deficiencies in the stance adopted by Mr Bonar.

35. First, as far back as January 2003, the previous quarry operator on the site, Mountain Top, proceeded on the basis that the existing quarry at that time constituted unauthorised planning development. It made a planning application for "*retention* and extension of existing stone quarry to include drilling and, blasting, excavating, crushing and screening of rock at Calhane". An Bord Pleanála refused this application and advised that "*any future application for retention and extension of this quarry should be accompanies by an environmental impact statement*". When Mountain Top later made its October 2006 planning application, there was again an acknowledgement from it that the existing quarry was unauthorised. As noted at the hearing, that Mountain Top so proceeded does not bind the respondent to take a like view of matters. However, it points to how a previous owner viewed matters to lie.

36. Second, by virtue of the grant of planning permission for, *inter alia*, the extension of the existing quarry in June 2008 and, in particular, by virtue of the implementation of that planning permission, the operator created a single, enlarged quarry on the site, which, in planning terms, is a single planning unit. This enlarged quarry is not a 'pre-1964' quarry and was, from June 2008 to June 2018, governed and regulated by the conditions of the said planning permission. (This analysis is borne out by the fact that the red line site boundary of the site the subject matter of the 2006 application incorporates the entire quarry, to include the then existing quarry and proposed extension area).

37. In a similar vein, when the respondent to these proceedings applied, in January 2018, for permission to continue quarrying activities on the site after the expiry of the 2008 permission in June 2018, this application was not confined to the part of the quarry that Mr Bonar refers to as the "*extended area".* Rather it applied for planning permission for the continuation of quarrying activities for a period of ten years on the entire site. (The said application includes the site location map showing the red line site boundary around the entire site and quarry the subject of these proceedings).

38. In the light of the foregoing, the suggestion that having been refused planning permission for the continuation of quarrying activities on the site on EIA and Habitats Directive grounds, the respondent can nevertheless somehow revert to quarrying on part of the site on an alleged pre-1964 user basis without any environmental controls, restrictions or conditions, is completely artificial and incorrect as a matter of law. (The artificiality of this contention is demonstrated by a series of aerial photographs which have been placed before the court and which show the development of the quarry, and the enlargement and deepening of extraction, over time. Those photographs show that the quarry has developed as a single quarrying operation and that it is not possible to 'turn back the clock' so as to treat one part of the quarry as a separate pre-'1964' unit).

39. Third, on a related note, condition no.5 of the planning permission granted in 2008 clearly contemplates and requires the cessation of quarrying and the taking of steps for land restoration on the site once that planning permission has expired (unless, of course, a further planning permission for the continuation of quarrying were granted). The respondent has not complied with this condition. In effect, the argument Mr Bonar

advances in these proceedings seeks to excise this condition. What the respondent has sought to do is to cherry-pick from the 2008 permission: to exhaust the benefit of it for 10 years, and then after the permission has expired, to ignore the requirements of condition no.5 by continuing quarrying without permission on part of the quarry on the basis of alleged pre-1964 user. One need merely state what is afoot to see its audacity as a proposition of logic/law.

40. Fourth, the evidence before the court suggests that the contention that the existing quarry, which had been in operation prior to 1st October 1964, has been continuously quarried since development began is mistaken. Thus, it appears that all quarrying on the site ceased upon expiry of the 2008 planning permission on 9th June 2018 and did not recommence until sometime in April 2019, after the Board had refused, on 2nd April 2019, the respondent's application to continue quarrying on the 7.3 hectare site for a further period of 10 years.

41. Fifth, the evidence before the court suggests that it is not the case that the respondent has not quarried in what Mr Bonar refers to as the 'extended area' or carried out quarry-related activities in that area, since 9th June 2018.

42. In a supplementary affidavit sworn by Mr McDermott 19th June 2020, with the intention of bringing the court up-to-date on how matters lay at that time, he avers, amongst other matters, as follows:

> *"21. My site inspection of 16th June 2020 was conducted in response to further complaints received from members of the public. I observed rock-breaking ongoing on the quarry floor. Material was being extracted by rock-breaking, loaded into dump trucks and transported by dump truck to the onsite processing plant. I observed Mr Bonar operating a loader, with which he was loading processed material from the processing plant onto lorries for transport off-site and also transporting some material between the two operational processing plants."*

43. So quarrying continues.

44. Mr McDermott moves on to aver as follows:

> *22. …I say and believe that it is clear that, unless restrained by this…Court the Respondent herein will continue to operate its quarry on the site without planning permission and without, therefore, any prevailing operating conditions. This is so notwithstanding that the Board has refused permission for the continued operation of this quarry on the grounds that the Board was not satisfied that the proposed quarrying would not adversely affect the integrity of the Leannan River SAC and that it had not been demonstrated that it would not have significant negative impacts on the environment, would not seriously injure the amenities of property in the vicinity and would not be contrary to the proper planning and sustainable development of the area".*

II. Law

45. When it comes to the law applicable to the s.160 application, the following points might be made.

(1) Granting of orders pursuant to s.160 comprises two stages: (a) the court must look to whether the subject matter of the application is unauthorised development; (b) the court must consider whether there are any discretionary factors that would militate against the grant of relief, despite there having been unauthorised to development.

(2) As to the claim that what is at play is but pre-1964 user of the site, this is not at all supported by the evidence, most particularly the photographic evidence. However, it is not clear that the court needs to decide this on the affidavit evidence (albeit that it just has). This is because any pre-1964 operation of the quarry was superseded by the permission granted in 2008 and extended in 2013. That such a supersession is possible is clear from Perdue, Young and Robinson, *Planning Law and Procedure*, 2nd ed., London: Butterworths, 1989, p.113, where the learned authors observe as follows (their views in this regard respectfully being adopted by the court as a correct statement of the position under Irish law):

> *"[J]udges have sometimes spoken, in the context of the extinguishment of existing use rights, of the creation of 'a new planning unit' [or]…'of a new chapter in planning history' being started. Any difference between the terms is, it seems, largely a matter of semantics. The important point is that both phrases are used to describe the situation where…a change in he physical nature of premises or in their planning status is so radical as to give rise to the inference that any prior use is being given up and a new planning history begun. In effect the slate is wiped clean."*

(3) Further to point (2), the court has been referred to the decision of the House of Lords in the now relatively long-ago case *of Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, a case which has a lovely wartime/post-War feel to it. There, in 1941, land in racehorse country in Berkshire had been requisitioned by the Crown for use as an airfield. Two large hangars were built. The airfield remained operational until 1947. After 1947 the hangars were used by the Ministry of Agriculture to store food supplies and from 1955 to 1959 they were used for the storing of civil defence vehicles by the Home Office. The surrounding area was restored to agricultural use and in 1959 family trustees were granted planning permission to use the hangars to store fertilisers and corn on the condition that they were removed by the end of 1970. In 1961 the trustees bought the freehold from the Crown and granted a 40-year lease back to the Crown at a nominal rent. A rubber company, ISR, then applied for permission to use the hangars as warehouses for the storage of synthetic rubber and on 31st May 1962, ISR were given planning permission for the use of the two hangars as warehouses on condition the buildings were removed at the expiration of the period ending 31st December 1972. Having obtained planning permission, ISR, in July 1962, bought the two hangars and the 40-year lease from the Crown at an auction. In November 1970 ISR applied for a 30-year extension of their permission which was due to expire in December

1972. In January 1971, the extension application was refused as it conflicted with the development plan in an area of outstanding natural beauty. ISR continued to use the hangars after the end of 1972 and did not remove them. In November 1973, the local authority served two enforcement notices. ISR appealed to the Secretary of State, who held that the condition for the hangars' removal was invalid under the Town and Country Planning Act 1971 because it was extraneous to the proposed use. The Divisional Court dismissed the local authority's appeal, the Court of Appeal allowed the appeal and on further appeal, the Secretary of State and ISR were successful. The House of Lords held, amongst other matters, that where the grant of planning permission is of such a character that the implementation of the permission leads to the creation of a new planning unit existing use rights attaching to the former planning unit are extinguished (but that here the grant of planning permission in May 1962 did not create a new planning unit and hence ISR was not precluded from relying on the existing use rights attaching to the site).

46. In the course of his judgment in *Newbury*, Viscount Dilhorne observes as follows, at 599:

> *"If, however, the grant of planning permission, whether it be permission to build or for a change of use, is of such a character that the implementation of the permission leads to the creation of a new planning unit, then I think that it is right to say that existing use rights attaching to the former planning unit are extinguished",*

while Lord Scarman observes as follows, at pp. 617-18:

> *"Clearly it will be much more difficult to establish the creation of a new planning unit or the beginning of a new chapter of planning history where the unnecessary permission which has been granted subject to conditions purports to authorise only a change of use. But such cases can exist, as at a later stage in the argument counsel for the Minister was able to show: e.g., where permission is granted to change the use of residential premises in single occupation to a multi-occupation use. There is in such a case a wholly new departure, a new chapter of planning history. It would be a negation of sound planning if the conditions attached to the multi-occupation use could be avoided merely because prior to such use the premises had the benefit of an existing residential use in single occupation."*

47. Here, the implementation of the 2008 planning permission created a new planning unit, with any entitlement to rely upon or revert to the pre-1964 user thereby being extinguished.

(4) The 2008 planning permission is indivisible: the respondent cannot avail of that permission to its benefit and then disavow an element of the permission of which one has just availed of. The whole purpose of planning permission is that one gets permission to do something subject to certain conditions: one cannot then do the something and ignore a condition. One might as well have no planning law at all if that was possible.

(5) Quarrying that occurred after the transposition of the EIA Directive and which is likely to have a significant impact on the environment cannot be permitted to continue without an application for planning permission first having been made out and an EIA undertaken. As counsel for the Council has succinctly observed in his written submissions *"[T]he requirement for an EIA trumps any pre-1964 user*". Here, An Bord Pleanála identified the quarrying the subject of these proceedings as one that requires to be subject to an EIA as long ago as 2004 and its decision to refuse the January 2018 application was based, amongst other matters, on the inadequacy of information submitted for the purposes of conducting a full and adequate EIA.

(6) In his judgment in *Meath County Council v. Murray* [2018] 1 I.R. 189, McKechnie J. identified, in the following terms, at paras.92-93 of his judgment, the discretionary factors that a court may take into account in deciding whether or not to grant relief under s.160:

"[92] What, then, are the factors which play into the exercise of the court's discretion? From a consideration of the case law, one can readily identify, inter alia, the following considerations:-

(i) the nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;

(ii) the conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:-

- *acting in good faith, whilst important, will not necessarily excuse him from a s.160 order;*
- *acting mala fides may presumptively subject him to such an order;*

(iii) the reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;

(iv) the attitude of planning authority: whilst important, this factor will not necessarily be decisive;

(v) the public interest in upholding the integrity of the planning and development system;

(vi) the public interest, such as:

- *employment for those beyond the individual transgressors; or*
- *the importance of the underlying structure/activity, for example, infrastructural facilities or services;*

(vii) the conduct and, if appropriate, personal circumstances of the applicant;

(Viii) the issue of delay, even within the statutory period, and of acquiescence;

(ix) the personal circumstances of the respondent; and

(x) the consequences of any such order, including the hardship and financial impact on the respondent and third parties.

[93] The weight to be attributed to each factor will be determined by the circumstances of a given case. Some, because of their importance, may influence whether an order is or is not in fact made: others, the scope, nature or effect of that order. This list is not in any way intended to be exhaustive, and it may well be that other matters might require consideration in an appropriate case."

48. It is not entirely clear to the court that it needs to consider these mitigating factors in circumstances where the respondent has not sought to rely upon any of them in mitigation of the relief sought. Regardless, the court notes (using McKechnie J.'s numerology) that as to:

–(i) it seems to the court that the breach presenting here is material, significant and gross;

–(ii) the respondent has acted in wilful and blatant breach of applicable law;

–(iii) the reason for the infringement is a complete and utter disregard for the law and an apparent sense that rules that apply to all only apply to the respondent when it deems fit;

–(iv) the planning authority is clearly perturbed enough by the respondent's action as to commence the within proceedings;

–(v) and (vi), there is of course a significant public interest in upholding the integrity of the planning and development system and in this context flagrant and deliberate disregard of that system of the type that presents here cannot be tolerated;

–(vii) the conduct of the applicant is to be deplored seeking to exploit a planning permission while avoiding doing what the permission requires of it and also continuing to quarry in flagrant breach of applicable law;

–(viii) no issue of delay or acquiescence presents;

–(ix) there is nothing in the circumstances of the respondent that points to mitigation (nor has this been contended);

–(x) while there may be some hardship occasioned by virtue of the court granting the relief sought, the alternative is to allow continued quarrying in wholesale breach of Irish and European law. That is not a situation that any court of law could countenance.

(7) The court notes the right and proper significance attached in case-law to the need for compliance with EU environmental law (see, for example*, McCoy v. Shillelagh Quarries*

[2015] IEHC 838, and *Krikke v. Barrannafaddock Sustainability Electricity Ltd* [2019] IEHC 825).

III. Conclusion as to Application #1

49. As mentioned above, granting of orders pursuant to s.160 comprises two stages: (a) the court must look to whether the subject matter of the application is unauthorised development; (b) the court must consider whether there are any discretionary factors that would militate against the grant of relief, despite there having been unauthorised to development. As to (a), it is clear, having regard to the preceding pages, that the court is confronted with an unauthorised development. As to (b) there is quite simply no factor presenting that would mitigate against granting relief. The court will therefore grant the reliefs sought, including the costs sought, subject to the caveat that if the respondent objects to costs being ordered in favour of the Council (which would seem to have a fairly unanswerable case to same) and notifies this objection to the registrar within 14 days of the date of this judgment, the court will schedule a hearing to focus on the issue of costs only. That hearing is not intended to offer an appeal against any aspect of this judgment.

IV. Application #2

50. The court turns now to Application #2 which came first in time but, by agreement between the Council and Mr Sweetman, was heard second. The facts underpinning Application #2 are essentially the same as those underpinning Application #1. As with Application #1, Application #2 was undefended.

51. By notice of motion of 2nd November 2019, the following reliefs are sought:

1. an order restraining the respondents their servants or agents from operating a quarry and/or carrying out quarrying and related activities at Calhame without the benefit of planning permission;

2. an order directing the respondents, their respective servants, agents, licensees or any person acting in connection with them or on their instruction to cease the unauthorised development being carried out on the property at Calhame;

3. an order restraining the respondents their servants or agents from operating a quarry and/or carrying out quarrying and related activities until the respondents have obtained a grant of planning permission authorising such activity;

4. an order requiring that any development and/or use carried out on the lands the subject matter of this application be consistent with the planning permission;

5. an order requiring the respondents their servants or agents to restore the lands the subject matter of the application located at Calhame to the condition that they were in prior to their commencement of the unauthorised use and/or works;

6. any interim or interlocutory relief;

7. any further and other relief….;

9. an order pursuant to ss.3 and 4 of the Environmental (Miscellaneous Provisions Act) 2011; and

10. the costs of these proceedings.

V. Conclusion as to Application #2

52. Applying the law and principles considered previously above, the court considers that Mr Sweetman would have been successful in his proceedings had he been heard first. However, the court finds itself in the unusual position that having heard the Council's proceedings (which started second in time but, by agreement of the parties, were heard first in time) and having indicated that it would be granting the reliefs sought by the Council, it struggles to see that any of the reliefs sought by Mr Sweetman achieve anything practical that is not achieved by the orders that the Council has sought. If Mr Sweetman's advisors consider that there is some dimension of what they seek that will not be covered by the order that the court proposes to make in respect of Application #1, they should so notify the registrar within 14 days of the date of this judgment and the court will hear them further in this regard before deciding what order to make in Application #2. The court will also hear any submissions as to costs at that time.